

# A DIGEST OF INDIAN LAW CASES;

CONTAINING

HIGH COURT REPORTS AND

AND

PRIVY COUNCIL

PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA,  
1887—1889.

WITH AN INDEX OF CASES.

COMPILED BY

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1890.

**CATALOGUED.**



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## PREFACE.

THIS volume is practically a continuation of the Digest recently compiled by me for the Government of India, and is published, in accordance with a number of suggestions that I should continue that work by bringing the cases up to the end of 1889, and after ascertaining from the Government of India that there was no objection to my doing so. After the publication of a large work like the Digest referred to, which necessarily took a long time to pass through the press, and to which it was impracticable to add any cases during its publication, it seemed to me very desirable to publish a supplementary work in which the cases could, as far as possible, be brought up to date.

J. V. W.

CALCUTTA,  
September 20th, 1890. }

AUG 31 1915

ALLAHABAD

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AUG

# CORRIGENDA.

Col. 67, last line, *for* "L. L. R., 16 L. A." *read* "L. R. 16 L. A."

Col. 570, line 16 from top, reference to case, *for* "L. R. 13 L. A. 23" *read* "L. R. 13 L. A. 123."

Col. 778, case 9, reference to case, *for* "11 Bom. 620" *read* "L. L. R. 11 Bom. 620."



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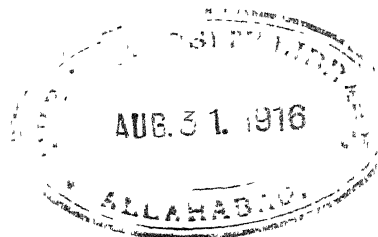
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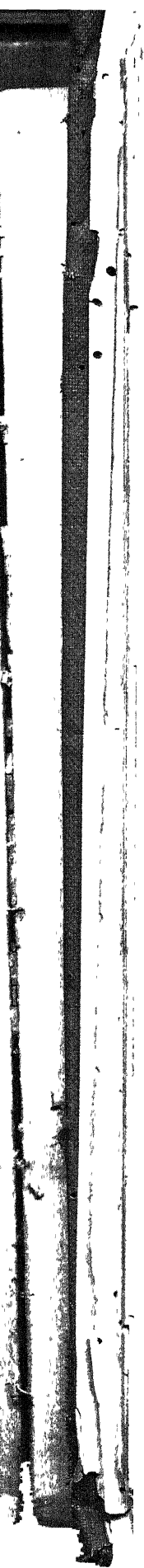
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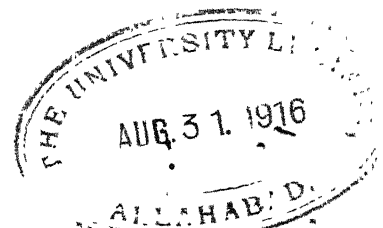
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# A DIGEST

OF

## THE HIGH COURT REPORTS,

AND OF

## THE PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA.

1887—1889.

( 1 )

### ABANDONMENT OF PART OF CLAIM.

See MUNSIF, JURISDICTION OF—

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See PLAINT—AMENDMENT OF PLAINT.

[I. L. R. 10 Mad. 152

### ABATEMENT OF SUIT.

			Col.	
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#### (1) SUITS.

1.—*Civil Procedure Code, s. 361—Tort—Malicious prosecution, Suit for—Cause of action, survival of, as against heir of a deceased wrong-doer—Act XII of 1855—“Actio personalis moritur cum persona,” application of.*] The plaintiff sued to recover damages from the defendant's father, Ramdas, for wrongful arrest and malicious prosecution. During the pendency of the suit Ramdas died, and the plaintiff substituted the defendant as his heir and representative. The defendant contended that the suit abated. Both the lower Courts disallowed the defendant's contention and awarded damages to the plaintiff, to be recovered from the estate of the deceased. On appeal by the defendant to the High Court, *held*, reversing the decision of the lower Courts, that the suit abated on the death of Ramdas, his estate having derived no benefit, but, on the other hand, suffered loss, in consequence of his wrongdoing. It was contended for the plaintiff that Act XII of 1855 gave the plaintiff a right to continue his suit against the heir of Ramdas. *Held*, that Act XII of 1855 did not apply to a suit, such as this, brought originally against the wrong-doer himself, and only subsequently sought to be continued against his heir. *Phillips v. Homfray*, L. R. 24 Ch. D. 439, followed. *HARIDAS RAMDAS v. RAMDAS MATHURADAS*.

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W. D.

( 2 )

### ABATEMENT OF SUIT—continued.

#### (2) APPEALS.

2.—*Suit to recover share of joint family property sold in execution of decree—Death of plaintiff-respondent—Survival of right to sue.*] In a suit for the recovery of a share of ancestral family property which had been sold in execution of a money-decree for a debt contracted by the plaintiff's grandfather, the plaintiff obtained a decree in the lower Appellate Court, from which the defendant appealed to the High Court. While the appeal was pending the plaintiff died, and, on her application, his widow was made respondent in his place. At the hearing of the appeal, the appellant contended that upon the plaintiff's death, the right to sue did not survive, and the appeal should therefore be decreed by the suit being dismissed. *Held* by the Full Bench that, judgment having been obtained before the plaintiff's death, the benefit of the judgment, or the right to sue, would survive to his legal representative, though whether the deceased plaintiff's representative could enforce the whole of the judgment in this case was a different matter. *Phillips v. Homfray*, L. R. 24 Ch. D. 439, and *Padarath Singh v. Raja Ram*, I. L. R. 4 All. 235, referred to. When a person desires to be added as such representative upon the death of a plaintiff after judgment, he must satisfy the Court that he is the proper person to be so added. *MUHAMMAD HUSAIN v. KHUSHALO*.

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3.—*Civil Procedure Code, ss. 368, 582—Death of plaintiff-respondent—Application by defendants-appellants for substitution—Application presented after the 1st July 1888—Civil Procedure Code Amendment Act (VII of 1888), ss. 53, 66—Limitation Act (XV of 1877), sch. ii, No. 175C.*] The plaintiff-respondent in an appeal pending before the High Court died on the 17th September 1885. Subsequently *D* applied to the High Court to be brought on the record as legal representative of the deceased. On the 15th April 1886 he was referred to a regular suit to establish his title

## ABATEMENT OF SUIT—concluded.

## (2) APPEALS—concluded.

as such representative, and on the 25th February 1887 such suit was dismissed. On 8th February 1886 the defendants-appellants applied to the High Court for judgment; but the application was dismissed under the decision of the Full Bench in *Chajmal Das v. Jagdamba Prasad*, I. L. R. 10 All. 260. On 24th July 1888 they applied to the High Court to bring certain persons upon the record as the legal representatives of the deceased plaintiff-respondent. *Held*, that the application having been made subsequent to the 1st July 1888, when the Civil Procedure Code Amendment Act (VII of 1888) came into force, and being an entirely fresh application not in continuation of any former proceedings between the same parties, must be dealt with under that Act and not under the Civil Procedure Code as it stood before the amendment; and that as it was made more than six months after the death of the deceased plaintiff-respondent, the appeal abated, with reference to s. 368 of the Code and Art. 175C of the Limitation Act (XV of 1877). *Held* also, that the petitioners had not shown "sufficient cause" within the meaning of s. 368 of the Code for not making the application within the prescribed period. *Ram Jivan Mal v. Chand Mal*, I. L. R. 10 All. 587, referred to. *CHAJMAL DAS v. JAGDAMBA PRASAD*.

[I. L. R. 11, All. 408]

## ABKARI ACT.

*See* MADRAS ABKARI ACT.*See* BOMBAY ABKARI ACT.

## ABSENCE FROM BRITISH INDIA.

*See* LIMITATION ACT, 1877, s. 13.

[I. L. R. 14 Calc. 457]

## ABWABS.

*See* CESS.

[I. L. R. 15 Calc. 828]

[L. R. 16 I. A. 152; I. L. R. 17 Calc. 171]

## ACCOMPLICE.

*See* CHARGE TO JURY—MISDIRECTION.

[I. L. R. 12 Mad. 196]

—*Evidence—Corroboration—Act I of 1872, s. 133.* *Per* EDGE, C. J.—Although, as a general rule, it would be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice, such evidence must, like that of any other witness, be considered and weighed by the judge, who, in doing so, should not overlook the position in which the accomplice at the time of giving his evidence may stand, and the motives which he may have for stating what is false. If the Judge, after making due allowance for these considerations and the probabilities of the story, comes to the conclusion that the evidence of the accomplice,

## ACCOMPLICE—concluded.

although uncorroborated, is true, and the evidence, if believed, establishes the guilt of the prisoner, it is his duty to convict. *Reg. v. Ramasami Padayachi*, I. L. R. 1 Mad. 391; *Empress v. Hardeo Dass*, Weekly Notes, All. 1881, p. 286, and *Queen-Empress v. Ram Saran*, I. L. R. 8 All. 306, referred to. *Queen-Empress v. Ram Saran*, I. L. R. 8 All. 306, explained and distinguished by STRAIGHT, J. *Per* BRODHURST, J., *contra*—Observations as to the necessity of corroboration in material particulars of the evidence of accomplice witnesses. *Queen-Empress v. Ram Saran*, I. L. R. 8 All. 306; *Queen v. Ramsadoy Chuckerbutty*, 20 W. R. Cr. 19, and *Reg. v. Budhu Nanku*, I. L. R. 1 Bom. 475, referred to. *Per* EDGE, C. J., and STRAIGHT, J.—Every case as it arises must be decided on its own facts, and not on supposed analogies to other cases. *QUEEN-EMPRESS v. GOBARDHAN*.

[I. L. R. 9 All. 528]

## ACCOUNT.

*See* COPYRIGHT.

[I. L. R. 13 Bom. 358]

—*Account stated—Hypothecation-bond for the amount due—Obligor preventing registration of bond by denying execution—Suit on account stated.* The plaintiff sued (i) for registration of a hypothecation bond executed by the defendant; (ii) in the alternative, for recovery of the amount of the bond upon an account stated. The defendant denied execution of the bond and that she had had any dealings or stated any account with the plaintiff. The Courts below disallowed the first claim as barred by limitation, and disallowed the second on the ground that the bond had effected a novation of the contract implied by the statement of accounts. *Held*, that this decision was wrong, and that the plaintiff was entitled to sue upon the account stated. *Sardar Kuar v. Chandrawati*, I. L. R. 4 All. 330, distinguished. *KIAM-UD-DIN v. RAJJO*.

[I. L. R. 11 All. 13]

## ACCOUNT, SUIT FOR.

*See* APPEAL—BOMBAY ACTS—BOMBAY CIVIL COURTS ACT (XIV OF 1869), ss. 8 and 26.

[I. L. R. 12 Bom. 675]

*See* LIMITATION ACT, 1877, ART. 89.

[I. L. R. 14 Calc. 147]

*See* PARTNERSHIP.

[I. L. R. 9 All. 120]

[I. L. R. 12 Bom. 335]

*See* PLAINT—FORM AND CONTENTS OF PLAINT—FRAME OF SUITS GENERALLY.

[I. L. R. 12 Bom. 675]

*See* VALUATION OF SUIT—SUITS.

[I. L. R. 12 Bom. 675]

**ACCOUNT, SUIT FOR—concluded.**

1.—*Principal and Agent—Suit by principal for an account—Object of a decree for an account as distinguished from a decree made upon the hearing—Costs.* A continued agency, or employment as dewan, for the purpose of drawing and expending the money of a principal, resulted in a suit by the latter, who alleged that more had been drawn than expended for him, and that a specific sum, or balance, stood against the defendant, having been misappropriated by him. The principal claimed also any further sum that might be proved to be payable. The dewan having denied the receipt of the money and any kind of accountability, it was found against him that the relation of agency existed between the parties. But, on the ground that it was impossible to decide, upon the evidence adduced at the hearing, how much of the principal's money was unaccounted for, though the attempt had been made to prove a balance due, the Appellate Court dismissed the suit. *Held*, that such a suit was essentially one for an account, and that the Courts below should have followed the regular course, *viz.*, to order an account to be taken of the defendant's dealings with plaintiff's money. This was without any expression of opinion that, in a suit for an account, an issue may not be raised, at the outset, so clearly as to be ready for decision. But the general rule being the other way, this suit was an example of it. *HURRINATH RAI v. KRISHNA KUMAR BAKSHI*.

[I L R. 14 Calc. 147; L R. 13 I. A. 123]

2.—*Impeachment of accounts on ground of fraud—Mode of proof—Re-opening of accounts.* Where accounts are impeached on the ground of fraud, two or three instances of particular items, which can be taken as false and fraudulent, must be brought to the notice of the Court before it can be called upon to order the accounts to be re-opened from the first. *Williamson v. Barbour*, L. R. 9 Ch. D. 529, followed. *BOO JINATBOO v. SHA NAGAR VALAB KANJI*

[I L R. 11 Bom. 78]

**ACCOUNTS—Mutual Accounts.**

See CASES UNDER LIMITATION ACT, 1877, ART. 85.

**Proof of Falsity of—**

See FRAUD—WHAT CONSTITUTES FRAUD AND PROOF OF FRAUD.

[I L R. 11 Bom. 78]

**ACCUMULATIONS.**

See HINDU LAW—WIDOW—POWER OF WIDOW—POWER OF DISPOSITION OR ALIENATION.

[I L R. 14 Calc. 861]

[I L R. 16 Calc. 574]

**ACKNOWLEDGMENT.**

See CASES UNDER LIMITATION ACT, 1877, S. 19.

See MAHOMEDAN LAW—ACKNOWLEDGMENT.

See STAMP ACT, 1879, Sch. I, Art. 1.

[I L R. 15 Calc. 162]

**ACQUIESCENCE.**

See DEKKAN AGRICULTURISTS RELIEF ACT (XVII OF 1879), S. 20.

[I L R. 12 Bom. 326]

See ESTOPPEL—ESTOPPEL BY DEEDS AND OTHER DOCUMENTS.

[I L R. 10 Mad. 272]

See GUARDIAN—RATIFICATION.

[I L R. 10 Mad. 272]

See JURISDICTION—QUESTION OF JURISDICTION—CONSENT OF PARTIES AND WAIVER OF JURISDICTION.

[I L R. 11 Bom. 153]

See PRE-EMPTION—RIGHT OF PRE-EMPTION

[I L R. 9 All. 234]

1.—*Absence of protest—Suit for removal of building—Obstruction to right of way.* In a suit for the removal of a building which the defendants had erected, and which was an obstruction to the plaintiffs' right to use a courtyard adjoining their residences, it appeared that the land on which the building stood did not belong to either party, but that all the inhabitants of the mohalla had from time immemorial exercised a right of way over it to and from their houses. *Held*, that there was no principle of acquiescence involved in the case, inasmuch as there was no evidence that the plaintiffs had given their actual consent to the building, and the only evidence of their acquiescence could be that they did not immediately protest, and the defendants must have known that they were building upon a courtyard which their neighbours had a right to use. *Uda Begam v. Imam-ul-din*, I L R. 1 All. 82, and *Ramsden v. Dyson*, L. R. 1 H. L. 129, referred to. *FATEHYAB KHAN v. MUHAMMAD YUSUF. MUHAMMAD YUSUF v. FATEHYAB KHAN*

[I L R. 9 All. 434]

2.—*Ratification of transfer of property.* A solehnama in 1847, to which were parties the sons, daughters, and widow of a deceased Muhammadan proprietor, transferred the shares of two minor daughters in their father's estate, having been executed by their mother, the widow, on their behalf. On the question whether the solehnama should be set aside, at the instance of the two daughters, on the ground of its having been beyond their mother's power to bind them, and of the instruments having been prejudicial to their interests, the evidence showed that it

**ACQUIESCENCE—concluded.**

had been acted on and followed by possession, and that the daughters had, after attaining full age, allowed a lengthened period of twenty years to elapse without taking proceedings to dispute it. *Held*, that, if the mother had exceeded her powers in executing the solohnama on their behalf, and if they might, at one time, have had it set aside, their long acquiescence was sufficient to show ratification of the transaction; and the solohnama was upheld. *MAHOMED ABDUL KADIR v. AMTAL KARIM BANU.*

[I. L. R. 16 Calc. 161; L. R. 15 I. A. 220]

3.—*Pre-emption—Mortgage by Conditional sale.*—Acquiescence in a mortgage by conditional sale does not involve relinquishment of the right of pre-emption upon the conditional sale eventually becoming absolute. *AJAIB NATH v. MATHURA PRASAD.*

[I. L. R. 11 All. 164]

4.—*Malabar kanam—Change in character of land—Passive acquiescence of landlord—Estoppel—Compensation for improvements by tenant.* Land was demised on kanam for wet cultivation. The demisee changed the character of the holding by making various improvements which were held to be inconsistent with the purpose for which the land was demised. On a finding that the landlord had stood by while the character of the holding was being changed and had thereby caused a belief that the change had his approval. *Held*, on second appeal, that the demisee was entitled to compensation for his improvements on redemption of the kanam. *Ramsden v. Dyson*, L. R. I. H. L. 129, followed. *KUNHAMMED v. NARAYANAN MUSSAD.*

[I. L. R. 12 Mad. 320]

*See RAVI VARMAH v. MATHISSEN*, I. L. R. 12 Mad., 323 note, where, however, it was held that the landlord had not acquiesced in some of the improvements, and compensation was therefore refused for them, though the tenant was permitted to remove those for which no compensation was allowed.

**ACQUITTAL.**

*See* REVISION—CRIMINAL CASES—ACQUITTALS.

[I. L. R. 9 All. 134]

**ACT, 1841—XIX, s. 3.**

*See* SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, 1882, s. 632

[I. L. R. 10 Mad. 68]

[I. L. R. 12 Mad. 341]

—, 1843—V.

*See* SLAVERY.

[I. L. R. 10 Mad. 375]

—, 1846—I. s. 6.

*See* PLEADER—REMUNERATION.

[I. L. R. 12 Bom. 557]

**ACT, 1847—IX, ss. 6, 9—Assessment of re-formed land after deliviation—Act IX of 1847, ss. 1, 6, 7, and 9, Effect of—Jurisdiction of Board of Revenue, Its extent—Civil Court, Power of—Survey Maps, their evidentiary value.]** Where, on inspection of a survey map, and after its comparison with a former *thak* map, the Board of Revenue assessed certain land as alluvial increment, which, however, the Civil Court, in a suit against the order of the Board, found upon further evidence to be a re-formation on the original site of a permanently-settled estate, in respect whereof the plaintiff had all along paid revenue without abatement. *Held*, that the land was not liable to fresh assessment, under the provisions of s. 6 of Act IX of 1847, nor was the comparison of the two maps by the Revenue Officer conclusive on the question of addition to the estate. *Surjit Sundari Devi v. The Secretary of State*, I. L. R. 11 Calc. 790, partially overruled. *Held* also (MITTER, J., *dissenting*), that the order of the Board of Revenue fixing the land with liability to assessment was not final, and could be set aside by the Civil Court as *ultra vires*—*Devan Ram Jewan Singh v. The Collector of Shahabad*, 18 W. R. 61; *Ram Jewan Singh v. The Collector of Shahabad*, 19 W. R. 127, overruled: *Held*, by the majority of the Full Bench, that the language of s. 9 was not such as would prohibit the present suit; and, unless the meaning were clear, its operation should be limited to suits for damages on account of anything done in good faith; for instance, in a case of ouster under s. 7—*The Collector of Moorshedabad v. Roy Dhanput Singh*, 15 B. L. R. 49, approved—*Held* (MITTER, J., *dissenting*),—S. 1 of Act IX of 1847 repealed everything in the Regulations which enacted by what officers and how the question of liability to assessment should be tied, and therefore took away from Collectors and Boards of Revenue the power of giving any binding decision on the point: *Held* also (MITTER, J., *dissenting*), that the effect of the words “shall be final” in s. 6 was to make the assessment final in every case in which there was jurisdiction to assess, but to leave it open to the Civil Courts to inquire in each case whether there was such jurisdiction, or whether the lands assessed were liable to assessment. *Per* MITTER, J.—S. 1 has not abolished the judicial functions of the Revenue authorities under Regulation II of 1819; all that has been abolished by that section are the tribunals constituted by Regulation III of 1828. *Per* MITTER, J.—The proceedings of the Revenue authorities under s. 6 embrace an inquiry upon two questions, *viz.*, the question of the liability to assessment, and the rate of assessment, and under the express wording of the section the finality attaches to the whole order of the Sudder Board of Revenue. *FAHAMIDAN-NISSA BEGUM v. SECRETARY OF STATE FOR INDIA IN COUNCIL.*

[I. L. R. 14 Calc. 67]

**ACT, 1847—XX, s. 12.**

*See* COPYRIGHT

[I. L. R. 13 Bom. 358]



## ACT, 1848—XVIII.

See NAWAB OF SURAT

[I. L. R. 12 Bom. 496]

## —, 1850—XXI

See HINDU LAW — INHERITANCE —  
DIVESTING OF EXCLUSION FROM  
AND FORFEITURE OF INHERIT-  
ANCE—OPTCASTS

[I. L. R. 11 All. 100]

## —, 1852—XI

See BOMBAY REVENUE JURISDICTION  
ACT X OF 1876, S. 4. PROV. K.

[I. L. R. 12 Bom. 442]

See JURISDICTION OF CIVIL COURT—  
RENT AND REVENUE SUITS. BOM-  
BAY.

[I. L. R. 13 Bom. 442]

## —Attachment under

See LIMITATION ACT, 1877, ART. 144.

[I. L. R. 11 B. m. 222]

## —, 1855—XII.

See ABATEMENT OF SUIT—SUITS

[I. L. R. 13 Bom. 677]

See RIGHT OF SUIT—SURVIVAL OF  
RIGHT.

[I. L. R. 13 Bom. 677]

## —, 1855—XXVIII.

See HINDU LAW—USURY.

[I. L. R. 14 Calc. 781]

See INTEREST—STIPULATIONS AMOUNT-  
ING TO PENALTIES OR OTHERWISE.

[I. L. R. 14 Calc. 248]

## —, 1856—XV, s. 2.

See HINDU LAW—WIDOW—DISQUALI-  
FICATION—REMARriage

[I. L. R. 11 Bom. 119]

[I. L. R. 11 All. 330]

## —, 1858—XXXV.

See LUNATIC.

[I. L. R. 13 Bom. 656]

## —, 1858—XL, s. 3.

1.—Guardian—Minority—Suit by minor—Certificate of administration.] Whenever an application is made for the appointment of a guardian under Act XL of 1858, and an order is passed appointing a person to be guardian of the minor, even though no certificate be taken out by the person so appointed, the minor becomes a ward of Court, and the period of his minority is extended to 21 years. *Stephen v. Stephen*. I. L. R. 8 Calc. 714; *Stephen v. Stephen*. I. L. R. 9 Calc. 901, dissented from; *Chunee Mul Johary v. Brojo Nath Roy Chowdhry*, I. L. R. 8 Calc. 967, followed. GRISH CHUNDER CHOWDRY v. ABDUL SELAM.

[I. L. R. 14 Calc. 55]

## ACT, 1858—XL, s. 3—concluded

2.—Permission to sue. Proof of—] Although the proper and regular manner of giving permission to sue on behalf of a minor is by an order recorded in the order-sheet there is nevertheless, nothing in the nature of the sanction provided by s. 3 of Act XL of 1858 which takes it out of the general rule of evidence that sanction may be proved by express words or by implication. *BHABA PERSHAD KHAN v. THE SECRETARY OF STATE FOR INDIA*.

[I. L. R. 14 Calc. 159]

3.—Suit on behalf of minor—Permission to relate to sue, Proof of—Civil Procedure Code, ss. 440, 578.] In a suit conducted on behalf of a minor by a relative, the absence of the certificate of guardianship required by s. 3 of the Bengal Minors Act (XL of 1858) is not a fatal defect; and the fact of the Court allowing such a suit to proceed must be taken as implying that the necessary permission has been given. Even if such permission has not, in fact been given, the irregularity is covered by s. 578 of the Civil Procedure Code. *Bhābā Pershad Khān v. The Secretary of State for India in Council*. I. L. R. 14 Calc. 159, followed. *PARNESHAR DASS v. BELA*.

[I. L. R. 9 All. 508]

4.—Minor—Effect of order for a certificate of guardianship—Guardian.] Held, that, according to the true construction of Act XL of 1858, a person who has obtained an order for a certificate thereunder is a properly constituted guardian, notwithstanding that no formal certificate in pursuance of such order has been obtained. *MUGNIRAM MARWARI v. GURSAHAI NUND, LIAKUT HOSSEIN v. GURSAHAI NUND*.

[L. R. 16 I. A. 195]

[I. L. R. 17 Calc. 346]

## ACT, 1858—XL, s. 18.

1.—Guardian and minor—Mortgage by certificated guardian without sanction of District Court—Mortgage money applied partly to benefit of minor's estate—Suit by minor to set aside the mortgage—Contract Act (IX of 1872), s. 65.] S. 18 of the Bengal Minors Act (XL of 1858) does not imply that a sale or mortgage or a lease for more than five years, executed by a certificated guardian without sanction of the Civil Court, is illegal and void *ab initio*, but the proviso means that in the absence of such sanction the certificated guardian, who otherwise would have all the powers which the minor would have if he were of age, shall be relegated to the position which he would occupy if he had been granted no certificate at all. If any one chooses to take a mortgage or a lease for a term exceeding five years under these circumstances, the transaction is on the basis of no certificate having been granted. In a suit brought by the guardian of a Muhammadan minor for a declaration that a mortgage-deed executed by the minor's mother was null and void to the extent of the minor's share and for partition and possession of such share, it was found that a considerable proportion

ACT, 1858—XL, s. 18—*continued*.

of the moneys received by the mortgagor had been applied for the benefit of the minor's estate by discharging incumbrances imposed on it by his deceased father. It appeared that, at the time of the mortgage, the mother held a certificate of guardianship under the Bengal Minors Act, and that she had not obtained from the Civil Court any order sanctioning the mortgage under s. 18 of that Act. *Held*, that the omission to obtain such sanction did not make the mortgage illegal or void *ab initio*, but relegated the parties to the position in which they would have been if no certificate had been granted, *i.e.*, that of a transaction by a Muhammadan mother affecting to mortgage the property of her minor son, with whose estate she had no power to interfere. *Held*, that this fell within the class of cases in which it has been decided that if a person sells or mortgages another's property, having no legal or equitable right to do so, and that other benefits by the transaction, the latter cannot have it set aside without making restitution to the person whose money has been applied for the benefit of the estate. *Held*, that even if mortgages executed by a certificated guardian without the sanction required by s. 18 of the Bengal Minors Act were void, the section did not make them illegal; and, with reference to s. 65 of the Contract Act, the plaintiff could not obtain a decree for a declaration that the mortgage was inoperative as against his share, except on condition of his making restitution to the extent of any moneys advanced by the defendant under the mortgage deed which had gone to the benefit of the plaintiff's estate, or had been expended on his maintenance, education, or marriage. *Manji Ram v. Tara Singh*, I. L. R. 3 All. 852, distinguished; *Sarat Chunder v. Raykissen Mookherjee*, 15 B. L. R. 350; *Pana Ali v. Sadik Hossein*, 7 N. W. 201; *Sahee Ram v. Mahomed Abdool Rahman*, 6 N. W. 268; *Hamir Singh v. Zakia*, I. L. R. 1 All. 57, and *Gulshere Khan v. Naubey Khan*, Weekly Notes, All. 1881, p. 16, referred to. GIRRAJ BAKHSI v. HAMID ALI.

[I. L. R. 9 All. 340]

2.—s. 18.—*Certificated guardian, Power of, to grant lease—Unauthorised transfer, Effect of.* A lease for a term of twelve years, but renewable at the pergunnah rate and transferable in its character, granted by a certificated guardian without the authority of the Court, is void *ab initio*, and will therefore, not avail the lessee, even for the period of five years for which such guardian is at liberty to grant the lease. *Held* accordingly, that in the case of *ijmali* property, whether such a lease was executed by the guardian conjointly with the co-sharers of the minor, or separately, the minor was entitled to eject the lessee as trespasser in respect of his own share without making his co-sharers parties to the suit. *Quære*, whether such a lease granted by a certificated guardian conjointly with the co-sharers of a minor, and thus creating one and the same tenancy, is not also void as against the co-sharers. *Held* also, that a transfer made by a person in the capacity

ACT, 1858<sup>1</sup>—XL, s. 18—*concluded*.

of a certificated guardian before the actual issue of the certificate, but after the orders for its issue have been made in his favour, and after his recognition as a certificated guardian, is a transfer within s. 18 of Act XL of 1858. HARENDRA NARAIN SINGH CHOWDHURY v. MORAN.

[I. L. R. 15 Calc. 40]

3.—s. 18.—*Lease granted by guardian of minor's property for term exceeding five years without sanction of Court, Effect of.* A lease granted by a guardian of minor's property who has obtained a certificate under Act XL of 1858 for a term exceeding five years without the sanction required by s. 18 of that Act is invalid. BHUPENDRO NARAYAN DUTT v. NEMYE CHAND MONDUL.

[I. L. R. 15 Calc. 627]

## ACT, 1858—XL, s. 28.

See APPEAL—ACTS—ACT XL OF 1858

[I. L. R. 14 Calc. 351]

See BURMA COURTS ACT XVII OF 1875, ss. 49, 95.

[I. L. R. 14 Calc. 351]

## —, 1859—XI, s. 9.

See CO-SHARERS—GENERAL RIGHTS IN JOINT PROPERTY.

[I. L. R. 14 Calc. 809]

## —, 1859—XI, ss. 13, 14.

See MORTGAGE—SALE OF MORTGAGED PROPERTY—PURCHASERS.

[I. L. R. 15 Calc. 546]

## —, 1859—XI, s. 33.

See PUBLIC DEMANDS RECOVERY ACT, s. 2.

[I. L. R. 14 Calc. 1]

## —, 1859—XI, s. 36.

See BENAMI TRANSACTION—CIVIL PROCEDURE CODE, 1882, s. 317.

[I. L. R. 14 Calc. 583]

## —, 1859—XI, s. 37.

See ONUS PROBANDI—SALE FOR ARREARS OF REVENUE.

[I. L. R. 15 Calc. 555]

See SALE FOR ARREARS OF REVENUE—INCUMBRANCES—ACT XI OF 1859.

[I. L. R. 14 Calc. 440]

[I. L. R. 15 Calc. 350]

## —, 1859—XI, s. 52.

See SALE FOR ARREARS OF REVENUE—INCUMBRANCES.

[I. L. R. 14 Calc. 440]

See SALE FOR ARREARS OF REVENUE—PROTECTED TENURES.

[I. L. R. 14 Calc. 440]

## ACT, 1859—XL, s 53

See SALE FOR ARREARS OF REVENUE—  
INCUMBRANCES—ACT XI OF 1859.

[I. L. R. 15 Calc. 350

## —, 1859—XL, s 54.

See MORTGAGE—SALE OF MORTGAGED  
PROPERTY—PURCHASERS.

[I. L. R. 15 Calc. 546

See SALE FOR ARREARS OF REVENUE—  
INCUMBRANCES—ACT XI OF 1859

[I. L. R. 14 Calc. 109

—, 1859—XIII—*Jurisdiction—Breach of contract to labour in foreign territory.* [I, having received an advance of money from G, contracted to labour for him in foreign territory. Having broken the contract, I was prosecuted under Act XIII of 1859, ordered to repay, and sentenced to imprisonment in default. *Held*, that the order was illegal. GREGORY v. VADAKASI KANGANI.

[I. L. R. 10 Mad. 21

—, 1859—XIII, s. 2—*Limitation Act, 1877. Art. 120—Claim to recover an advance.* [Act XIII of 1859 being a penal enactment, the Limitation Act (Sch. II, Art 120) is no bar to a claim under s 2 to recover an advance made to a labourer. IN RE KITTU.

[I. L. R. 11 Mad. 332

—, 1859—XIII, s. 2 and Preamble—*Wilful breach of contract—Construction of Statute—Preamble. Construction of—Summary trial—Criminal Procedure Code, s. 260* [Offences under s. 2 of Act XIII of 1859 are triable summarily under s. 260 of the Criminal Procedure Code. The offence made punishable by s. 2 of Act XIII of 1859 is the wilful and without lawful and reasonable excuse neglecting or refusing to perform the contract entered into by persons whom the Act concerns. Notwithstanding the preamble of the Act, it is not necessary to prove that a breach of contract is fraudulent in order to sustain a conviction under s. 2. *Taradoss Bhattacharjee v. Bhaloo Sherkh*, 8 W. R. Cr. 69 dissented from. Where the enacting sections of a statute are clear, the terms of the preamble cannot be called in aid to restrict their operation, or to cut them down. QUEEN-EMPRESS v. INDARJIT.

[I. L. R. 11 All. 262

## ACT, 1859—XV.

See CASES UNDER PATENT.

## —, 1860—XXVII.

See CASES UNDER CERTIFICATE OF ADMINISTRATION.

## —, 1860—XXVIII.

See MADRAS BOUNDARY ACT.

## —, 1860—XXVIII

See MINOR—REPRESENTATION OF MINOR  
IN SUITS.

[I. L. R. 11 Mad. 309

## ACT, 1860—XXVIII—concluded

See RES JUDICATA—PARTIES—SAME  
PARTIES OR THEIR REPRESENTA-  
TIVES.

[I. L. R. 11 Mad. 309

## —, 1861—V.

See POLICE ACT.

## —, 1863—XX.

See RIGHT OF SUIT—CHARITIES.

[I. L. R. 10 All. 18

## —, 1863—XX.

See VALUATION OF SUIT—SUITS

[I. L. R. 11 Mad. 148, 149 note

—, 1863—XX, ss. 3, 4, 11, 12—*Suit by member of a temple committee—Burden of proof—Form of decree.* [Suit by the members of a temple committee appointed under Act XX of 1863 against one claiming to be the hereditary trustee of a Hindu temple for possession of certain temple property, for a declaration of their right to receive certain annual dues and for a perpetual injunction restraining defendant from interfering with these dues: *Held*, the burden of proving that the temple was of the class mentioned in s 3 of Act XX of 1863 lay on the plaintiffs. On its appearing that the defendant's ancestor was not the founder of the temple, but was appointed trustee by the Government, as also were his successors in the office of trustee, of whom all were not members of his family: *Held*, (1) the plaintiffs were entitled to a decree declaring the temple in dispute to be of the class mentioned in Act XX of 1863, s. 3, and, as such, subject to their jurisdiction: (2) the plaintiffs were not entitled under Act XX of 1863, ss. 11, 1 and 12, to be put in possession of the property of the temple nor in receipt of its income. PONDURANGA v. NAGAPPA.

[I. L. R. 12 Mad. 366

## ACT, 1863—XX, s 10.

See APPEAL—ACTS—ACT XX OF 1863.

[I. L. R. 11 Mad. 26

## —, 1863—XX, s 18.

See APPEAL—ACTS—ACT XX OF 1863.

[I. L. R. 10 Mad. 98, 98 note

See SUPERINTENDENCE OF HIGH COURT  
—CIVIL PROCEDURE CODE, 1882,  
s. 622.

[I. L. R. 10 Mad. 98, 98 note

—, 1863—XX, s. 18—*Sanction to suit—Suit brought different from the suit sanctioned—Rejection of plaint* [A and B, being worshippers at a Hindu temple, obtained sanction under s. 18 of the Religious Endowments Act to sue for the removal of the managers of the temple on the ground of breach of trust and for damages. A and B sued to remove the managers, but claimed no damages in their plaint. *Held*, that, as the suit instituted differed from the one for which sanction was given, the plaint was properly rejected. SRINIVASA v. VENKATA.

[I. L. R. 11 Mad. 148

## ACT, 1864—XX.

*See* GUARDIAN—DUTIES AND POWERS OF GUARDIANS.

[I. L. R. 12 Bom. 686

*See* CASES UNDER MINOR—CASES UNDER BOMBAY MINOR'S ACT.

## —, 1865—X.

*See* SUCCESSION ACT.

## —, 1865—XI, ss. 2, 6, 12, 21.

*See* SUBORDINATE JUDGE, JURISDICTION OF.

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## —, 1865—XI, s. 6.

*See* CASES UNDER SMALL CAUSE COURT MOFUSSIL—JURISDICTION.

*See* CASES UNDER SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS.

## —, 1865—XV.

*See* HIGH COURT, JURISDICTION OF—HIGH COURT, BOMBAY—CIVIL.

[I. L. R. 13 Bom 302

*See* PARSIS.

[I. L. R. 13 Bom. 302

## —, 1865—XXI.

*See* PARSIS.

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## —, 1866—XXVII.

*See* TRUSTEES AND MORTGAGEES ACT.

## —, 1868—I.

*See* GENERAL CLAUSES CONSOLIDATION ACT

## —, 1869—I.

*See* OUDE ESTATES ACT.

## —, 1869—IV.

*See* DIVORCE ACT.

## —, 1869—XIV, ss 23 and 24.

*See* SUBORDINATE JUDGE, JURISDICTION OF.

[I. L. R. 12 Bom. 155

## —, 1869—XIV, s. 28.

*See* SUBORDINATE JUDGE, JURISDICTION OF.

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## —, 1869—XIV, s. 31.

*See* SUBORDINATE JUDGE, JURISDICTION OF.

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## —, 1870—VII.

*See* COURT FEES ACT, 1870.

## —, 1870—XXI.

*See* HINDU WILLS ACT

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*See* CATTLE TRESPASS ACT

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*See* PENSIONS ACT

## —, 1873—X

*See* OATHS ACT

## —, 1874—III

*See* MARRIED WOMAN'S PROPERTY ACT.

## —, 1874—XIV

*See* SCHEDULED DISTRICTS ACT.

## —, 1875—IX

*See* MAJORITY ACT

## —, 1875—XVII

*See* BURMA CIVIL COURTS ACT XVII OF 1875.

## —, 1876—V

*See* REFORMATORY SCHOOLS ACT.

## —, 1878—XI.

*See* ARMS ACT.

## —, 1879—I.

*See* STAMP ACT, 1879

## —, 1879—XVII.

*See* DEKKAN AGRICULTURISTS RELIEF ACT

## —, 1879—XXI

*See* EXTRADITION ACT.

## —, 1880—III.

*See* CANTONMENTS ACT, 1880

## —, 1881—V.

*See* PROBATE ACT, 1881.

## —, 1881—XXII.

*See* EXCISE ACTS.

## —, 1881—XXIII.

*See* DEKKAN AGRICULTURISTS RELIEF ACT.

## —, 1881—XXVI.

*See* NEGOTIABLE INSTRUMENTS ACT.

## —, 1882—V.

*See* EASEMENTS ACT.

## —, 1882—XV.

*See* SMALL CAUSE COURT, PRESIDENCY TOWNS.

## —, 1882—XXII.

*See* DEKKAN AGRICULTURISTS RELIEF ACT.

## —, 1884—III, s. 8, cl 6.

*See* MAGISTRATE, JURISDICTION OF—POWERS OF MAGISTRATES

[I. L. R. 9 All. 420

## ACT, 1886—XVII.

See JHANSI AND MORAR ACT.

## —, 1886—XVIII, s. 8.

See RES JUDICATA—CAUSE OF ACTION.

[I. L. R. 10 All. 517]

## —, 1887—IX.

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## —, 1888—XI

See ATTACHMENT—ATTACHMENT OF  
PERSON.

[I. L. R. 16 Calc. 85]

See INSOLVENCY—INSOLVENT DEBTORS  
UNDER CIVIL PROCEDURE CODE.

[I. L. R. 16 Calc. 85]

## —, 1888—VII, s. 46.

See EXECUTION OF DECREE—REPEAL OF  
ACT PENDING SUIT.

[I. L. R. 16 Calc. 323]

## —, 1888—VII, ss. 53, 66.

See ABATEMENT OF SUIT—APPEALS.

[I. L. R. 11 All. 408]

See PARTIES—SUBSTITUTION OF PARTIES  
—RESPONDENTS.

[I. L. R. 11 All. 408]

## —, 1888—VII, ss. 55, 56.

See APPEAL—APPEAL NEWLY GIVEN BY  
LAW.

[I. L. R. 16 Calc. 429]

## —, 1888—VII, s. 56

See APPEAL—ORDERS.

[I. L. R. 12 Mad. 472]

## —, 1888—X, s. 3

See APPEAL—ORDERS.

[I. L. R. 12 Mad. 472]

## ACT OF STATE.

—*Resumption of nam village and re-grant. Effect of—Maikars, Status of—Treaties of 1820—Effect of grant of nam under construction—Attachment by Government of such village, Effect of.* From the year 1820 down to the year 1872 the Waikar family had been in the enjoyment of the village of Pasarni under a treaty between the East India Company and one *M A* and *K M* were brothers and the last male descendants of *M*. For an alleged fraud of *K M* Government restricted the enjoyment of the said village to his life-time only. *A* predeceased *K*. On the death of *K M* Government, on the 31st December 1872, placed an attachment over the village. On the 13th July 1874, a judgment-creditor of *A* caused the lands in dispute, which were *mirasi* lands of the Waikar

## ACT OF STATE—concluded.

family situated at Pasarni, to be sold in execution of his decree against *A*, and they were purchased by the defendant, who was put in possession on the 22nd April 1876. In the meanwhile, Government, having chosen to recognise the plaintiff as a representative of the Waikar family, had removed the attachment, and re-granted the village to the plaintiff shortly before, *viz.*, on the 3rd April 1876. The plaintiff, being dispossessed, sued the defendant, contending (*inter alia*) that *A*, having predeceased his brother, had no interest in the lands, which had been purchased by the defendant. The Court of First Instance awarded the plaintiff's claim, and directed the defendant to pay the plaintiff's costs. The defendant appealed to the District Judge, who was of opinion that the proceedings of Government since the attachment in 1872 and restoration of the village were acts of State, and he varied the decree of the lower Court by cutting down the plaintiff's costs, made payable by the lower Court's decree, to half. On appeal by the defendant to the High Court, *held*, reversing the decree of the lower Appellate Court, that the plaintiff's claim should be dismissed. The attachment placed by Government on the death of *K M* in December 1872 was limited to an exemption from assessment, and the resumption and re-grant to the plaintiff did not give the plaintiff any title to the lands in question. The proceedings of Government in 1873 and 1876, by which the plaintiff was recognised as the representative of the Waikar family, were not acts of State. The *status* of the Waikars and other persons, with whom the agreements of 1820 were entered into, was not that of an independent sovereign. They (the Waikars) were merely powerful *saranjamdars* subordinate to the Raja of Satara, and after the annexation of the territory of the Raja in 1849 they held their lands under the East India Company. *Secretary of State for India v. Narayan Balwant Bhosle*, Printed Judgments, 1883, p. 244, distinguished. *HARI SADASHIV v. AJMUDIN*.

[I. L. R. 11 Bom 235]

## ADJOURNMENT.

See CRIMINAL PROCEDURE CODE, 1882.  
s 526A.

[I. L. R. 15 Calc. 455]

## ADMINISTRATION.

—*Civil Procedure Code, ss. 213, 276, 295—Administration decree, Effect of—Attachment after date of institution of administration suit under decree obtained prior to such suit—Injunction.* On the 22nd July 1886, one *R L* obtained a money-decree against one *P C*. On the 5th November 1886 *P C* died; and on the 18th December 1886, *R L* applied to attach certain properties belonging to the estate of his judgment-debtor, which properties were actually attached on the 8th and 12th January 1887. On the 21st December 1886, one *S* filed a suit to administer the estate of the deceased, and on the 20th January 1887 obtained the usual administration

**ADMINISTRATION—concluded.**

decree. On the 5th May 1887, S applied for an order staying all proceedings taken by R L against the estate of P C, and directing him to come in, should he think fit so to do, and prove his claim in the administration suit. *Held*, that the attachment did not create any interest in, or charge upon, the properties in favour of the attaching creditor as against other creditors, and that the order asked for ought to be granted. **IN THE MATTER OF THE APPLICATION OF SOOBUL CHUNDER LAW. SOOBUL CHUNDER LAW v. RUS-SICK LALL MITTER**

[I. L. R. 15 Calc. 202]

**ADMINISTRATION-BOND.**

—*Breach of condition—Compensation—Succession Act, ss 256, 257—Contract Act IX of 1872, s. 74—Exception—Damages* ] An administration-bond executed by an administrator in accordance with s. 256 of the Succession Act is not an instrument of the kind referred to in the exception to s. 74 of the Contract Act, so as to make the obligor liable, upon breach of the condition thereof, to pay the whole amount mentioned therein; and an assignee of the bond under s. 257 of the Succession Act cannot recover more damage than he proves to have resulted to himself or to those interested in the bond. *Held*, therefore, where neither the assignee of such a bond nor any one else had suffered any damage by reason of the breach of a condition requiring the obligor to file an inventory of the estate within a specified period, that the assignee was not entitled to recover from the obligor any compensation in respect of such breach. **LACHMAN DAS v. CHATER.**

[I. L. R. 10 All. 29]

**ADMINISTRATOR, APPOINTMENT OF—**

*See* CERTIFICATE OF ADMINISTRATION—  
CERTIFICATE UNDER BOMBAY REG.  
VIII OF 1827.

[I. L. R. 13 Bom. 37]

**ADVERSE POSSESSION.**

*See* CASES UNDER ONUS PROBANDI—  
LIMITATION AND ADVERSE POSSES-  
SION.

*See* CASES UNDER POSSESSION—ADVERSE  
POSSESSION.

*See* VARIANCE BETWEEN PLEADING AND  
PROOF—SPECIAL CASES—POSSES-  
SION, SUIT FOR.

[I. L. R. 14 Calc. 592]

**ADVOCATE.**

1.—*Counsel—Privilege.* ] An advocate in India cannot be proceeded against, civilly or criminally for words uttered in his office as advocate. **SULLIVAN v. NORTON.**

[I. L. R. 10 Mad. 28]

**ADVOCATE—concluded.**

2.—*Practice—Barrister—Right to take instructions directly from client—Right to “act” for client—Letters Patent, N.W.P., ss. 7, 8—Civil Procedure Code, ss. 2, 36, 39, 635* ] Reading together ss. 7 and 8 of the Letters Patent for the High Court, and ss. 2, 36, 39, and 635 of the Civil Procedure Code, an advocate on the roll of the Court can, for the purposes of the Code, perform on behalf of a suitor all the duties that may be performed by a pleader, subject to his exemption in the matter of a *rakalutnema* and to any rules which the High Court may make regarding him. No such rule having been made to the contrary, such an advocate may take instructions directly from a suitor, and may “act” for the purposes of the Code on behalf of his clients. **BAKHITAWA SINGH v. SANT LAL.**

[I. L. R. 9 All. 617]

**ADVOCATE-GENERAL, CASE CERTI-  
FIED BY—**

*See* MERCHANT SHIPPING ACT, 1854,  
s. 267

[I. L. R. 16 Calc. 238]

**ADVOCATE-GENERAL, SANCTION BY—**

*See* RIGHT OF SUIT—CHARITIES.

[I. L. R. 10 Mad. 375]

**AFFIDAVIT.**

*See* STAMP ACT, 1879, SCH. II, CL. 1 (b).

[I. L. R. 12 Bom. 276]

**AFFIDAVIT AFFIRMED BEFORE DE-  
PUTY MAGISTRATE.**

*See* FALSE EVIDENCE—GENERALLY.

[I. L. R. 14 Calc. 653]

**AGENT.**

*See* CASES UNDER CIVIL PROCEDURE  
CODE, s. 37.

**AGREEMENT TO PAY.**

*See* STAMP ACT, 1879, SCH. I, CL. 5.

[I. L. R. 15 Calc. 150]

**AGRICULTURIST**

*See* DEKKAN AGRICULTURISTS RELIEF  
ACT, s. 12.

[I. L. R. 11 Bom. 469]

**APPEAL.**

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[I. L. R. 12 Mad. 1]

See CASES UNDER SPECIAL OR SECOND APPEAL

See SUBORDINATE JUDGE, JURISDICTION OF.

[I. L. R. 12 Bom. 486]

## (1) APPEAL NEWLY GIVEN BY LAW.

1.—*Proceedings instituted prior to change in procedure—Appeal from order under s. 312, Civil Procedure Code (Act XIV of 1882)—Act VII of 1888, ss. 55 and 56.* It is a general principle of law that an appeal newly given by law is made applicable to proceedings instituted before that change in procedure is made. *Held*, accordingly, that an appeal from an order under the second paragraph of s. 312 of the Civil Procedure Code, although made before Act VII of 1888 came into force, would, upon the operation of that Act, lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made. *Hurroosundary Dabi v. Bhujohari Das Manji*, I. L. R. 13 Cal. 86. explained and distinguished IN THE MATTER OF ANUND CHUNDER ROY v. NITAI BHOOMIJ.

[I. L. R. 16 Cal. 429]

## (2) ACTS.

2.—*Act XL of 1858—Burmah Courts Act (XVII of 1875), s. 95—Certificate of administration* The appeal given by s. 28 of Act XL of 1858 is subject to the ordinary law of appeal laid down in the Burmah Courts Act. No appeal, therefore, will lie from an order refusing an application for the issue of a certificate of administration under Act XL of 1858, it being impossible to place any specific money valuation on such an application. IN THE MATTER OF THE PETITION OF MULLA ADJIM.

[I. L. R. 14 Cal. 351]

3.—*Act XX of 1863, s. 10—Order of District Judge filling vacancy on committee.* It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by the enacted law or equivalent authority. The

## Col. APPEAL—continued.

## (2) ACTS—concluded.

High Court has no jurisdiction to hear an appeal from the order of a District Judge made by him on petition pursuant to s. 10 of Act XX of 1863 (Religious Endowments), appointing a member to fill a vacancy in a committee. Neither that Act nor the general law gives any right of appeal, which, therefore, does not exist from such an order. *MINAKSHI NAIDU v. SUBRAMANYA SASTRI*.

[I. L. R. 11 Mad. 26]

[L. R. 14 I. A. 160]

4.—*Act XX of 1863, s. 18—Civil Procedure Code, s. 622—Order refusing permission to sue.* An order passed under s. 18 of Act XX of 1863, refusing leave to sue, is not appealable, nor, if the Judge has exercised his discretion, liable to revision under s. 622 of the Code of Civil Procedure. IN RE VENKATESWARA.

[I. L. R. 10 Mad. 98]

See ANONYMOUS CASE.

[I. L. R. 10 Mad. 98 note]

5.—*Bengal Tenancy Act (VIII of 1885), ss. 93, 113—Manager, Application for—Suit* An application under s. 93 of the Bengal Tenancy Act 1885, is not a suit between a landlord and tenant within the meaning of s. 143, and no appeal lies from an order rejecting such an application. *HUSSAIN BUX v. MUTOOKDHAREE LALL*.

[I. L. R. 14 Cal. 312]

6.—*Bengal Tenancy Act (VIII of 1885), s. 153—Suit for Rent—Question as to amount of Rent* Where there was a question as to the amount of rent annually payable, the plaintiffs claiming Rs. 15, and the defendants alleging the rent to be only Rs. 7-8: *Held*, an appeal lay under s. 153 of the Bengal Tenancy Act. *AUBHOY CHURN MAJI v. SOSHI BHUSAN BOSE*.

[I. L. R. 16 Cal. 155]

7.—*Land Acquisition Act, s. 39—Additional Judge—District Judge—Civil Procedure Code (Act XIV of 1882) s. 647.* An Additional Judge appointed to hear cases under the Land Acquisition Act, 1870, is a District Judge within the meaning of s. 39 of the Act. Under s. 647 of the Civil Procedure Code an appeal from the decision of an Additional Judge so appointed lies to the High Court. IN THE MATTER OF THE APPLICATION OF PORESH NATH CHATTERJEE v. SECRETARY OF STATE FOR INDIA.

[I. L. R. 16 Cal. 31]

## (3) ARBITRATION.

8.—*Civil Procedure Code, s. 522—Award, Appeal against decree in terms of—Extension of time for presenting award—Evidence.* Where a decree purports to have been made in terms of an award under s. 522 of the Code of Civil Procedure, an appeal lies against it if there was no award in fact or in law. *SUPPU v. GOVINDACHARYA*.

[I. L. R. 11 Mad. 85]



## APPEAL—continued.

## (3) ARBITRATION—concluded.

9.—*Civil Procedure Code*, ss. 521, 522, and 582—*Revocation of submission—Appellate decree in accordance with award* [By reason of s. 582 of the *Civil Procedure Code*, where a Court of First Instance wrongly sets aside an arbitration award and passes a decree against the terms thereof, and a Court of first appeal, holding that the award was not open to objection upon the grounds mentioned in s. 521, passes a decree strictly in accordance with the award, such appellate decree is entitled to the same finality as the first Court's decree would have been under the last paragraph of s. 522, and cannot be made the subject of second appeal. *Parashnath Dey v. Nohin Chunder Dutt*, 12 W. R. 93, and *Roghubeer Dyal v. Muna Koor*, 12 C. L. R. 564, dissented from. NAURANG SINGH v. SADAPAL SINGH.

[I. L. R. 11 All 8]

10.—*Award—Application to file award, objection to—Decree on award, Finality of—Private arbitration—Civil Procedure Code (Act XIV of 1882)*, ss. 520, 521, 525, 526.] Certain disputes between parties were referred under a written agreement to an arbitrator who, in due course, made his award. The plaintiffs then applied to the Subordinate Judge to have the award filed in Court under the provisions of s. 525 of the *Code of Civil Procedure*. The defendants came in and objected to the award on the following amongst other grounds—(1), that the value of the property in suit was Rs. 500 only, and therefore that the application should have been made in the Munsiff's Court and not in that of the Subordinate Judge; (2) That the agreement of submission was vague and indefinite and did not clearly set out the matters in dispute. The Subordinate Judge overruled the objection without taking any evidence, and directed the award to be filed and a decree to be passed thereon. The plaintiff appealed. The defendants contended that no appeal lay, and that if it did, it lay to the District Judge and not to the High Court. *Held*, that, assuming that in a proceeding under ss. 552 and 528, the Court has power to consider such objections as are mentioned in ss. 520 and 521, the above objections did not fall under either section, and therefore no appeal lay. BINDESSURI PERSAD SINGH v. JANKEE PERSHAD SINGH.

[I. L. R. 16 Calc. 482]

## (4) BOMBAY ACTS.

11.—*Bombay Civil Courts Act (XIV of 1869)*, ss. 8 and 26—*Suit for account and for balance that may be found due.* The plaintiffs sued, for an account of all the business done by the defendants as their commission agents from 1854 to 1867, and prayed that whatever was found due might be awarded with interest. The plaintiffs valued the relief sought approximately at Rs. 510, and this was the only valuation stated in the plaint. The suit was filed in the Court of a First Class Subordinate Judge, who rejected the

## APPEAL—continued.

## (4) BOMBAY ACTS—concluded.

plaintiff's claim. Against this decision the plaintiffs preferred an appeal to the High Court. *Held*, that as the approximate amount of the claim was stated in the plaint to be Rs. 510, that must be taken to be the value of the subject-matter of the suit for purposes of jurisdiction. The appeal, therefore, lay under ss. 8 and 26 of Act XIV of 1869, not to the High Court, but to the District Court. KHUSIALCHAND MULCHAND v. NAGINDAS MOTICHAND.

[I. L. R. 12 Bom. 675]

12.—*Bombay Civil Courts Act (XIV of 1869)—Civil Procedure Code*, ss. 111, 216—*Suit for dissolution of partnership—Set-off* [A suit for dissolution of partnership in which the claim was valued at Rs. 2,000 with a prayer that such balance as might be found due to the plaintiff upon taking the partnership accounts might be paid to him is a suit for money within the meaning of s. 111 of the *Code of Civil Procedure*, and a plea of set-off may be raised in such a suit; and if in consequence of such plea the Court of First Instance decides in favour of the defendant a sum above Rs. 5,000, then by reason of the provision in paragraph ii, s. 216 of the *Code*, an appeal from that decree will lie to the High Court and not to the District Court. RAMJIWAN MAL v. CHAND MAL.

[I. L. R. 10 All. 587]

(5) CERTIFICATE OF ADMINISTRATION  
(ACT XXVII OF 1860).

13.—*Act XXVII of 1860, s. 6—Appeal to High Court—“Fresh certificate.”* The fresh certificate contemplated by s. 6 of Act XXVII of 1860 means a certificate granted to a person other than the person to whom the first certificate was granted. Where, therefore, a person to whom the District Court had granted a certificate under Act XXVII of 1860 appealed to the High Court and prayed for a fresh certificate, on the ground that the District Court should not have made the grant of certificate conditional upon her giving security to another person. *Held*, that no appeal lay to the High Court in the case. NAURANGI KUNWAR v. RAGHUBANSI KUNWAR.

[I. L. R. 9 All. 231]

## (6) DECREES

14.—*Civil Procedure Code*, 1882, ss. 586, 581—*Appeal from part of decree disallowing objections* [Where a portion of the plaintiff's claim was disallowed by the first Court and the plaintiff appealed to the Subordinate Judge from the portion of the decree which refused part of his claim, and the defendant filed a memorandum of objections under s. 561 of the *Civil Procedure Code*, the Judge decreed the plaintiff's appeal and disallowed the defendant's objections. *Held* in an appeal by the defendant on a preliminary objection taken by the respondent that a second appeal lay from so much of the decree of the Subordinate Judge as disallowed



## APPEAL—continued.

## (6) DECREES—continued.

the objections filed by the appellant under s. 561 of the Code of Civil Procedure. *GANAPATI v SITHARAMA*.

[I. L. R. 10 Mad. 292]

15.—*Civil Procedure Code*, 1882, ss. 232, 244—*Assignment of decree—Validity of transfer—Registration of transfer*]. The holders of a decree for the sale of mortgaged property transferred the same to *M* by instruments which were registered at a place where a small portion only of the property was situate. Subsequently *M* transferred the decree to other persons, and the co-transferees applied, under s. 232 of the Civil Procedure Code, to have their names substituted for those of the original decree-holders. The judgment-debtor opposed the application on the grounds that *M*'s name had not been substituted for the names of the original decree-holders who had transferred to him, and that the transfers to *M* were inoperative, as the instruments of transfer had not been registered, at the place where the substantial portion of the mortgaged property was situate, in accordance with s. 28 of the Registration Act (III of 1887). It appeared that no notice had been issued to *M* under s. 232 of the Civil Procedure Code, that he was dead; and that his legal representatives had not been cited as required by law. The application was allowed by the Courts below. *Held* that the matter involved questions arising between the parties to the decree or their representatives within the meaning of s. 244 (c) of the Code, and that the order allowing the application was, therefore, a decree within the definition of s. 2, and was appealable as such. *GULZARI LAL v. DAYA RAM*.

[I. L. R. 9 All. 46]

16.—*Civil Procedure Code*, ss. 241, 411—*Application by Collector in pauper suit—Court-fees, recovery of, by Government—Question between parties to suit.*] *Held*, that a Collector applying on behalf of Government, under s. 411 of the Civil Procedure Code, for recovery of court-fees by attachment of a sum of money payable under a decree to a plaintiff suing *in forma pauperis*, might be deemed to have been a party to the suit in which the decree was passed, within the meaning of s. 241 (c) of the Code, and that an appeal would, therefore, lie from an order granting such application. *JANKI v. COLLECTOR OF ALLAHABAD*.

[I. L. R. 9 All. 64]

17.—*Application for permission to sue as a pauper—Rejection of application on the ground that it had been withdrawn—Civil Procedure Code, s. 2.*] *Held*, that an order rejecting an application for permission to sue as a pauper, and striking the case off the Court's file, on the ground that the applicant had previously withdrawn the application and entered into a new contract with the defendants, was a "decree" within the

## APPEAL—continued.

## (6) DECREES—concluded.

meaning of s. 2 of the Civil Procedure Code, and appealable as such. *BALDEO v. GULA KUAR*

[I. L. R. 9 All. 129]

18.—*Civil Procedure Code*, 1882, ss. 2, 545—*Order rejecting stay of execution.*] An order by a District Judge under s. 545 of the Civil Procedure Code (Act XIV of 1882), refusing to stay execution is a decree as defined in s. 2, and is therefore appealable. *MUSAJI ABDULLA v. DAMODAR DAS*.

[I. L. R. 12 Bom. 279]

19.—*Civil Procedure Code*, ss. 2, 54—*Dismissal of suit for insufficient court-fees on plaint—Court-fees (Act VII of 1870), s. 12.*] The Court of First Instance being of opinion that the plaintiff bore an insufficient court-fee, and the plaintiff not making good the deficiency, dismissed the suit after recording evidence, but without entering into the merits. On appeal the lower Appellate Court held that the court-fee was sufficient, and remanded the case for trial on the merits. *Held*, that the first Court's disposal of the suit must be treated as being under s. 54 of the Civil Procedure Code and was therefore a decree within the meaning of s. 2, and appealable as such, and that such appeal was not prohibited by s. 12 of the Court-fees Act. *Ajodhya Pershad v. Gunga Pershad*, I. L. R. 6 Cal. 249, and *Annamalai Chetti v. Cloete*, I. L. R. 4 Mad. 204, referred to. *MUHAMMAD SADIQ v. MUHAMMAD JAN*.

[I. L. R. 11 All. 91]

## (7) DEFAULT IN APPEARANCE.

20.—*Civil Procedure Code*, ss. 98, 99, 157, 158.] A District Munsiff struck a case off the file of his Court on neither party appearing. Subsequently, on an application by the plaintiffs, the case was restored. The order of restoration was reversed by the District Judge: *Held*, (1) that the order to strike off the case was illegal; (2) that, assuming that the case was dismissed, no appeal lay to the District Judge, whose order was accordingly made without jurisdiction. *ALWAR v. SESHAMMAL*.

[I. L. R. 10 Mad. 270]

21.—*Civil Procedure Code*, ss. 102, 103—*Dismissal of suit for non-appearance of plaintiff.*] S. 103 of the Civil Procedure Code does not take away the remedy of appeal from a decree dismissing a suit under s. 102. *Lal Sing v. Kunjan*, I. L. R. 4 All. 387; *Ajodhya Prasad v. Balmukand*, I. L. R. 8 All. 354, and *Partab Rai v. Ram Kishen*, Weekly Notes, All. 1883, p. 171, referred to. *ABLAH v. BHAGIRATHI*.

[I. L. R. 9 All. 427]

## (8) EXECUTION OF DECREE.

## (a) QUESTION IN EXECUTION.

22.—*Civil Procedure Code*, 1882, ss. 257 and 258—*Adjustment of decrees more than three years old—*

## APPEAL—continued

## (S) EXECUTION OF DECREE—continued.

## (a) QUESTION IN EXECUTION—continued.

*Reference under s. 617 of a question arising under these sections.]* On the 22nd March 1886, the applicant presented an application to a Subordinate Judge, praying that the adjustment of certain decrees, dated the 28th March 1867 and 11th July 1871, might be certified, and a sanction granted to a *sankhat*, dated 18th March 1880, passed to him by the defendant in satisfaction of the said decrees and in substitution of two bonds dated February 1879. The Subordinate Judge being of opinion that the application could not be granted, inasmuch as the execution of the decrees was then barred by limitation, referred the case to the High Court under s. 617 of the Civil Procedure Code (Act XIV of 1882). *Held*, that the question could not be referred under s. 617 of the Civil Procedure Code (Act XIV of 1882), as the order applied for to the Subordinate Judge was appealable under s. 2 of the Code. The question raised by the application related to the satisfaction of the decree within the meaning of s. 244 of the Code. *RANGJI v. BHAIJI HARJIYAN.*

[I. L. R. 11 Bom. 57]

23.—*Order allowing mortgagor to deposit in Court amount due after date fixed—Ministerial act—Civil Procedure Code, ss. 244, 588.]* S. 244 of the Civil Procedure Code contemplates that there must be some question in controversy and conflict in execution which has been brought to a final determination and conclusion so as to be binding upon the parties to the proceedings, and which must relate in terms to the execution, discharge or satisfaction of the decree. A judgment-debtor under a decree for foreclosure made an application to the Court two days after the expiry of time prescribed by the decree for payment of the amount due thereunder, in which she alleged that, by reason of the two previous days having been holidays, she had been unable to pay the money before, and asked to be allowed to deposit the same. Upon this application the Court passed the following order:—"Permission granted. Applicant may deposit the money." The money was deposited accordingly. *Held*, that the order was merely a ministerial act, and nothing more than a direction from the Judge to his subordinate official to receive the money, which, as it did not fall within either s. 244 or s. 588 of the Civil Procedure Code, was not appealable; and that the proper remedy of the decree-holder, assuming the deposit to have not been made in time, was to apply for an order absolute for foreclosure, which order would be subject to any steps the parties affected by it might take by way of appeal or otherwise. *HULAS RAI v. PIRTHI SINGH.*

[I. L. R. 9 All. 500]

24.—*Civil Procedure Code, 1882, ss. 2 and 244—Stay of execution—Amount of security required in granting of execution, a question in execution and order thereon appealable.]* The defendant in a

## APPEAL—continued.

## (S) EXECUTION OF DECREE—continued.

## (a) QUESTION IN EXECUTION—continued.

redemption suit against whom a decree had been passed appealed to the High Court, which on his application granted the usual stay of execution pending the appeal, upon security being given by him. The Subordinate Judge, feeling doubt as to whether the actual value of the property or the value stated in the plaint should be regarded in fixing the security, referred the case to the High Court. *Held*, that the question as to the amount of the security was a question relating to execution as contemplated by s. 244 of the Code, and, therefore, an order determining that question would be appealable under s. 2 of the Code. *ISHWARGAR v. CHUDASAMA MANABHAI.*

[I. L. R. 12 Bom. 30]

25.—*Civil Procedure Code, 1882, s. 293—Question for Court executing decree—Defaulting purchaser answering for loss by re-sale—Description of property at sale and re-sale, Difference of—Regular suit.]* An appeal will lie against an order made under s. 293 of the Code of Civil Procedure—*Sree Narain Mitter v. Mahtab Chund*, 3 W. R. 3; *Sooraj Buksh Singh v. Sree Krishen Dass*, 6 W. R. Mis. 126; *Joobraj Singh v. Gour Buksh*, 7 W. R. 110; *Bisokha Mayee Chowdhraim v. Sonatun Dass*, 16 W. R. 14, and *Ram Dul v. Ram Das*, I. L. R. 1 All. 181, followed. *BAIJNATH SAHAI v. MOHEEP NARAIN SINGH.*

[I. L. R. 16 Calc. 535]

## (b) PARTIES TO SUITS.

26.—*Civil Procedure Code, 1882, s. 244—Decree passed against representative of debtor—Attachment of property as belonging to debtor—Objection to attachment by judgment-debtor setting up an independent title—Appeal from order disallowing objection—Civil Procedure Code, ss. 2, 283.]* The decree-holders, in execution of a simple money decree passed against the legal representatives of their debtor and which provided that it was to be enforced against the debtor's property, attached and sought to bring to sale a house as coming within the scope of the decree. The judgment-debtors objected to the attachment and proposed sale, on the ground that the house was their own private property and not the property of the debtor within the meaning of the decree, having been validly transferred to them during the debtor's life-time. The objection was disallowed by the Court of First Instance. *Held*, that s. 283 of the Civil Procedure Code had no application, that the case fell within s. 244, and that an appeal would lie from the first Court's order. *Ram Ghulam v. Hazara Kuar*, I. L. R. 7 All. 547, and *Sita Ram v. Bhagwan Das*, I. L. R. 7 All. 723, followed. *Shankar Dial v. Amur Haidar*, I. L. R. 2 All. 752; *Abdul Rahman v. Muhammad Yar*, I. L. R. 4 All. 190; *Awadh Kuari v. Roktn Tiwari*, I. L. R. 6 All. 109; *Chowdhry Wahed Ali v. Jumaee*, 11 B. L. R. 149; *Ameeroonissa Khatoon v. Meer Mahomed*, 20 W. R. 280, and *Kurriyali v.*

## APPEAL—continued.

## (8) EXECUTION OF DECREE—concluded.

## (b) PARTIES TO SUITS—concluded.

Mayan, I L R 7 Mad 255. referred to MUL-  
MANTRI v. ASHFAK AHMAD.

[I L R 9 All. 605]

27.—Attachment—Objection to attachment by judgment-debtor on behalf of others—Order against decree-holder—Civil Procedure Code (Act XIV of 1882), ss. 244, 280, 283.] Where a judgment-debtor claims property which is the subject-matter of attachment, either on his own account as his own property, under whatever right, or as the representative of third parties in which capacity he has been sued, the question between him and the attaching creditor is properly one between the parties to the suit under s. 244 of the Code of Civil Procedure. But where the judgment-debtor raises the claim or objection on behalf of third parties who are not represented before the Court, the order passed thereon must be regarded as an order under s. 280 of the Code, and the only mode in which that order can be contested is in a regular suit as provided by s. 283. In execution of a decree against a judgment-debtor in his private capacity, the judgment-creditor attached certain property. Thereupon the judgment-debtor objected that the property attached had been dedicated by him some time previous as *wakf* under a registered *wakfnamah*, and that he was only in possession as *mutwali* under the deed. The lower Court found that the document created a valid *wakf*, and allowed the objection and released the property from attachment. The judgment-creditor appealed. At the hearing of the appeal it was contended that no appeal lay, inasmuch as the order was one under s. 280 of the Civil Procedure Code. On behalf of the judgment-creditor it was contended that the order was one under s. 244 and was thus appealable. *Held*, that the order was one under s. 280 and that no appeal lay, the remedy of the judgment-creditor being by way of a regular suit as provided by s. 283. ROOP LALL DASS v. BEKANI MEAH; MOHINEE MOHUN ROY v. BEKANI MEAH.

[I. L. R. 15 Calc. 537]

28.—Civil Procedure Code, 1882, ss. 244, 293, 306—Liability of defaulting purchaser—Appeal from order under s. 293.] At a sale in execution of a decree, a decree-holder, who had obtained leave to bid, was alleged to have made a bid through his agent of Rs. 90,000, but he shortly afterwards repudiated the bid and did not pay the deposit. The property was put up for sale again on the following day under s. 306 of the Code of Civil Procedure, and was in due course knocked down for a smaller sum. The judgment debtor filed a petition under s. 293 to recover from the decree-holder the loss by resale; the petition was rejected. On appeal, *held*, that the question at issue was one arising between the parties to the suit, and that an appeal lay against the order rejecting the petition. VALLABHAN v. PANGUNNI.

[I. L. R. 12 Mad. 454]

## APPEAL—continued.

## (9) EX PARTE CASES.

29.—Order setting aside ex parte decree—Civil Procedure Code (Act XIV of 1882), ss. 108, 583—Notification in Gazette.] There is no appeal from an order setting aside an *ex parte* decree. SHAMA DASS v. HURBUNS NARAIN SINGH.

[I. L. R. 16 Calc. 426]

## (10) MADRAS ACTS.

30.—Forest Act, s. 10—Decision as to title to land, appeal to High Court from decision of District Court on appeal.] An appeal lies to the High Court from a decision of a District Court passed under s. 10 of the Madras Forest Act, 1882, on appeal from the decision of a Forest Settlement Officer. KAMARAJU v. SECRETARY OF STATE FOR INDIA.

[I L. R. 11 Mad. 309]

## (11) NORTH-WEST PROVINCES ACTS.

31.—N.W.P. Land Revenue Act (XIX of 1873) ss. 113, 114.—Order for partition by Assistant Collector confirmed by Collector—Objection subsequently made to mode of partition—Question of title.] Upon an application made under s. 103 of the N.W.P. Land Revenue Act (XIX of 1873) for partition of a share in a mehal, no question of title or proprietary right of the nature contemplated by s. 113 was raised, nor any serious objection made by any of the co-sharers, and the Assistant Collector recorded a proceeding setting forth the rules which were to govern the partition, and this proceeding was confirmed by the Collector under s. 111. An Amin was ordered to carry out the partition, and, in taking steps to do so, stated the principle upon which he proposed to distribute the common land. An objection was then for the first time raised by two of the co-sharers in the Court of the Assistant Collector to the inclusion of a particular piece of land in the partition, on the ground that it appertained exclusively to their share. This objection was disallowed by the Assistant Collector and, on appeal, by the District Judge. *Held*, that at the stage of the proceedings when objections were taken, it was too late to determine questions of title under s. 113 of the Act; that accordingly the Assistant Collector could not be said to have done so; that the objections could, therefore, only be regarded in the light of objections to the mode in which it was proposed to make the partition; and that consequently there was no appeal from the order of the Assistant Collector to the District Judge, or from the District Judge to the High Court. TOTA RAM v. ISHUR DAS.

[I. L. R. 9 All. 445]

32.—N.W.P. Land Revenue Act (XIX of 1873) s. 113—Question of title—Appeal from order under first part of s. 113.] No appeal lies to the High Court from a decision of a Collector or Assistant Collector under the first part of s. 113 of the

APPEAL—*continued*(11) NORTH-WEST PROVINCES ACTS—  
*concluded.*

North-Western Provinces Land Revenue Act (XIX of 1873), declining to grant an application for partition until the question in dispute has been determined by a competent Court. *INTIAZ BANO v. LATAFAT-UN-NISSA.*

[I. L. R. 11 All. 328]

## (12) ORDERS.

33.—*Civil Procedure Code, 1882, ss. 344, 588—Insolvent judgment-debtor.* A debtor was arrested on civil process. He presented a petition to the Court from which process issued, alleging that he was unable to pay the debt, and praying to be declared insolvent and to be released. The Court passed an order on the same day, directing that he should be released, and that the creditor should proceed against his property: *Held*, that an appeal lay against the order. *KOMARASAMI v. GOVINDU.*

[I. L. R. 11 Mad. 136]

34.—*Order refusing to execute Small Cause Court decree transferred for execution to Munsif—Civil Procedure Code, 1882, ss. 223, 228, 249, 622—Mofussil Small Cause Court Act (XI of 1865), ss. 20, 21—Execution proceedings.* The plaintiff obtained a decree in a Small Cause suit in a Subordinate Court in the Mofussil, and a certificate was granted to him under s. 20 of the Mofussil Small Cause Court Act for the execution of the decree against immovable property of the judgment-debtor in the jurisdiction of a District Munsif. He accordingly presented a petition to the District Munsif under s. 247 of the Code of Civil Procedure, but his petition was dismissed: *Held*, that an appeal lay to the District Court. *PERUMAL v. VENKATARAMA.*

[I. L. R. 11 Mad. 130]

35.—*Order granting review—Civil Procedure Code (Act XIV of 1882), s. 629.* No appeal lies from an order granting a review of judgment, except in the cases set forth in s. 629 of the Civil Procedure Code (Act XIV of 1882) *BOMBAY AND PERSIA STEAM NAVIGATION COMPANY v. S. S. "ZUARI."*

[I. L. R. 12 Bom. 171]

36.—*Stay of execution pending suit between decree-holder and judgment-debtor—Appeal from order staying execution—Civil Procedure Code, s. 243.* An appeal lies from an order passed under s. 243 of the Civil Procedure Code, staying execution of a decree pending a suit between the decree-holder and judgment-debtor. The plaintiff instituted a suit against defendant for recovery of money and other relief, which was ultimately dismissed in appeal by the High Court, and he was ordered to pay defendant Rs. 1,000 as costs of the litigation. Plaintiff then brought this suit against defendant in the Court of the Subordinate Judge of Farukhabad, and while it was pending defendant

APPEAL—*continued.*(12) ORDERS—*continued.*

applied to the Court to execute his decree for costs. Plaintiff then applied for stay of the execution, and his application was refused by the first Court, but granted by the District Court. On appeal by defendant to the High Court, *Held*, that an appeal lay from the order, and the Judge's order was correct. *Mithun Bibi v. Buzloor Khan*, 8 W. R. 392, disapproved. *KASSA'MAL v. GOPI.*

[I. L. R. 10 All. 339]

37.—*Civil Procedure Code, ss. 494, 5887—Order for issue of notice made under s. 494.* A petition praying for a temporary injunction in a suit was presented by the plaintiff in a Subordinate Court. The Judge refused to pass orders on it without hearing the defendants, and ordered notice to issue to them. The plaintiff appealed to the District Judge, who granted the injunction prayed for: *Held*, that no appeal lay from the Subordinate Court, and that the District Judge had purported to exercise a jurisdiction not vested in him by law. *LUIS v. LUIS.*

[I. L. R. 12 Mad. 186]

38.—*Decree affirmed on appeal—Amendment of decree by first Court after affirmance—Objection by judgment-debtor to execution of amended decree—Appeal from order disallowing objection—Objection allowed on appeal.* The decree of a Court of First Instance having on appeal been affirmed by the High Court, the first Court altered the decree which had been affirmed, intending to bring it into accordance with the judgment of the High Court. After the decree had been altered, application was made to execute it as altered, but this was opposed by the judgment-debtor on the ground that that was not the decree which could be executed: *Held*, by the Division Bench that the order of the first Court disallowing the objection and directing that execution of the decree as altered should proceed could not be regarded as passed under s. 206 of the Civil Procedure Code, but was an order passed in execution of decree and as such was appealable. *MUHAMMAD SULAIMAN KHAN v. FATIMA.*

[I. L. R. 11 All. 314]

39.—*Letters Patent, High Court, cl. 15—"Judgment"—Order granting review of judgment—Civil Procedure Code, 1882, s. 629.* A second appeal was decided on the 1st June 1888 in favour of the respondents by two Judges of the High Court. On the 21st July 1888, an application for review was filed with the Registrar. Various reasons prevented the two Judges from sitting together until the month of March 1889. On the 6th March the matter came up before them, when a rule was issued, calling upon the respondents to show cause why a review should not be granted, and made returnable on the 28th March 1889. On that day one of the Judges had left India on furlough, and the rule was taken up, heard, and made absolute by the other of the two Judges sitting alone: *Held*, that the

## APPEAL—continued.

## (12) ORDERS—continued

order was not a judgment within the meaning of cl. 15 of the Letters Patent; and that no appeal would lie therefrom, the order being final under s. 629 of the Code of Civil Procedure. *Bombay Persia Steam Navigation Company v. The Zuari*, I. L. R. 12 Bom. 171, and *Achaya v. Ratnavelu*, I. L. R. 9 Mad. 253, approved. **AUBHOY CHURN MOHUNT v. SHAMANT LOCHUN MOHUNT.**

[I. L. R. 16 Calc. 788]

40.—*Civil Procedure Code*, s. 589—*Civil Procedure Code Amendment Acts (VII of 1888)*, s. 56 (Act X of 1888), s. 3—*Appeal against order of a Subordinate Court on a petition of insolvency*.] The judgment-debtor, having been arrested in execution of a decree passed by the Small Cause Court at Madras, which was transferred for execution to the Subordinate Court of South Malabar, applied to the District Court to be declared an insolvent. The District Court transferred the application for disposal to the Subordinate Court, and the application was granted on 25th July 1888. On 5th November 1888 one of the opposing creditors appealed to the High Court. *Held*, that the appeal did not lie. **SITHARAMA v. VYTHILINGA**

[I. L. R. 12 Mad. 472]

41.—*Civil Procedure Code*, ss. 32, 588 (2)—*Appeal against order that a plaintiff be made defendant*.] An appeal lies under Civil Procedure Code, s. 588 (2), against an order under s. 32 that a plaintiff be made defendant. **LAKSHMANA v. PARAMASIVA.**

[I. L. R. 12 Mad. 489]

42.—*Civil Procedure Code*, s. 462—*Order rejecting application to stay execution. &c., for want of sanction of Court under s. 462—Decree by consent of guardian of minor defendant.*] An application to stay execution of, and to set aside a decree passed with the consent of the guardian of a minor defendant, for want of sanction of the Court under s. 462, Civil Procedure Code, was rejected. *Held*, no appeal lay against the order of rejection. **ARUNACHALLAM v. MURUGAPPA**

[I. L. R. 12 Mad. 503]

43.—*Civil Procedure Code*, s. 232—*Order rejecting petition for execution by transferee of decree*.] A petition, by one claiming to be the purchaser at a Court-sale of the interest of a decree-holder under a decree, for execution of the decree was rejected. *Held*, no appeal lay from the order rejecting the petition. **SAMBASIVA v. SRINIVASA**

[I. L. R. 12 Mad. 511]

44.—*Civil Procedure Code*, 1882, s. 629—*Order on application to review—Appeal from decree as amended.*] A second appeal lies against an order of a lower Appellate Court passed under s. 629 of the Civil Procedure Code (Act XIV of 1882)

W. D.

## APPEAL—continued

## (12) ORDERS—concluded.

where the appeal to the lower Appellate Court has been, not from the order allowing a review, but from the original decretal order itself as amended by the original Court on the application for review. *Than Singh v. Chundua Singh*, I. L. R. 11 Calc. 296, distinguished. *Sumble*—The words of s. 629, "an order of the Court for rejecting the application shall be final," *prima facie* apply to the Court which has passed the original decree, but in spirit they would seem properly to apply also to an order of an Appellate Court. **BALI NATHA v. BHIYA NATHA.**

[I. L. R. 13 Bom. 496]

## (13) RECEIVERS.

45.—*Civil Procedure Code*, ss. 503, 505, 588—*Order rejecting application to appoint Receiver—Appellable order.*] An order rejecting an application to appoint a Receiver is an order passed under s. 503, and is therefore, appealable under s. 588, cl. 24, of the Code of Civil Procedure. *Subramanyu v. Appasami*, I. L. R. 6 Mad. 355, overruled. **VENKATASAMI v. STRIDAVAMMA.**

[I. L. R. 10 Mad. 179]

See ANONYMOUS CASE.

[I. L. R. 10 Mad. 180 note]

## (14) SALE IN EXECUTION OF DECREE.

46.—*Civil Procedure Code*, 1882, ss. 312 and 588, cl. 16—*Order setting aside a sale, Appeal from.*] An appeal does not lie from an order setting aside a sale passed under s. 312, para 2 of the Civil Procedure Code (Act XIV of 1882). **SAKHARAM VITHAL v. BHIKU DAYRAM.**

[I. L. R. 11 Bom. 603]

47.—*Civil Procedure Code*, ss. 311, 312—*Objection to sale—Legal disability—Order confirming sale before time for filing objections has expired—Appeal from order.*] Although s. 312 of the Civil Procedure Code contemplates that objections to a sale under s. 311 shall be filed before an order for confirmation is passed, if the precipitate action of the Court has led to the confirmation of a sale before the time allowed for filing objection to the sale has expired, whether or not that Court could entertain such objections after confirming the sale, the High Court on appeal is bound to interfere, and to see that objections which by law the appellant is empowered to make are heard and determined before a sale of his property is confirmed or becomes absolute. An application under s. 311 of the Civil Procedure Code on behalf of a judgment-debtor who was a minor, was rejected on the ground that the applicant did not legally represent the minor, and the Court thereupon confirmed the sale. A second application to the same effect was then filed on behalf of the minor by his guardian, and was rejected on the ground that the Court had already confirmed the sale, and was precluded from entertaining

**APPEAL—continued.****(14) SALE IN EXECUTION OF DECREE—  
concluded**

objections after such confirmation, prior to which no proper application had been filed. From this order the judgment-debtor appealed. *Held*, that the appeal must be considered to be one from an order under the first paragraph of s. 312 of the Civil Procedure Code, confirming the sale after disallowing the appellant's objection, and that it would, therefore, lie. The order disallowing the application and the order confirming the sale were set aside and the case remanded for disposal of the appellant's objections. *BALDEO SINGH v. KISHAN LAL*.

[I. L. R. 9 All. 411]

48.—*Civil Procedure Code*, 1882, s. 311—*Rejection of application to restore to file petition to set aside sale, dismissed for default*.] An application under s. 311 of the Code of Civil Procedure to set aside a sale in execution of a decree having been dismissed for default, the petitioner applied to the Court to restore the application to the file. The Court having rejected this application, the petitioner appealed against this order. *Held*, that no appeal lay. *Ningappa v. Gungawa*, I. L. R. 10 Bom. 133, followed. *RAJA v. STRINIVASA*.

[I. L. R. 11 Mad. 319]

**(15) OBJECTIONS BY RESPONDENT.**

49.—*Civil Procedure Code*, 1882, s. 561—*Practice—Objections to decree by respondent—Time for filing objections—Date fixed for hearing appeal*.] *Quære*—Whether, under s. 561 of the Code of Civil Procedure, objections to the decree by the respondent must necessarily be filed seven days before the date originally fixed for hearing the appeal, or whether it is not sufficient if they are filed seven days before the day on which the appeal is actually heard, and whether the decision of the Bombay High Court in *Rangildas v. Bai Girja*, I. L. R. 8 Bom. 559, to that effect is not correct, and the decisions of the Calcutta High Court to the contrary are not erroneous. *TULSHI PERSHAD v. RAJA MISSEK*.

[I. L. R. 14 Calc. 610]

50.—*Civil Procedure Code*, 1882, s. 561—*Filing of objections, time for—Practice*.] The expression "the day fixed for the hearing" used in s. 561 of the Civil Procedure Code (Act XIV of 1882) means the day on which the hearing actually commences, and includes both that day and the day to which the hearing may be adjourned. The purpose of the section is to give the appellant timely intimation of the proposed objections. Accordingly, a cross-objection filed by the respondent on the day mentioned as the day fixed for hearing the appeal in the notice to the respondent, was held not too late. *Rangildas v. Bai Girja*, I. L. R. 8 Bom. 559, followed. *DINKAR PARSHARAM v. VINAYEK MORESHWAR*.

[I. L. R. 11 Bom. 698]

**APPEAL—concluded.****(15) OBJECTIONS BY RESPONDENT—  
concluded.**

51.—*Civil Procedure Code*, s. 561—*Dismissal of appeal as barred by limitation—Objections not entertainable.*] The entertainment of objections under s. 561 of the Civil Procedure Code is contingent and dependent upon the hearing of the appeal in which such objections are taken, and when that appeal itself fails, is rejected, or dismissed, without being disposed of upon the merits, the objections cannot be entertained either. *RAMJIWAND MAL v. CHAND MAL*.

[I. L. R. 10 All. 587]

**APPEAL IN CRIMINAL CASES.**

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**(1) ACQUITTALS, APPEALS FROM.**

1.—*Appeal by local Government from judgment of acquittal.*] *Queen-Empress v. Gayadin*, I. L. R. All. 168, followed by *BRODHURST, J.*, as to the principle applicable to the determination of appeals preferred by the local Government from judgments of acquittal. *Per EDGE, C. J.*—In capital cases, where the local Government appeals, under s. 417 of the Criminal Procedure Code, from an order of acquittal, it is generally speaking undesirable that the prisoner's fate should be discussed while he remains at large; and the Government should, in such cases, apply for the arrest of the accused under s. 427 of the Code. *Per EDGE, C. J.* and *STRAIGHT, J.*—Every case as it arises must be decided on its own facts, and not on supposed analogies to other cases. *Queen-Empress v. Gayadin*, I. L. R. 4 All. 148, distinguished. *QUEEN-EMPRESS v. GOBARDHAN*.

[I. L. R. 9 All. 511]

**(2) ACTS.**

2.—*Cattle Trespass Act*, s. 22—*Compensation for illegal seizure of cattle*.] No appeal lies from an order under s. 22 of Act I of 1871, awarding compensation for illegal seizure of cattle. *Queen-Empress v. Lakshmi*, I. L. R. 10 Bom. 230, followed. *DHIKU v. DENONATH DEB alias DINU*.

[I. L. R. 15 Calc. 712]

3.—s. 22—*Compensation.*] No appeal lies against an order made under s. 22 of Act I of 1871. *IN RE KHADAR KHAN*.

[I. L. R. 11 Mad. 359]

**(3) CRIMINAL PROCEDURE CODE, 1882.**

4.—*Criminal Procedure Code* (Act X of 1882), s. 411—*Appeal from sentence of Presidency Magistrate.*] No appeal lies from a sentence of six months' rigorous imprisonment and a fine of Rs. 200 or a further period of three months' simple imprisonment, passed by a Presidency Magistrate. *SCHIEIN v. THE QUEEN-EMPRESS*.

[I. L. R. 16 Calc. 799]

**APPEAL TO PRIVY COUNCIL.**

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**(1) CASES IN WHICH APPEAL LIES.**

1.—*Substantial question of law—Form of judgment—Civil Procedure Code, 1882, s. 574*—The judgment of the High Court in a first appeal was as follows:—“This appeal must, in my opinion, be dismissed with costs and the judgment of the first Court affirmed. and I do not think it necessary to say more than that we agree with the Judge’s reasons.” The appellant applied for leave to appeal to Her Majesty in Council, on the ground that the requirements of s. 574 of the Civil Procedure Code had not been complied with. *Held*, by the Full Bench, that the objection involved no substantial question of law, and that the application for leave to appeal must, therefore, be rejected. **SUNDAR BIBI v. BISHESHA NATH.**

[I. L. R. 9 All. 93]

2.—*Concurrence of two Courts on facts—“Affirming” judgment of Lower Court—Civil Procedure Code (Act XIV of 1882), s. 596—Substantial question of law—Case disposed of on facts*—Where the issues in a case involved questions both of law and fact, and the Subordinate Judge had decided against the plaintiff on two issues of fact sufficient for the disposal of the case, without trying the other issues, the High Court found on those two issues substantially in favor of the plaintiff, but raised a further question of fact on the evidence and decided that against him, coming finally to the same conclusion on the facts as the Subordinate Judge, though not agreeing with him in all his findings or in the reasons on which they were based. *Held*, on an application for leave to appeal to the Privy Council, that the High Court did not “affirm” the judgment of the lower Court within the meaning of s. 596 of the Civil Procedure Code: *Held* also, even assuming the judgment of the lower Court was affirmed by the High Court, that there were substantial questions of law in the case which entitled the plaintiff to appeal, notwithstanding that such questions might be immaterial to the decision of the case. **IN THE MATTER OF THE PETITION OF ASHGHAH REZA. ASHGHAH REZA v. HYDER REZA.**

[I. L. R. 16 Calc 287]

GOPINATH BIRBAR v. GOLUCK CHUNDER BOSE

[I. L. R. 16 Calc. 292 note]

**(2) PRACTICE AND PROCEDURE.**

3.—*Time for appealing—Civil Procedure Code, s. 599—Limitation Act, s. 12, sch. 11, art. 177—Period of limitation for admission of an appeal to Privy Council.*—On a petition for leave to appeal to the Privy Council presented on the 8th April, it appeared that the period of six months from the date of the decree to be appealed against had expired on the 23rd of March, if the time

**APPEAL TO PRIVY COUNCIL—concluded.****(2) PRACTICE AND PROCEDURE—concluded.**

occupied by the petitioner in getting a copy of the decree was to be computed in that period. *Held*, that the petition was barred by limitation. *Per curiam*—It is not at all clear that the word “ordinary” in s. 599 of the Code of Civil Procedure does not refer to the circumstances referred to in the second paragraph of that section, viz., when the last day happens to be one on which the Court is closed. **LAKSHMAN v. PERTASAMI.**

[I. L. R. 10 Mad. 373]

**APPEARANCE, DEFAULT IN.**

See CASES UNDER APPEAL—DEFAULT IN APPEARANCE.

See CIVIL PROCEDURE CODE, 1882, ss. 97, 98.

[I. L. R. 10 Mad 270]

**APPELLATE COURT.**

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**(1) GENERAL DUTY OF APPELLATE COURTS.**

1.—*Dismissal of suit by first Court without examining defendants’ witnesses—Reversal of decree on appeal—Duty of Appellate Court to direct examination of witnesses before reversing decree.*—Where a Court of First Instance, considering it unnecessary to examine certain witnesses for the defence, dismissed the suit, and the lower Appellate Court, disbelieving the evidence of those witnesses for the defence who were examined, allowed the plaintiff’s appeal: *Held*, that, before doing so, the lower Appellate Court should have afforded the defendants an opportunity of supplementing the evidence which they had given in the first Court by the testimony of those witnesses whom that Court had declared it unnecessary to hear, and that the case must be regarded as one in which the first Court had refused to examine the witnesses tendered by the defendants. The Court directed the first Court to examine the defendants’ witnesses and, having done so, to return their depositions to the lower Appellate Court, which was to replace the appeal upon its file and dispose of it. **KHUDA BAKSH v. IMAM ALI SHAH.**

[I. L. R. 9 All. 339]



## APPELLATE COURT—continued.

## (1) GENERAL DUTY OF APPELLATE COURTS—concluded.

2.—*Presumption as to facts found by lower Court—Omission to file objections under Civil Procedure Code, s. 561.* Where a decree is in favour of the respondent, the Appellate Court is not entitled to accept the facts found by the Court of First Instance as incontestably proved, merely because the respondent has not filed any cross-objections to the decree under s. 561 of the Code of Civil Procedure (Act XIV of 1882). *BHAGOJI v. BAPUJI.*

[I. L. R. 13 Bom. 75]

## (2) EXERCISE OF POWERS IN VARIOUS CASES.

3.—*Decree—Error in decree of lower Court—Power to make decree which lower Court ought to have made—Madras Rent Recovery Act, ss. 9, 10, 11.* A summary suit by a landlord to enforce the acceptance of a patta under the Madras Rent Recovery Act should not be dismissed on a finding by the Appellate Court that the patta tendered was not a proper patta. The Appellate Court ought to pass the decree which the Court of First Instance should have passed. *NAGARAJA v. KASIMSA.*

[I. L. R. 11 Mad. 23]

4.—*Plaint—Order to file new plaint—Withdrawal of suit.* An Appellate Court having set aside the whole of the proceedings, including the plaint, directed that a new plaint be presented in a proper Court: *Held*, that this order, equivalent to directing the plaintiff to institute a new suit, was wrong; and that with only the alternative of having leave to withdraw the suit and bring a new one, his suit should have been dismissed. *LEDGARD v. BULL.*

[I. L. R. 9 All. 191; L. R. 13 I. A. 134]

5.—*Civil Procedure Code, s. 57—Return of plaint when Court has no jurisdiction.* An Appellate Court is not bound to return the plaint under all circumstances where defect of jurisdiction appears. *YACOOB v. MOHAN SINGH.*

[I. L. R. 11 Mad. 482]

9.—*Amendment of plaint—Objection not taken to plaint—Ground for dismissal of suit—Suit for declaratory decree without asking consequential relief.* A suit should not be dismissed by an Appellate Court on the ground of its being one asking merely for a declaratory decree, and no consequential relief, where that objection has never been taken by the defendants to the suit. The plaintiffs should in such a case be allowed an opportunity of amending their plaint. *LIMBA BIN KRISHNA v. RAMA BIN PIMPLU.*

[I. L. R. 13 Bom. 548]

## APPELLATE COURT—continued

## (3) EVIDENCE AND ADDITIONAL EVIDENCE ON APPEAL.

7.—*Fresh Evidence—Civil Procedure Code s. 568.* An appellant who had ample opportunity of giving evidence in the Court below and elected not to do so, but to rest his case on the evidence as it stood, ought not to be allowed at the stage of appeal to give evidence which he could have given below. *RAM DAS CHAKRABARTI v. OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY.*

[I. L. R. 9 All. 366]

8.—*Civil Procedure Code, 1883, s. 568—Production of additional evidence in Appellate Court.* Circumstances under which an Appellate Court will not allow additional evidence to be produced at the hearing of an appeal under s. 568 of the Civil Procedure Code. *NADIAH CHAND SINGH v. CHUNDER SIKHUR SADHU.*

[I. L. R. 15 Calc 765]

9.—*Application to put in evidence on appeal which applicant refused to produce in lower Court.* The plaintiffs had applied, during the hearing of the case in the Court of First Instance, for the production of certain books of account of the defendants. The defendants resisted the application, and the Court refused to order the books to be produced. The suit having been dismissed, the plaintiffs appealed, and in the Court of appeal the defendants applied to be permitted to put in evidence the books which they had refused to produce. *Held*, that the evidence could not be admitted. *MANOHAR GANESH TAMBEKAR v. LAKHMIRAM GOVINDARAM.*

[I. L. R. 12 Bom. 247]

## (4) REJECTION OR ADMISSION OF EVIDENCE BY COURT ADMITTED OR REJECTED BELOW.

## (a) UNSTAMPED DOCUMENTS.

10.—*Stamp Act, 1879, s. 34, proviso III—Admission of documents in evidence—Unstamped promissory note admitted as a bond on payment of stamp-duty and penalty.* The plaintiff sued to recover the amount due on three *khatus*. The defendant objected that the *khatus* were not duly stamped. The Subordinate Judge held that the instruments were bonds, and as such admitted them in evidence on payment of the proper stamp duty and penalty under s. 34, proviso I, of the Stamp Act (I of 1879). At a subsequent stage of the same suit, his successor in office was of opinion that the *khatus* in question were promissory notes; that as such they could be stamped only at the date of their execution, and that they had been illegally admitted in evidence under s. 34, proviso I. He accordingly dismissed the suit. On appeal, the District Judge agreed with the Subordinate Judge that the instruments sued on were promissory notes, but held that after they had once been admitted in



APPELLATE COURT—*continued*.(4) REJECTION OR ADMISSION OF EVIDENCE ADMITTED OR REJECTED BY COURT—*concluded*.(a) UNSTAMPED DOCUMENTS—*concluded*.

evidence on payment of the stamp duty and penalty, the question of their admissibility could not be subsequently raised in the suit under proviso III to s. 34 of the Stamp Act (I of 1879). He therefore reversed the decree of the Subordinate Judge and remanded the case for trial on the merits. Against this order of remand defendants appealed to the High Court. *Held*, that the promissory notes, having been once admitted in evidence, could not afterwards be rejected on the ground of their not being duly stamped. *DEVA CHAND v. HIRA CHAND KAMARAJ*.

[I. L. R. 13 Bom. 449]

11.—Stamp Act, 1879, s. 34.—*Instrument admitted as duly stamped—Appellate Court's power to question the admission.* Where a Court of First Instance has admitted a document in evidence as duly stamped, s. 34, cl. 3, of the Stamp Act (I of 1879) precludes the Appellate Court from questioning the admission of such document. If the Appellate Court considers the document to be insufficiently stamped, it can only proceed under s. 50 of the Act. *GURUPADAPA BIN IRAPA v. NARO VITHAL KULKARNI*.

[I. L. R. 13 Bom. 493]

## (5) OTHER ERRORS AFFECTING MERITS OF SUIT

12.—*Suit brought on behalf of minor without authority—Civil Procedure Code, 1882, s. 37—Minors Act, Bombay (Act XX of 1864)* In a suit brought by the Political Agent, Southern Maratta country, as administrator of the estate of the Chief of Madhol, who was described in the plaint as being 19 years of age, to eject the defendants from certain lands belonging to the Chief situated in the Satara district it was found, on preliminary objections taken by the defendants, that the Political Agent had no authority to institute the suit, he being neither a certificated guardian of the Chief under the Bombay Minors Act XX of 1864, nor a "recognised agent" under s. 37 of the Civil Procedure Code. *Held* also, that the irregularity of the Political Agent's suing for the Chief without authority, was one affecting the merits of the case, though not the jurisdiction of the Court. If the Political Agent was not properly representing the Chief, he had no merits, no rights as against the defendants. The District Judge was, therefore, right in reversing the decree of the first Court, —s. 578 of the Code of Civil Procedure having no application to the present case. *VENKATRAY RAJE GHORPADE v. MADHAVRAY RAMCHANDRA*.

[I. L. R. 11 Bom. 53]

13.—*Civil Procedure Code, 1882, s. 591—Omission to appeal from order.* S. 591 of the Code enables the Court, when dealing with an appeal

APPELLATE COURT—*continued*.(5) OTHER ERRORS AFFECTING MERITS OF SUIT—*concluded*.

from a decree, to deal with any question which may arise as to any error, defect, or irregularity in any order affecting the decision of the case, though an appeal from such order might have been and has not been preferred. *Googhe Sahoo v. Prem-lall Sahoo*, I. L. R. 7 Calc. 148, referred to *HAR NARAIN SING v. KHARAG SING*.

[I. L. R. 9 All. 447]

14.—*Act XL of 1858, s. 3—Permission to relate to sue, Proof of—Civil Procedure Code, ss. 440, 578.* In a suit conducted on behalf of a minor by a relative, the absence of the certificate of guardianship required by s. 3 of the Bengal Minors Act (XL of 1858) is not a fatal defect; and the fact of the Court allowing such a suit to proceed must be taken as implying that the necessary permission has been given. Even if such permission has not in fact been given, the irregularity is covered by s. 578 of the Civil Procedure Code. *Bhaba Pershad Khan v. The Secretary of State for India in Council*, I. L. R. 14 Calc. 159, followed. *PARMESWAR DAS v. BELA*.

[I. L. R. 9 All. 503]

15.—*Specific Relief Act (I of 1877), s. 42—Declaratory decree—Civil Procedure Code, s. 578.* An improper or irregular exercise of the discretionary power conferred by s. 42 of the Specific Relief Act (I of 1877) does not in itself constitute sufficient ground for the reversal of a decree which is not open to objection, on the ground of jurisdiction, or of the merits of the case, being covered by s. 578 of the Civil Procedure Code. *Sant Kumar v. Dena Saran*, I. L. R. 8 All. 365, referred to. *MUHAMMAD MASHUK ALI KHAN v. KHUDA BAKHS*.

[I. L. R. 9 All. 622]

16.—*Error in rejecting documents already admitted—Order of remand—Civil Procedure Code, 1882, s. 578* Where in a suit to recover the amount due on three *khatas* the first Court found they were bonds and admitted them on payment of stamp-duty and penalty under s. 34 of the Stamp Act; but at a subsequent stage of the suit his successor in office was of opinion that they were promissory notes, and that, therefore, they, not being stamped, could not have been legally admitted in evidence, and accordingly dismissed the suit: and the District Judge held that after they had once been admitted in evidence on payment of the penalty the question of their admissibility could not be raised, and remanded the suit for trial on the merits: *Held*, that under s. 578 of the Code of Civil Procedure (Act XIV of 1882) the High Court could not interfere with the order of remand, as it was not one which affected the merits of the case or the jurisdiction of the Court. *DEVACHAND v. HIRA CHAND KAMARAJ*.

[I. L. R. 13 Bom. 449]

## APPELLATE COURT—continued.

## (6) INTERFERENCE WITH AND POWER TO VARY ORDER OF LOWER COURT.

17.—*Civil Procedure Code*, ss. 562, 578 — *Practice*—*Appeal on full court-fee from decree dismissing suit in part*—*Remand of whole case, though no cross-appeal or objections preferred*—*Dismissal of whole suit on remand*—*High Court competent in second appeal to consider validity of remand order not specifically appealed*—*Civil Procedure Code*, ss. 544, 561.] A plaintiff whose suit had been decreed in part appealed from so much of the first Court's decree as was adverse to him, and stamped his memorandum of appeal with a stamp which would have covered an appeal from the whole decree. The defendant did not appeal or file cross-objections. The lower Appellate Court remanded the whole case to the first Court under s. 562 of the Civil Procedure Code, the plaintiff not appealing under s. 588 (28) from the order of remand. The first Court then dismissed the whole suit, and, on appeal by the plaintiff, the lower Appellate Court confirmed the decree. On a second appeal to the High Court, *held*, (i) that the High Court was competent to consider the validity or propriety of the order of remand, though it had not been specially appealed against; (ii) that the order of remand was *ultra vires*, so far as it related to that part of the first Court's decree which was favourable to the plaintiff, the lower Appellate Court not having jurisdiction, in the absence of any appeal or objections by the defendant, to disturb that part of the decree; (iii) that the order of remand was not made valid by the subsequent appearance of the plaintiff before the first Court or by the appeal from the first Court's decree on the remand, and (iv) that the case was not covered by s. 578 of the Code. *Per MAHMOOD, J.*—S. 544 had no application to the case, that section relating only to cases where one or more of the parties arrayed on the same side appealed against a decree passed on ground common to all, and not cases where either of two opposite parties appealed from a part of the decree under a court-fee sufficient for an appeal from the whole. *Moheshur Singh v. Bengal Government*, 7 Moore's I. A. 283; *Forbes v. Amecroonissa Begum*, 10 Moore's I. A. 310; and *Mukhan Lal v. Sree Kishen Singh*, 12 Moore's I. A. 157, referred to. *CHEDA LAL v. BADULLAH*.

[I. L. R. 11 All. 35]

## (7) OBJECTION TAKEN FOR FIRST TIME ON APPEAL.

## (a) GENERAL CASES.

18.—*New point—Discretion of Court.*] On second appeal the appellant should not be allowed to raise an entirely new point, if it is one for the right determination of which it is necessary to go into evidence which has not been produced in the lower Courts, or unless it is a pure point of law going into the question of the jurisdiction of the lower Courts and capable of being determined without the consideration of any evidence other than that on the record; and even if it falls

## APPELLATE COURT—continued.

## (7) OBJECTION TAKEN FOR FIRST TIME ON APPEAL—continued.

## (a) GENERAL CASES—concluded.

within the above exception, it is purely discretionary with the Court whether to consider it or not. *FAKIR CHAND AUDHIKARI v. ANUNDA CHUNDER BHUTTACHARJI*.

[I. L. R. 14 Calc. 586]

## (b) SPECIAL CASES.

19.—*Evidence—Objection to document as evidence not raised in lower Court.*] If no objection is taken in the Court of First Instance to the reception of a document in evidence, it is not within the province of the Appellate Court to raise or recognise it in appeal. *CHITINAJI GOVIND GODBOLE v. DINKAR DHONDEV GODBOLE*.

[I. L. R. 11 Bom. 320]

20.—*Jurisdiction—Objection to suit for mesne profits as being matter for execution—Civil Procedure Code (Act XI, of 1882), s. 241.*] A landlord sued his tenant for arrears of rent, and obtained a decree for a certain amount and a declaration that, if the amount were not paid within fifteen days, the tenant should be ejected under s. 52, Act VIII of 1869. The amount was not paid, and the landlord executed the decree and obtained possession. The tenant appealed and succeeded in getting the decree set aside, and the amount found due from him for arrears by the first Court was reduced and a decree made, directing that, if the reduced amount were not paid within fifteen days he should be ejected. He paid the amount found due by the Appellate Court within the fifteen days and recovered possession of his holding. He then brought a suit in the Munsif's Court to recover mesne profits from his landlord for the time he was in possession after the execution of the first Court's decree. It was contended on second appeal that the suit would not lie, as the matter might and should have been determined in the execution department under s. 241 of the Civil Procedure Code. *Held*, that, as the suit was instituted in the Munsif's Court, and the Munsif under the circumstances of the case was the officer who, in the first instance, would have had to determine the matter in the execution department, there was at most only an error of procedure and no exercise of jurisdiction by the Munsif which he did not possess, and that upon the authority of the decision in *Purneswar Pershad Narain Singh v. Jankhee Koor*, 19 W. R. 90, this could not be made a ground of objection on appeal. *Held* also, that, the point being one that was not raised in the pleadings or before either of the lower Courts, and being a point which went exclusively to the jurisdiction of the Court, it could not be raised on second appeal. *AZIZUDDIN HOSEIN v. RAMANUGRA ROY*.

[I. L. R. 14 Calc. 605]

**APPELLATE COURT—concluded.****(7) OBJECTION TAKEN FOR FIRST TIME ON APPEAL—concluded.**

21.—*Objection affecting jurisdiction—Want of proper certificate—Suit under Dekkan Agriculturists Relief Act* [Held, that an objection taken to a suit under the Dekkan Agriculturists Relief Act on the ground that a proper certificate had not been obtained could be taken for the first time on second appeal, as it was an objection affecting the jurisdiction of the Courts below. **NYAMATULA v. NANA WALID FARIDSHA.**

[I. L. R. 13 Bom. 424]

22.—*Limitation.* Where the question of limitation was raised for the first time on second appeal held, that it could not be decided against the plaintiff. **SHIVAPA C. DOD NAGAYA.**

[I. L. R. 11 Bom. 114]

23.—*Partus—Non-joinder of partus—Misjoinder* [Held by Muttusami Ayyar and Bland, JJ. (Kernan, J. dissenting) the objection as to non-joinder of partus is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal. **MOIDIN KUTTI v. KRISHNAN**

[I. L. R. 10 Mad. 322]

**APPLICATION BY PERSON NOT A PARTY TO SUIT.**See **MANAGEMENT OF ESTATE BY COURT**

[I. L. R. 15 Calc. 253]

**APPROVERS.**See **CHARGE TO JURY—MISDIRECTION.**

[I. L. R. 12 Mad. 196]

*Criminal Procedure Code, ss. 337, 339.—Accomplice—Tender of pardon, effect of—Subsequent trial of accomplice for connected offences* [A prisoner charged before a Magistrate at Benares with offences punishable under ss. 471, 472, and 474 of the Penal Code, made a confession to the Magistrate in respect of those offences. He was then sent in custody to Calcutta, and was there, together with other persons, charged before a Magistrate with offences punishable under ss. 467, 473, and 475. The conduct to which these charges related was closely connected and mixed up with that to which the charges first-mentioned had reference. Under s. 337 of the Criminal Procedure Code, the Magistrate at Calcutta tendered a pardon to the prisoner upon the conditions specified in that section, and the prisoner accepted the pardon, and gave evidence for the prosecution. The Magistrate held that this evidence was not sufficiently corroborated, and accordingly discharged all the accused, but the pardon was not withdrawn, and there was nothing to show that the Magistrate was dissatisfied with the prisoner's statements or considered that he had not complied with the conditions on which the pardon was tendered. Subsequently the prisoner was

**APPROVERS—concluded.**

committed by the Magistrate of Benares for trial before the Court of Sessions upon the charges under ss. 471, 472 and 474 of the Penal Code. He pleaded not guilty but did not in terms plead the pardon as a bar to the trial, though he made some reference to the subject; and the Sessions Judge having made a brief inquiry as to the proceedings at Calcutta, came to the conclusion that there was no sufficient proof of any conditional pardon and convicted and sentenced the accused: Held, that by the terms of the conditional pardon granted to the accused by the Calcutta Magistrate, the conditions of which were satisfied, as was shown by its never having been withdrawn, the accused was protected from trial at Benares in respect of the offences under ss. 471, 472, and 474, and was not liable to be proceeded against in respect of them, and that the trial and conviction were, therefore, illegal. Although s. 337 of the Criminal Procedure Code does not in terms cover a case where a Magistrate holding a preliminary inquiry for commitment against several persons tenders a conditional pardon to one of them, examines him as a witness, and subsequently discharges all the accused for want of a *prima facie* case against them, the words "every person accepting a tender under this section shall be examined as a witness in the case" mean that for all purposes (subject to failure to satisfy the conditions of the pardon as provided for by s. 339) such a person ceases to be triable for the offence or offences under inquiry or (with reference to s. 339) for "any other offence of which he appears to have been guilty in connection with the same matter," while making "a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences" directly under inquiry. The words last quoted refer to the importance, when a pardon is tendered, of encouraging the approver to give the fullest details, so that points may be found in his evidence which may be capable of corroboration. The question of how far the pardon protects him, and what portion of it should not protect him, ought not to be treated in a narrow spirit. **QUEEN-EMPRESS v. GANGA CHARAN.**

[I. L. R. 11 All. 79]

**ARBITRATION.**

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See **CASES UNDER APPEAL—ARBITRATION.****Agreement to Refer to—**See **SPECIFIC RELIEF ACT, s. 21**

[I. L. R. 11 Bom. 199]

**Revocation of—**See **SPECIFIC RELIEF ACT, s. 21.**

[I. L. R. 9 All. 168]

See **WITHDRAWAL OF SUIT.**

[I. L. R. 9 All. 168]

## ARBITRATION—continued.

## (1) SUBMISSION OF AWARD

1.—*Order extending time for presentation of award.* [An order extending the time for the presentation of an award upon application presented within time is not bad in law by reason of its having been made after the expiry of the term which it purports to extend. *SUPPU v. GOVINDACHARYAN.*

[I. L. R. 11 Mad. 85]

2.—*Omission to fix time for delivery of award—Extension of time after expiration of period fixed—Civil Procedure Code, ss 35, 508, 511.* [The provision contained in s. 508 of the Civil Procedure Code, requiring the Court to fix a reasonable time for the delivery of the award is not imperative but directory, and non-compliance with it does not make the order of reference abortive and any subsequent arbitration proceedings ineffectual and bad. Under s. 511 of the Code the Court may extend the time for making the award after the time fixed therefor has expired. *HAR NARAIN SINGH v. BHAGWANT KUAR.*

[I. L. R. 10. All 137]

3.—*Making and filing award—Award made but not filed within time specified by order of Court—Civil Procedure Code (Act XIV of 1882), ss. 508, 511, 521.* [The present suit for dissolution of partnership and all matters in dispute between the parties thereto were by Judge's order, dated 18th July 1887, referred to the arbitration of A and B. The time for making and filing the award was by subsequent orders extended to the 18th May 1888. The award was made on that day, but was not filed until the 18th June 1888. The second defendant obtained a rule calling on the other parties to show cause (*inter alia*) why the award should not be set aside by reason of its not having been filed in time. *Held*, that the omission to file the award on or before the 18th May 1888, did not render it invalid. The word "made" in ss 514 and 521 of the Civil Procedure Code (Act XIV of 1882) does not include the filing of the award. *UMERSEY PREMJI v. SHAMJI KANJI.*

[I. L. R. 13 Bom 11 9]

## (2) REMISSION TO ARBITRATORS.

4.—*Award on one point only—Remission to arbitrator—Refusal by arbitrator to act—Limitation—Adverse possession* [A case was referred for decision to an arbitrator. The arbitrator made his return, deciding by the award only one of the issues raised in the case, viz., that the defendants had been in possession of the land in suit for more than twelve years. The plaintiffs and the defendants claimed under the same landlord. The Munsif remitted the award to the arbitrator for determination of the other matters arising in the case; the arbitrator, however, refused to act further in the matter, and the Munsif himself took up the case and

## ARBITRATION—continued.

(2) REMISSION TO ARBITRATORS—continued. decided it in favour of the plaintiffs. On appeal, the Subordinate Judge held that the award made by the arbitrator was sufficient for the determination of the case, and reversed the decision of the Munsif and gave the defendants a decree in terms of the award. *Held*, that, as the plaintiffs and the defendants claimed under one and the same landlord and the question between them being which of the two had the better title to the land in dispute, the case could not have been concluded by the finding of the arbitrator upon the question of possession, and that the Munsif had acted rightly, on the arbitrator declining to complete the award, in deciding the case himself. *JONARDON MUNDUL DAKNA v. SAMBHU NATH MUNDUL.*

[I. L. R. 16 Cal. 806]

## (3) AWARDS

## (a) VALIDITY OF AWARDS AND GROUND FOR SETTING THEM ASIDE

5.—*Civil Procedure Code, s. 521, cl. (a).*—"Misconduct" of arbitrator. [The word "misconduct" as used in s. 521, cl. (a), of the Civil Procedure Code should be interpreted in the sense in which it is used in English law with reference to arbitration proceedings. It does not necessarily imply moral turpitude, but it includes neglect of the duties and responsibilities of the arbitrators, and of what Courts of justice expect from them before allowing finality to their awards. An arbitrator to whom the matters in difference in a suit were referred under s. 508 of the Civil Procedure Code, and who was directed by the order of reference to deliver his award by the 22nd September, applied on the 17th September for an extension of time, on the ground that a very full investigation was necessary, which it was not possible to make within the prescribed period. On the 20th September, without waiting for the order of the Court, he notified the parties that he proposed to hold an inquiry in the case on the 21st, and it appeared that he did not expect this intimation to reach them before the 21st or 22nd. On the 23rd he informed the plaintiff's pleader that a new date would be fixed for the inquiry, of which notice would be given to the parties. Notwithstanding this on the 23rd the arbitrator took evidence for the defendant in the absence of the plaintiff and his pleader. All these proceedings were held before the arbitrator received an order of the Court extending the time for delivery of the award up to the 26th October. On the 27th September he directed the parties to be informed that the investigation would be held on the 5th October. On the 4th October the plaintiff presented a petition praying the arbitrator to summon witnesses and to take documentary evidence, and upon this nothing definite was settled at the time; but, after the pleaders had left, the arbitrator passed an order rejecting the petition, on the ground that the evidence sought to be produced was unnecessary. On the same date and on the

ARBITRATION—*continued*.(3) AWARDS—*continued*.(a) VALIDITY OF AWARDS AND GROUND FOR SETTING THEM ASIDE—*continued*.

5th and 6th October he took evidence for the defence in the absence of the plaintiff and his pleader. On the 10th he rejected a petition by the plaintiff praying for further time to produce evidence, and complaining of his having taken evidence in the plaintiff's absence and having received in evidence a fabricated document. On the 25th October, the arbitrator delivered his award in favor of the defendant. Subsequently upon objections made by the plaintiff, the Court set aside the award and directed that the trial of the suit should proceed. *Held*, that although no case of "corruption" within the meaning of s. 521, cl. (a) of the Civil Procedure Code had been made out against the arbitrator, the circumstances above stated amounted to "misconduct," and the award was, therefore, bad in law and had rightly been set aside. *Sonal Thakur Opadecah v. Panchanand Tikka*, S D A. Bengal, 1848, p 115; *Reddy Kisto Mozumdar v. Puddo Lachun Muzumdar*, I. W R. 12; *Sada Ram v. Beharee*, S D. A. N W., 1864, Vol 2, p. 399, *Parv Dass v. Khoober*, S. D A. N W., 1861, Vol 2, p 199, *Howard v. Wilson* I L R 4 Cal. 231; *Bhagurath v. Ram Ghulam*, I L R. 4 All 283; *Wazir Mahton v. Lalit Singh*, I. L. R. 7 Cal. 166; *Nainsukh Rai v. Umadar*, I L R. 7 All. 273; and *Pestonjee Nur-surwanjee v. Manockjee*, 12 Moore's I. A. 112, distinguished. GUNGA SAHAI v. LEKHRAJ SINGH.

[I. L. R. 9 All. 253]

6.—*Omission of arbitrators to act in conformity with the rules of evidence* ] It is not a valid objection to an award that the arbitrators have not acted in strict conformity with the rules of evidence. *SUPPU v. GOVINDACHARYAR*.

[I. L. R. 11 Mad 85]

7.—*Civil Procedure Code*, ss. 508, 514, 521—*Omission to fix time for delivery of award—Extension of time after expiration of period fixed—Effect of acceptance of award by the Court—Effect of the arbitrator first tendering and then withdrawing resignation.* ] The provision contained in s. 508 of the Civil Procedure Code, requiring the Court to fix a reasonable time for the delivery of the award, is not imperative but directory, and non-compliance with it does not make the order of reference abortive and any subsequent arbitration proceedings ineffectual and bad. Under s. 514 of the Code, the Court may extend the time for making the award after the time fixed therefor has expired. The last paragraph of s. 521 does not imply that an omission by the Court to fix a positive date within which the award is to be filed is fatal to the validity of the award. Where an order extending the time for delivery of an award was made after the time fixed therefor had expired, and did not fix any positive date for the filing of the award. *Held*, that the adoption of the award by the Court amounted to

ARBITRATION—*continued*.(3) AWARDS—*continued*.(a) VALIDITY OF AWARDS AND GROUND FOR SETTING THEM ASIDE—*continued*.

an enlargement of the time for delivery of the award to the date on which it was in fact delivered, and to a ratification of what had been done by the arbitrators, and that the parties, having made no objection to the action of the Court, must be taken to have waived any objection to the award. The mere circumstance of an arbitrator having first tendered and then withdrawn his resignation does not formally divest him of his character as arbitrator. *Jaymangul Singh v. Mohun Ram Marwari* 23 W. R. 429, referred to. HAR NARAIN SINGH v. BHAGWANT KUAR.

[I. L. R. 10 All. 187]

8.—*Civil Procedure Code*, s. 521—*Misconduct of arbitrators—Ground for setting aside award* ] Where a suit was referred to arbitration, and objection was taken to the award on the ground that one of the arbitrators had not attended a meeting when witnesses were examined by the other arbitrators. *Held*, that the award was invalid by reason of misconduct on the part of the arbitrators within the meaning of s. 521 (a) of the Code of Civil Procedure. *THAMMIRAJU v. BAPIRAJU*.

[I L R 12 Mad. 113]

9.—*Making and filing award—Award made, but not filed within the time specified by order of Court—Civil Procedure Code (Act XIV of 1882)*, ss. 508, 514, 521.] A suit for dissolution of partnership and all matters in dispute between the parties thereto were by Judge's order, dated 18th July 1887, referred to the arbitration of A and B. The time for making and filing the award was by subsequent order extended to the 18th May 1888. The award was made on that day, but was not filed until the 18th June 1888. The second defendant obtained a rule calling on the other parties to show cause (*inter alia*) why the award should not be set aside by reason of its not having been filed in time. *Held*, that the omission to file the award on or before the 18th May 1888 did not render it invalid. The award "made" in ss. 514 and 521 of the Civil Procedure Code (Act XIV of 1882) does not include the filing of the award. *UMERSEY PREMI v. SHANJI KANJI*.

[I. L. R. 13 Bom. 119]

10.—*Private Arbitration—Civil Procedure Code (Act XIV of 1882)*, ss. 520, 521, 525, 526.] Certain disputes between parties were referred under a written agreement to an arbitrator, who in due course made his award. The plaintiff then applied to the Subordinate Judge to have the award filed in Court under the provisions of s. 525 of the Code of Civil Procedure. The defendants came in and objected to the award on the following amongst other grounds: that the agreement of submission was vague and indefinite

## ARBITRATION—concluded.

## (3) AWARDS—concluded.

## (a) VALIDITY OF AWARDS AND GROUND FOR SETTING THEM ASIDE—concluded.

and did not clearly set out the matters in dispute. The Subordinate Judge overruled the objection without taking any evidence, and directed the award to be filed and a decree to be passed thereon. The plaintiff appealed: *Held*, on appeal, that as the objection was well founded, inasmuch as the agreement to refer was vague and indefinite, and did not clearly lay down the power of the arbitrator in dealing with the subject-matter in dispute, and as it was not possible to make out what powers were intended to be conferred upon the arbitrator, the award should not be allowed to be enforced under the provisions of ss. 525 and 526. *BINDESSURI PERSHAD SINGH v JANKEE PERSHAD SINGH*.

[I. L. R. 16 Calc. 482]

## (4) PRIVATE ARBITRATION.

11.—*Civil Procedure Code, s. 525—Loss of award, procedure on.* When an award has been lost, a Court acting under s. 525 of the Code of Civil Procedure cannot take secondary evidence of its provisions and pass a decree accordingly. A suit to have a copy of such award filed cannot, therefore, be maintained. *GOPI REDDI v. MAHANANDI REDDI*.

[I. L. R. 12 Mad. 331]

## ARMS ACT, 1878.

—, s. 5 and 19.] A having obtained a license under the Arms Act, 1878, for a match-lock, had the same converted into a percussion gun. He was convicted under s. 19 of the said Act, on the ground that the license did not permit him to keep a percussion gun: *Held*, that the conviction was bad. *QUEEN-EMPRESS v. BODAPPA*.

[I. L. R. 10 Mad. 131]

—, s. 19 (a)—*Sale of sulphur and ammunition by agent of a license-holder.* Sale of sulphur and ammunition by the agent of one holding a license (in Form VI) under Act XI of 1878 is not illegal. *QUEEN-EMPRESS v. SITHARAMAYYA*.

[I. L. R. 12 Mad. 473]

## ARMY ACT, 1881 (44 &amp; 45 Vict., c. 58), s. 144.

See SOLDIER.

[I. L. R. 11 Mad. 475]

## ARMY ACT, 1881 (44 &amp; 45 Vict., c. 58), ss. 144, 151.

See SERVICE OF SUMMONS.

[I. L. R. 10 Mad. 319]

[I. L. R. 11 Mad. 475]

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—ARMY ACT.

[I. L. R. 10 Mad. 319]

## ARMY ACT, 1881, s. 156.

*Taking in pawn medal or military decoration from a soldier.* Under the Army Act, 1881 (44 & 45 Vict., c. 58), s. 156, any person who takes in pawn a military decoration from a soldier is liable to punishment: *Held*, that this section of the Army Act, 1881, is applicable to a person who takes a medal in pawn from a sepoy in India. *QUEEN-EMPRESS v. NARAYANSAMI*.

[I. L. R. 10 Mad. 108]

## ARREST.

See ATTACHMENT—ATTACHMENT BEFORE JUDGMENT.

[I. L. R. 14 Calc. 695]

See EXECUTION OF DECREE—MODE OF EXECUTION—MARRIED WOMAN.

[I. L. R. 12 Bom. 228]

See REVIEW—GROUND FOR REVIEW.

[I. L. R. 12 Bom. 228]

See WRONGFUL RESTRAINT.

[I. L. R. 12 Bom. 377]

*Civil Procedure Code, s. 319—Court, power of, to release judgment-debtor after he is imprisoned—“Arrest” and “imprisonment.”* “Arrest” as used in s. 319 of the Civil Procedure Code (Act XIV of 1882) does not include “imprisonment.” Therefore the power conferred on the Court, under that section, to release a judgment-debtor arrested in execution of a decree on security being given by him ceases after he has been imprisoned or put into jail. *In the matter of Eastw*, I. L. R. 11 Calc. 151, dissented from. *In re Quarne*, I. L. R. 8 Mad. 503, followed. *MAHOMED HUSSEIN v. RADHI*.

[I. L. R. 12 Bom. 46]

## ASSAM, LAW AS TO PYKES IN.

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT—PERSONS BY WHOM RIGHT MAY BE ACQUIRED.

[I. L. R. 15 Calc. 100]

## ASSAM LAND AND REVENUE REGULATION (I OF 1886).

—, s. 59.—*Rent suit—Suit for arrears due before Regulation came into force.* In a suit for the recovery of arrears of rent accrued due before the Assam Land and Revenue Regulation of 1886 came into force, which was instituted on the 7th of July 1886, where it appeared that the plaintiff's name had been previously registered, but that the Chief Commissioner had issued no notification under s. 48 of the Regulation directing that the registers then in existence should be deemed to be registers prepared under s. 59 of the Regulation, and that the plaintiff's name had not been registered under the last mentioned section: *Held*, that s. 59 applies to rent accruing

# ASSAM LAND AND REVENUE REGULATION (1 OF 1886)—*concluded*.

due after the Regulation came into force and not to rent already due on the date on which it came into force, and that, therefore, the suit was maintainable. *BROJO NATH CHOWDHURY v. BIRMONI SINGH MONIPURI*.

[I. L. R. 15 Calo 227]

# ASSESSORS, ACQUITTAL WITHOUT CONSULTING

*See* CRIMINAL PROCEEDINGS.

[I. L. R. 10 All 414]

*See* SESSIONS JUDGE, POWER OF—

[I. L. R. 10 All 414]

# ASSIGNMENT OF CHOSE-IN ACTION

*See* CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—AGAINST PUBLIC POLICY

[I. L. R. 13 Bom 42]

*See* PROMISSORY NOTE

[I. L. R. 11 Mad. 290]

# ATTACHMENT.

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[I. L. R. 12 Bom. 228]

## (1) SUBJECTS OF ATTACHMENT.

### (a) BUILDINGS AND HOUSE MATERIALS.

1.—*Civil Procedure Code*, 1882, s. 266 (c)—*Building site—Agriculturist Bhagdar—Bhagdari Act (Bom. Act V of 1862)—Decree—Execution against bhag.* A having obtained a decree against B, who was a *bhagdar*, attached his *bhag* in execution, including the *gabhan* or site upon which B's house was built. B applied to have the attachment removed from the *gabhan* on the ground that he was an agriculturist, and that, therefore, the *gabhan* of his house was protected from attachment by cl. (c) of s. 266 of the Civil

## ATTACHMENT—*continued*

### (1) SUBJECTS OF ATTACHMENT—*continued*.

#### (a) BUILDINGS AND HOUSE MATERIALS—*concluded*.

*Procedure Code (Act XIV of 1882): Held*, that the *gabhan* was subject to attachment, and was not protected by the above clause B did not hold as an agriculturist. He could not have occupied the house except as a *bhagdar*, and it was as part of a *bhag* that the site was attached. The protection of s. 266, cl. (c) was intended for agriculturists in the strictest sense, and for agriculturists in that sole character. *JIVAN BHAGA v. HIRA BHAIJI*.

[I. L. R. 12 Bom 363]

#### (b) DEBTS.

2.—*Execution of decree—Partnership debt. Attachment of.* An uncertain sum which may or may not be payable by one member to another of a partnership, not shown to have been wound up cannot be attached or sold in execution of a decree. *DWARIKA MOHUN DAS v. LUCKIMONI DASI*.

[I. L. R. 14 Calo. 384]

3.—*Civil Procedure Code*, ss. 268, 281, 301—*Attachment of a debt due to a judgment-debtor—Sale of debt—Payment into Court—Prohibitory order.* A decree-holder by a prohibitory order made under s. 263 (a) of the Civil Procedure Code attached a debt due to his judgment-debtor. The debt was not paid into Court. *Held*, that the Court cannot, under s. 268, of the Code of Civil Procedure, call on a person subject to a prohibitory order to pay or show cause why he should not pay his debt into Court. The Court is bound to satisfy itself that a debt is due; the debt must then be sold and delivery made under ss. 281 and 301 of the Code of Civil Procedure. *SIRIAH v. MUCKANACHARY*.

[I. L. R. 10 Mad 194]

4.—*Civil Procedure Code*, 1882, ss. 267, 268, and 303—*Execution—Practice—Garnishee—Attachment by a judgment-creditor of a debt due to judgment-debtor by a third party—Order upon third party to pay where debt admitted—Procedure where existence of debt not admitted* When a debt alleged to be due by a third party to a judgment-debtor has been attached by the judgment-creditor, the Court may, under s. 268 of the Civil Procedure Code (Act XIV of 1882), make an order upon the garnishee for the payment of such debt to the judgment-creditor in case the former admits it to be due to the judgment-debtor. Where, however, the garnishee denies the debt, there is no other course open to the judgment-creditor than to have it sold, or to have a receiver appointed under s. 303 of the Code. *TOOLSIA GOOLAL v. ANTONI*.

[I. L. R. 11 Bom. 448]



## ATTACHMENT—continued.

## (1) SUBJECTS OF ATTACHMENT—continued.

## (c) JOINT FAMILY &amp; REVERSIONARY INTERESTS.

5.—*Property liable to attachment and sale—Grant to Hindu widow for maintenance for life—Reversionary right of grantor—Act VIII of 1859, s. 205—Civil Procedure Code, s. 266 (k).* One N, the sole owner of a certain village, had a son J, and J had two wives. By his first wife he had a son U. J's second wife was G, by whom he had a son, whose widow was K, the defendant in the suit. J died, leaving U his son, G his widow, and K his son's widow, and on his death U inherited the village. Prior to the year 1871 U had made a gift to G of 105 bighas situate in the village. In 1874 the rights and interests of U in the village were sold by auction and purchased by T, the ancestor of the plaintiffs. G, by a deed of gift, conveyed the 105 bighas to K and ultimately died on 26th January 1883. Plaintiffs then sued to set aside the gift and for possession of the land. The learned Judge found that the land was given to G in lieu of her maintenance, which she was to hold rent free for her life, and that she had been in possession thereof for twenty years. Further, that U had the right to resume the land and assess it to rent on the death of G and that all the rights and interests of U in the land were attached and sold in 1874. On second appeal it was contended that the interest of U in the land at the time of the sale of the village by auction was in the nature of a mere expectancy, and therefore could not be sold and was not sold. Held, that U gave to G the usufruct of the land for her life in lieu of her maintenance; that after the gift the interest of U in the land was of the same character and carried with it the same consequences as the reversion which the lessor would have for land leased for life or years, and analogous to the right which a mortgagor who had granted a usufructuary mortgage would have; and that U had a vested right in the land, which was capable of being sold, and that right passed to the auction-purchaser at the sale of 1874. *Koraj Koonwar v. Komai Koonwar*, 6 W.R. 34; *Ram Chunder Tantra Doss v. Dharmo Narain Chukarbatty*, 7 B. L. R. 341, 15 W. R. F. B 17, and *Tuffuzool Husain Khan v. Raghnath Pershad*, 7 B. L. R. 186, 14 Moore's I. A. 40, distinguished. *KACHWAIN v. SARUP CHAND*.

[I. L. R. 10 All. 462]

## (d) PROPERTY AND INTEREST IN PROPERTY OF VARIOUS KINDS.

6.—*Transfer of Property Act (Act IV of 1882), s. 6, cl. (d)—Property—Actionable claim—Transferable claim—Civil Procedure Code, s. 266—Execution of decree—Attachment.* Under the Transfer of Property Act, property includes an actionable claim. There was sold in execution of a decree the judgment-debtor's right to get by division a quantity of land which had been reserved by him for his own use in a deed of gift, but which, at the time of the execution-sale, was in the possession of the donee of the estate, the

## ATTACHMENT—continued.

## (1) SUBJECTS OF ATTACHMENT—continued.

## (d) PROPERTY AND INTEREST IN PROPERTY OF VARIOUS KINDS—concluded.

land never having been appropriated by measurement as provided in the deed. In a suit brought by the auction-purchaser (decree-holder) for the area of the land reserved, by measurement and division. Held, that the claim of the judgment-debtor to the land was a transferable claim, and therefore capable of being attached and sold in execution under s. 266 of the Civil Procedure Code. *RUDRA PERKASH MISSEER v. KRISHNA MOHUN GHATAK*.

[I. L. R. 14 Cal. 241]

7.—*Civil Procedure Code, s. 266—Standing crops—Immovable property.* Standing crops are, for the purposes of the Code of Civil Procedure immovable property, and cannot, therefore, be attached under s. 266 of the Procedure Code. *MADAYYA v. YENKATA*.

[I. L. R. 11 Mad. 193]

8.—*Civil Procedure Code, 1882, s. 266 (f)—Vritti—Jotishpana vritti—Liability to attachment in execution of a decree—Nature of vrittis under Hindu law.* The *jotishi vritti*, being a right to receive certain emoluments as a reward for personal services, is not liable to attachment under s. 266 (f) of the Code of Civil Procedure (Act XIV of 1882). *Semble*—Under the Hindu law, *vrittis* are to be regarded as generally *extra commercium*. *GOVIND LAKSHMAN JOSHI v. RAMKRISHNA HARI JOSHI*.

[I. L. R. 12 Bom. 366]

## (e) SALARY.

9.—*Civil Procedure Code, 1882, s. 266, cl. (f)—Percentage received by a khot liable to attachment.* A percentage received by a *khot* for collecting the assessment on *dhara* lands is not "salary," nor is such a *khot* a "public officer" within the contemplation of s. 266, cl. (h) of the Civil Procedure Code (Act XIV of 1882). The Collector, therefore, cannot object to the attachment of such percentage in execution. *RAVJI MORESHVAR v. SAYAJIRAO GANPATRAO*.

[I. L. R. 13 Bom. 673]

## (f) TRUST PROPERTY.

10.—*Civil Procedure Code, s. 266—Property held by judgment-debtor in trust for a specific purpose—Attempt to attach surplus after fulfilment of trust.* Neither the whole corpus, nor any specific portion of the corpus, of an estate in the hands of a trustee who is a judgment-debtor is rendered liable to attachment in execution of the decree against him, because a surplus of income is in his hands for his own benefit after due performance of the trust; nor does such corpus, or any part of it, come, for that reason, within the meaning of s. 266 of the Code of Civil



## ATTACHMENT—continued.

## (1) SUBJECTS OF ATTACHMENT—concluded.

## (f) TRUST PROPERTY—concluded

Procedure, which only authorizes the attachment of property over which the judgment-debtor has a disposing power, exerciseable for his own benefit. Where a trust had been created for specific purposes, viz., the performance of religious and other duties, and the trustee had duly appointed another trustee in his place, the latter being entitled to hold the trust estate. *Held*, that a decree having been made against the trustee personally, the corpus of that trust estate could not be sold to satisfy the claim of the judgment-creditor, nor could any specific portion of the corpus of the estate be taken out of the hands of the trustee on the ground that there was, or might be, a margin of profit coming to him personally after the performance of the trusts. *BISHEN CHAND BASAWAT v. NADIR HOSSEIN*

[I L. R. 15 Calc 329: L. R. 15 I. A. 1]

## (2) ATTACHMENT BEFORE JUDGMENT

11.—*Security for personal appearance of defendant—Civil Procedure Code (Act XIV of 1882), ss. 477, 479—Bonâ fide suit* ] A suit was instituted against the master of a vessel for repairs done to his vessel and for hire of a dock in which the vessel had been. The master being about to leave the jurisdiction of the Court with his vessel, the plaintiffs, under s. 477 of the Code of Civil Procedure, applied for an order that the defendant should give security for his appearance to answer any decree that might be passed against him, and a rule was issued calling on him to show cause why such security should not be furnished. The defendant showed cause, and alleged that the amount claimed for the repairs was excessive that the repairs were badly done, that the plaintiffs were not entitled to dock hire, and that some of the repairs charged for had not been executed. He further counterclaimed for a large sum for demurrage owing to the detention of his vessel and damages caused to it by the wrongful act of the plaintiffs. It was contended that, as the claim was on a contested account which on the face of it was stated, but unsettled on the principle of the English authorities, the plaintiffs were not entitled to the order asked for. It was further contended that the suit was not a *bonâ fide* one, but brought merely to harass the defendant, and that for this reason security should not be ordered to be given. It was not disputed that the defendant had no domicile in this country, and that he was shortly leaving in his vessel in the ordinary course of his business. The Court found the plaintiffs were undoubtedly entitled to recover some amount on account of repairs, and that the mere fact that the plaintiffs added on to such a claim one of a disputable character did not go to show that the suit was not a *bonâ fide* one. *Held*, that there is no authority for saying that the principles applied in England to the granting of writs *ne erant regno* should be applied in this country; that the Court can

## ATTACHMENT—continued.

## (2) ATTACHMENT BEFORE JUDGMENT—concluded.

only look to the provisions of the Code of Civil Procedure; that when a person comes on business to this country, in which he has no property or domicile, and enters into a contract with a person to do work in connection with that business, and which must be done before he leaves the country, and it is known he intends to leave as soon as the work is completed, there is an implied understanding if the work was done on his credit, that it should be paid for before he leaves. *Held* also, that the case fell within the provisions of s. 477 of the Code, and that the defendant should furnish security for his appearance while the suit was pending within a week in terms of s. 479, such security to be for the amount of the claim. *PROBODE CHUNDER MULLICK v. DOWEY*.

[I L. R. 14 Calc. 695]

## (3) ATTACHMENT OF PERSON.

12.—*Execution of Decree—Decree for sale of hypothecated property and against judgment-debtor personally—Execution against judgment-debtor's person—Decree-holder entitled to proceed against property or person as he might think fit.* ] Where a decree upon a hypothecation bond allows satisfaction of the debt from the hypothecated property and also from the judgment-debtor personally, and contains no condition that execution shall first be enforced against the property, and where there is no question of fraud being perpetrated on the judgment-debtor, there is no principle of equity which prevents the decree-holder from enforcing his decree against the judgment-debtor's person or property, whichever he may think best. *Wali Muhammad v. Tarab Ali*, I. L. R. 1 All 197, explained. *JOHARI MAL v. SANT LALL*.

[I L. R. 9 All 484]

13.—*Civil Procedure Code, s. 319—Court, power of to release judgment-debtor after he is imprisoned—"Arrest" and "imprisonment" ] "Arrest" as used in s. 319 of the Civil Procedure Code (Act XIV of 1882), does not include "imprisonment."* Therefore the power conferred on the Court under that section to release a judgment-debtor arrested in execution of a decree on security being given by him ceases after he has been imprisoned or put into jail. *In the matter of Hastie*, I. L. R. 11 Calc. 451, dissented from. *In re Quarme*, I. L. R. 8 Mad. 503, followed. *MAHOMED HUSEN v. RADHI*.

[I L. R. 12 Bom. 46]

14.—*Insolvency—Civil Procedure Code, 1882, ss. 336, 337—Act VI of 1885—Debt not in schedule—Execution of decree obtained against insolvent for such debt—Scheduled debts* ] A person who has taken the benefit of the insolvent sections of the Civil Procedure Code, and who is undischarged, but has not inserted in his schedule a debt for which a decree is subsequently obtained, is not

## ATTACHMENT—continued.

## (3) ATTACHMENT OF PERSON—concluded.

protected from arrest in execution of such decree merely because his property is in the hands of the Receiver in insolvency. Such a person is liable to arrest under the circumstances and in accordance with the procedure provided for by the Civil Procedure Code Amendment Act (VI of 1888). *PANNA LALL v. KANHAIYA LALL.*

[I. L. R. 13 Cal. 85]

## (4) MODE OF ATTACHMENT AND IRREGULARITIES IN ATTACHMENT

15.—*Attachment of assets of a judgment-debtor outside the jurisdiction of the attaching Court—Practice—Procedure.* The plaintiff, having obtained a decree against the defendant in the Court at Bhusaval, sought to execute it by attaching a moiety of the defendant's pay. The defendant was a sorter in the Railway Mail Service and travelled between Bhusaval and Nagpur, at which latter place he resided and received his pay. By an order of attachment issued, at the plaintiff's instance, by the Bhusaval Court to the defendant's disbursing officer at Nagpur, a moiety of pay having been withheld by that officer, the defendant applied to the Bhusaval Court to cancel the order, contending that it was illegal, as neither he nor his disbursing officer resided at Bhusaval. On reference to the High Court, *held*, that the order of attachment was *ultra vires*, as neither the defendant nor his disbursing officer resided within the jurisdiction of the Bhusaval Court. The proper procedure was to send the decree of the Bhusaval Court for execution to Nagpur, where the disbursing officer resided and the defendant's pay was available for satisfaction of the decree. *RANGO JAIRAM v. BALKRISHNA VITHAL.*

[I. L. R. 12 Bom. 44]

GOPAL v. LAVET.

[I. L. R. 12 Bom. 45 note]

16.—*Attachment before judgment—Termination of attachment—Sale in execution—Material irregularity in publishing or conducting sale without attachment—Waiver—Civil Procedure Code, ss. 311, 483.* The plaintiff instituted a suit against the defendant for recovery of money, and previous to judgment, that is, on the 8th January 1885, applied for, and on the 11th obtained, orders for attachment of several houses and premises belonging to defendant and such attachment was made. The suit was dismissed, but eventually on appeal it was decreed, but the attachment was never withdrawn. Plaintiff then applied for execution of his decree and his application was granted by an order directing that the property of the judgment-debtor should be notified for sale on the 1st February 1887, and accordingly, on the 21st December 1880, a sale notification was issued. Judgment-debtor twice applied for postponement of sale, but his applications were refused, and the sale took place on the date fixed. The judgment-

## ATTACHMENT—continued.

## (4) MODE OF ATTACHMENT AND IRREGULARITIES IN ATTACHMENT—concluded.

debtor then objected to the confirmation of the sale, urging that the property sold was never attached in execution of the decree, and the attachment previous to judgment was infructuous, because afterwards the claim was dismissed by the Court of First Instance; that there had been several other irregularities in publishing and conducting the sale; and that, owing to the irregularities, the property had been sold at a grossly inadequate price, causing substantial injury. The Subordinate Judge, overruling the objections, confirmed the sale. On appeal by the judgment-debtor, *held*, following *Mahadeo Dubey v. Bhola Nath Dicht* I. L. R. 5 All. 86, that a regularly perfected attachment is an essential preliminary to sales in execution of decrees for money; and where there has been no such attachment, any sale that may have taken place is not simply voidable but *de facto* void, and may be set aside without any inquiry as to substantial injury being sustained by the judgment-debtor for want of a valid attachment; and that an attachment before judgment, like a temporary injunction, becomes *functus officio* as soon as the suit terminates. Further, that the phrase "a material irregularity in publishing or conducting" in the first paragraph of s. 311 of the Code of Civil Procedure should be liberally construed, and that absence of attachment of property at the time of sale thereof is "a material irregularity," attachment being the first step which a Court in executing a simple money decree has to take to assert its authority to bring property to compulsory sale. *RAM CHAND v. PITAM MAL.*

[I. L. R. 10 All. 506]

17.—*Civil Procedure Code, ss. 268, 272—Official Trustee's Act (XVII of 1861)—Public Officer—Attachment by notice.* A decree against a married woman provided that the amount due under it should be payable out of the separate estate of the judgment-debtor. The judgment-debtor was entitled to a life-interest in certain trust funds under a settlement of which the Official Trustee was the trustee. The decree-holder proceeded to execute his decree against the life-interest of the judgment-debtor by notice to the Official Trustee under s. 272 of the Code of Civil Procedure; but there were no funds in the hands of the Official Trustee which would have been attachable under s. 268. The decree-holder now applied that the life-interest might be sold: *Held*, that the interest of the judgment-debtor was not validly attached. *Scamler.* The Official Trustee is a public officer within the meaning of s. 2 of the Civil Procedure Code. *ABDUL LATEEF v. DOUTRE.*

[I. L. R. 12 Mad. 250]

## (5) ALIENATION DURING ATTACHMENT.

18.—*Civil Procedure Code, ss. 276, 295—Claim to rateable distribution under s. 295.* A claim under s. 295 of the Civil Procedure Code is not

**ATTACHMENT—concluded.****(5) ALIENATION DURING ATTACHMENT—concluded.**

enforceable as an attachment against which an assignment is rendered void by the provisions of s. 276. *Ganga Din v. Khushali*. I. L. R. 7 All. 702, followed. In June 1888 A, B, and C obtained separate money-decrees against amongst others, T as executor under the will of his father. Some time in 1884 B attached the whole of the testator's properties in execution of his decree, and A and C applied for rateable shares in the sale proceeds. On the 2nd June 1884 the parties came to an arrangement, by which it was agreed that B's claims should be satisfied by means of all the attached properties with the exception of one, which should be left free for the benefit of the other judgment-creditors. By a deed dated the 16th June, but which was found to have been actually executed on the 17th, T conveyed this property to A; and on the 17th June all the other attached properties were sold in execution of B's decree; and on the same day B put in an application for the removal of his attachment from this property. D, another decree-holder, on the 16th June, applied to be included in the rateable distribution of the properties attached by B, and on the 30th June D attached the property sold to A in execution of his decree. A preferred a claim to the property, which was disallowed; and A thereupon brought a suit to establish her right to it on the ground (*inter alia*) that B's attachment had ceased to exist on the date of her purchase and that the sale was a valid one. *Held*, that the sale to A was valid against D. *DURGA CHURN ROY CHOWDHRY v. MONMOHINI DAS*.

[I. L. R. 15 Calc. 771]

**ATTEMPT TO COMMIT OFFENCE.***See* CRIMINAL INTIMIDATION.

[I. L. R. 11 Bom. 376]

*Attempt to commit offence—Attempt to cheat—Currency Office—Application for payment of lost halves of Currency Notes.* A man may be guilty of an attempt to cheat, although the person he attempts to cheat is forewarned, and is therefore not cheated. *R. v. Henster*, 11 Cox C. C. 570, referred to. M wrote a letter to the Currency Office at Calcutta, enclosing the halves of two Government currency notes stating that the other halves were lost, and enquiring what steps should be taken for the recovery of the value of the notes. The Currency Office having, upon enquiry, discovered that the amount of the notes had been paid to the holder of the other halves and that the notes had been withdrawn from circulation and cancelled, sent M the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never contemplated paying M in respect of the notes. The form was filled up and signed by M and returned by him to the Currency Office. *Held*, that although there was no intention on the

**ATTEMPT TO COMMIT OFFENCE—concluded.**

part of Currency Office to pay the amount of the notes, M was guilty of an attempt to cheat. *GOVERNMENT OF BENGAL v. UMESH CHUNDER MITTER*.

[I. L. R. 16 Calc. 310]

**ATTORNEY AND CLIENT.**

*Practice—Costs—Attorney's lien—Lien—Attaching Creditor—Fund in Court attached.* A sum of money had been paid into Court as admittedly due to the plaintiff in a certain suit. The plaintiff not having satisfied in full his attorney's taxed bill of costs, the attorney applied for payment out of the fund in Court. Previously to this application the fund had been attached by a third party. *Held*, that the attorney was entitled to enforce his lien as against the attaching creditor for all costs incurred up to the date of attachment; that the attaching creditor was then entitled to be satisfied before the attorney could claim payment out of the balance in Court of any sum remaining due to him on account of his costs. *SUPRAMANYAN SETTY v. HURRY PROO MUG*.

[I. L. R. 14 Calc. 374]

**AUCTIONEER.***See* SALE BY AUCTION.

[I. L. R. 16 Calc. 702]

**"AUCTION-PURCHASER"***See* LIMITATION ACT, 1877, s. 10

[I. L. R. 15 Calc. 703]

**AUTREFOIS ACQUIT.***See* DISCHARGE OF ACCUSED.

[I. L. R. 12 Mad. 35]

**AWARD.***See* CASES UNDER ARBITRATION.*See* MADRAS BOUNDARY ACT, ss. 21, 25, 28.

[I. L. R. 12 Mad. 1]

**Loss of—***See* ARBITRATION—PRIVATE ARBITRATION.

[I. L. R. 12 Mad. 331]

**BAIL.**

*Illegal practice—Police-officer—Court, Duty of—Criminal Procedure Code, s. 344.* The practice of leaving to the Police the decision as to the sufficiency of bail, when bail has been ordered by the Court, is contrary to law. The duty of deciding as to its sufficiency or otherwise is with the Court itself and not with the Police. *QUEEN-EMPRESS ON THE PROSECUTION OF PALAKDHARI MAHTON v. GAYITRI PRASUNO GHOSAL*.

[I. L. R. 12 Calc. 455]

**BAILMENT.**

See CONTRACT ACT, s. 108.

[I. L. R. 9 All. 398]

See SUPERINTENDENCE OF HIGH COURT  
—CIVIL PROCEDURE CODE, 1882,  
s. 622

See ONUS PROBANDI—BAILMENTS.

[I. L. R. 9 All. 398]

**BALANCE SHEET.**

See STAMP ACT, 1879, SCH. 1, CL. 1.

[I. L. R. 15 Calc. 162]

**BANKER AND CUSTOMER**

See LIMITATION ACT, 1877, ART. 59.

[I. L. R. 13 Bom. 338]

See LIMITATION ACT, 1877, ART. 60.

[I. L. R. 16 Calc. 25]

**BARRISTER.**

See ADVOCATE.

[I. L. R. 9 All. 617]

*Practice—Barrister or Pleader appearing as litigant in person* ] In cases where a Barrister or Pleader appears before the Court as a litigant in person, he must not address the Court from the Advocate's table or in robes, but from the same place and in the same way as any ordinary member or the public. IN THE MATTER OF THE WEST HOPE TOWN TEA COMPANY.

[I. L. R. 9 All. 180]

**BASTARDY PROCEEDINGS.**

See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO

[I. L. R. 16 Calc. 781]

See WITNESS—CIVIL CASES—PERSON  
• COMPETENT TO BE WITNESS.

[I. L. R. 16 Calc. 781]

**BENAMI TRANSACTION.**

Col.

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| 1. General Cases        | ... | 64 |
| 2. Onus of Proof        | ... | 64 |
| 3. Certified Purchasers | ... | 64 |

See ESTOPPEL—ESTOPPEL BY CONDUCT.

[I. L. R. 16 Calc. 137, 148]

See FRAUD—EFFECT OF FRAUD.

[I. L. R. 11 Bom. 708]

See SALE FOR ARREARS OF REVENUE—  
INCUMBRANCES—ACT XI OF 1859.

[I. L. R. 14 Calc. 109]

**BENAMI TRANSACTION—continued.****(1) GENERAL CASES.**

1.—*Benami transfer—Mutation of names in settlement record.* ] A transfer from a husband of a share in a village was not formally carried out otherwise than by its being evidenced by mutation of names in the settlement record; and a son, claiming as his father's heir, alleged that his mother's name was only used *benami* by the father: *Held*, that a finding that such mutation was not for the purpose of putting the property into the name of the wife, *benami* for the husband, but for her own benefit, was substantially correct. THAKRO v. GANGA PARSAD.

[I. L. R. 10 All. 197; L. R. 15 I. A. 29]

**(2) ONUS OF PROOF.**

2.—*Possession by receipt of rent—Proof of ownership of property.* ] Where there are *benami* transactions, and the question is who is the real owner, the actual possession by receipt of the rents of the property is most important. In a suit against a purchaser at a sale under Act XI of 1859, s. 13, the plaintiff claimed to have an incumbrance by virtue of two mukurari pattas executed by the heirs of the last of a series of *benamidars*, and it appearing that the last *benamidar* had actual ownership of one-fourth of the property comprised therein: *Held*, that the incumbrance was good to the extent of such fourth. IMAMBANDI BEGUM v. KUMLESWARI PARSAD.

[I. L. R. 14 Calc. 109; L. R. 13 I. A. 160]

**(3) CERTIFIED PURCHASERS.**

3.—*Civil Procedure Code, 1882, s. 317—Sale for arrears of revenue—Act XI of 1859 s. 36—Certified purchaser, Suit against.* ] A, the certified purchaser of a taluk at a sale held under the provisions of Act XI of 1859, for arrears of revenue, and who had obtained symbolical possession had at the time of the sale agreed with B, the former owner of the taluk, to reconvey to him (B) after the sale had been completed. In a suit by B to compel specific performance of the contract, alleging that he had never quitted actual possession of the taluk, objection was taken that the suit was not maintainable under s. 36 of Act XI of 1859 and s. 317 of Act XIV of 1882: *Held*, that the suit, not being one to oust the certified purchaser from possession, was not barred by s. 36; and that neither was it barred by s. 317 of the Civil Procedure Code, that section applying only to sales in execution of decrees of Civil Courts held under the Procedure Code. FAZAL RAHAMAN v. IMAM ALI.

[I. L. R. 14 Calc. 583]

4.—*Suit against benami purchaser at Court-sale, by owner, to recover the land after ejectment.* ] If, after obtaining a certificate of sale in execution of a decree, the purchaser acknowledges that his purchase is *benami* and gives up possession

**BENAMI TRANSACTION—concluded.****(3) CERTIFIED PURCHASER—concluded.**

or does some act which clearly indicates an intention to waive his right, or restores the property to the real owner, such act may, by reason of the antecedent relation of the parties, operate as a valid transfer of property. Defendant acted *benami* in buying certain land at a Court-sale for plaintiff, paid part of the purchase-money for plaintiff, and allowed plaintiff to remain in possession on the understanding that defendant was to transfer the property on repayment of the balance of the purchase-money. Defendant having ejected plaintiff, plaintiff sued to recover the land. *Held*, that s. 317 of the Code of Civil Procedure was no bar to plaintiff's suit. *MONAPPA v. SURAPPA*.

[I. L. R. 11 Mad 234]

**BENAMIDAR.**

*See* LIMITATION ACT 1877, ART. 179—  
STEP IN AID OF EXECUTION—  
GENERALLY.

[I. L. R. 16 Calc. 355]

*See* CASES UNDER PARTIES—PARTIES TO  
SUITS—BENAMIDARS.

**BENEFIT SOCIETY.**

*See* MADRAS MUNICIPAL ACT 1884.

[I. L. R. 11 Mad. 253]

**BENGAL ACT, 1868—VII, s. 1.**

*Estate—Lands not permanently settled—Sunderbund Estate—District of which portion only is permanently settled—Bengal Regulations IX of 1816 and III of 1828—Estate—Bengal Act VII of 1868.* The plaintiff was the auction-purchaser at a sale under Act XI of 1859 by the Collector of the 24-Pergunnahs for arrears of revenue of an estate in the Sunderbunds on which the defendant was the holder of a *mokurari mawraji jungleburi* tenure, under which he was to clear away the jungle and then to cultivate the land with paddy. The estate was one borne on the register of revenue-paying estates in the Collectorate of the 24-Pergunnahs, and therefore within that Collectorate with regard to the provisions of Bengal Act VII of 1868, s. 10. The district of the 24-Pergunnahs is a permanently-settled district, but the portion of it forming the Sunderbunds was declared by Regulation III of 1828, s. 13, not to be included in the permanent settlement. The Sunderbunds tract was moreover under Regulation IX of 1816 formed into a separate jurisdiction for settlement purposes under an officer styled the Commissioner of the Sunderbunds, who is subject to the direct control of the Board of Revenue, and independent of the Collector of the 24-Pergunnahs: *Held*, that though there was no permanent settlement of the lands sold to the plaintiff, they fell within the definition of an "estate" as given in Bengal

W., D.

**BENGAL ACT, 1868—VII, s. 1.—concluded**

Act VII of 1868. *BHOLANATH BANDYOPADHYA v. UMACHURN BANDYOPADHYA. UMACHURN BANDYOPADHYA v. BHOLANATH BANDYOPADHYA.*

[I. L. R. 14 Calc 440]

—, 1868—VII, s. 2.

*See* PUBLIC DEMANDS RECOVERY ACT,  
s. 2.

[I. L. R. 14 Calc. 1]

—, 1871—IX, s. 27.

*Notice of Suit—Tolls paid in excess of powers given—Suit for refund of money.* In certain suits brought against a toll collector for the refund of money alleged to have been exacted by him improperly as toll under Bengal Act IX of 1871, the defendant pleaded that no notice of suit in accordance with s. 27 of that Act had been given. *Held*, that such notice not having been given the suits should be dismissed. *Waterhouse v. Keen*, 4 B. & C. 200, followed. *RAM PITAM SHAH v. SHOEBUL CHUNDER MULICK.*

[I. L. R. 15 Calc. 259]

—, 1876—VII.

*See* LAND REGISTRATION ACT (BENGAL)  
1876.

—, 1876—VIII, s. 26.

*See* PARTITION—MISCELLANEOUS CASES.  
[I. L. R. 16 Calc. 117]

—, 1876—VIII, s. 31.

*See* JURISDICTION OF CIVIL COURT—  
REVENUE COURTS—PARTITION.  
[I. L. R. 15 Calc. 198]

*See* PARTITION—JURISDICTION OF CIVIL  
COURTS IN SUITS RESPECTING  
PARTITION

[I. L. R. 15 Calc. 198]

—, 1878—VII.

*See* BENGAL EXCISE ACT 1878.

—, 1879—IX.

*See* COURTS OF WARDS ACT (BENGAL).

—, 1880—VII.

*See* PUBLIC DEMANDS RECOVERY ACT.

—, 1880—IX.

*See* ROAD CESS ACT.

—, 1881—III.

*See* COURT OF WARDS ACT (BENGAL).

**BENGAL CIVIL COURTS ACT (VI of 1871), s. 17.**

*See* HOLIDAY

[I. L. R. 9 All. 366]

**BENGAL CIVIL COURTS ACT (VI of 1871),  
s. 17—concluded.**

*See* JURISDICTION—QUESTION OF JURISDICTION—CONSENT OF PARTIES AND WAIVER.

[I. L. R. 9 All. 366]

—, s. 20.

*See* MUNSIF, JURISDICTION OF.

[I. L. R. 15 Calc. 104]

—, s. 24.

*See* MAHOMEDAN LAW—GIFT—VALIDITY.

[I. L. R. 9 All. 213]

**BENGAL EXCISE ACT (VII of 1878).**

*See* CANTONMENT MAGISTRATE.

[I. L. R. 15 Calc. 452]

—, *Revenue, Protection of—Contract Act (IX of 1872), s. 23—Public Policy*] The Bengal Excise Act of 1878 is not an Act framed solely for the protection of the revenue, but is one embracing other important objects of public policy as well. An agreement therefore for the sale of fermented liquors, entered into by a person who has not obtained a license under that Act, is void and cannot be recovered on. *BOISTUB CHURN NAUN v. WOOMA CHURN SEN.*

[I. L. R. 16 Calc. 436]

—, s. 14.

*See* CANTONMENTS ACT.

[I. L. R. 15 Calc. 452]

—, ss. 60, 74.—“*Like offence*”—*Punishment on second or subsequent conviction under Bengal Excise Act—Selling retail with wholesale license.*] The offence of selling wine retail by a person who has only a wholesale license is an offence of a like nature to that of selling wine without a license at all, within the meaning of the term “like offence,” as used in s. 174 of the Bengal Excise Act, (I. L. R. 9 Calc. 575). *Ram Churn Shaw v. The Empress*, followed. *SCHEIN v. THE QUEEN-EMPRESS.*

[I. L. R. 16 Calc. 799]

**BENGAL REGULATION, 1793—VIII,  
ss. 48, 52.**

*See* ENHANCEMENT OF RENT—LIABILITY TO ENHANCEMENT—DEPENDANT TALUKDARS.

[I. L. R. 14 Calc. 133]

—, s. 54.

*See* CESS.

[I. L. R. 15 Calc. 828]

[I. L. R. 16 I. A. 152 : I. L. R. 17 Calc. 131]

**BENGAL REGULATION, 1793—VIII,  
—continued.**

—, s. 55,

*See* CESS

[I. L. R. 16 I. A. 152 : I. L. R. 17 Calc. 131]

—, s. 61.

*See* CESS.

[I. L. R. 16 I. A. 152 : I. L. R. 17 Calc. 131]

—, 1793—XLIV, ss. 2, 5.

*See* ENHANCEMENT OF RENT—LIABILITY TO ENHANCEMENT—DEPENDANT TALUKDARS.

[I. L. R. 14 Calc. 133]

—, 1806—XVII.

*See* LIMITATION ACT 1877, ART. 135.

[I. L. R. 16 Calc. 693]

*See* PRE-EMPTION—RIGHT OF PRE-EMPTION.

[I. L. R. 11 All. 164]

—, s. 7.

*See* MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION

[I. L. R. 9 All. 20]

*See* MORTGAGE—REDEMPTION—MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE.

[I. L. R. 9 All. 20]

—, s. 8.

*See* LIMITATION ACT 1877, ART. 144—ADVERSE POSSESSION.

[I. L. R. 11 All. 144]

*See* MORTGAGE—FORECLOSURE—DEMAND AND NOTICE OF FORECLOSURE.

[I. L. R. 14 Calc. 451, 599]

[I. L. R. 15 Calc. 357]

*See* MORTGAGE—REDEMPTION—MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE.

[I. L. R. 9 All. 20]

*See* MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION.

[I. L. R. 9 All. 20]

*See* TRANSFER OF PROPERTY ACT, s. 2.

[I. L. R. 14 Calc. 451, 599]

[I. L. R. 15 Calc. 357]

—, 1812—V—ss. 2 and 3.

*See* CESS.

[I. L. R. 15 Calc. 828]

BENGAL REGULATION, 1812—XVIII,  
s 2

See CESS.

[I L. R. 15 Calc. 828]

—, 1816—IX.

See BENGAL ACT VII OF 1868

[I. L. R. 14 Calc. 440]

See SALE FOR ARREARS OF REVENUE—  
INCUMBRANCES.

[I. L. R. 14 Calc. 440]

—, 1819—VIII, ss 3, 5, 6, 14.

See SALE FOR ARREARS OF RENT—SET-  
TING ASIDE SALE—OTHER GROUNDS.

[I L R 15 Calc. 345]

—, 1819—VIII, s 8.

See CASES UNDER SALE FOR ARREARS OF  
RENT—SETTING ASIDE SALE—IR-  
REGULARITY.

—, 1822—VII.

See ENHANCEMENT OF RENT—LIABILITY  
TO ENHANCEMENT—GENERAL  
LIABILITY—

[I. L. R. 16 Calc. 586]

See SETTLEMENT—MISCELLANEOUS  
CASES.

[I. L. R. 16 Calc. 586]

—, 1822—XI, s. 29.

See LIMITATION ACT, 1877, ART. 134.

[I L. R. 9 All 97]

—, 1828—III.

See BENGAL ACT VII OF 1868, s 1.

[I. L. R. 14 Calc. 440]

See SALE FOR ARREARS OF REVENUE—  
INCUMBRANCES.

[I L R 14 Calc. 440]

BENGAL RENT ACT (BENGAL ACT VIII  
OF 1869), s. 6.

See CASES UNDER RIGHT OF OCCUPANCY.

—, s. 14.

See LEASE—CONSTRUCTION.

[I. L. R. 14 Calc. 99]

—, ss. 22, 52

See LANDLORD AND TENANT—EJECT-  
MENT—GENERALLY.

[I. L. R. 14 Calc. 38]

BENGAL RENT ACT (BENGAL ACT  
VIII OF 1869)—continued.

—, s. 27

See BENGAL TENANCY ACT, SCH III,  
APT. 3.

[I L R. 16 Calc. 741]

—, s. 27—*Limitation—Suit for possession—Question of title* ] Where the plaintiff alleged that he was the holder of a jote under the defendant by whom he had been forcibly dispossessed, and sued for a declaration of his title and for recovery of possession claiming a right of occupancy, and the defendant, while admitting that the plaintiff had for one or two years been a tenant of a small portion of the land in suit, denied his title to the remainder, or that he had acquired a right of occupancy. *Held*, that the suit was one to try a *bona fide* question of title, and that it was not barred by one year's limitation under s. 27 of Bengal Act VIII of 1869, but was maintainable within 12 years from the date of the cause of action. *Srinath Bhattachary v. Ram Ratan De*, I L. R. 12 Calc. 606, distinguished. *BASARUT ALI v. ALTAF HOSAIN*.

[I. L. R. 14 Calc. 624]

—, s. 58.

See LIMITATION ACT 1877, ART. 179—  
PERIOD FROM WHICH LIMITATION  
RUNS—CONTINUOUS PROCEEDINGS.

[I L R. 14 Calc. 385]

—, s. 58.—*Execution of Decree—Suit for rent not brought under Bengal Act VIII of 1869—Decree of Court of Foreign State—Civil Procedure Code, 1882, s. 434—Limitation.* ] The law of limitation applicable to the execution of a decree of the Civil Court of Cooch Behar, for rent for a sum under Rs. 500 in a suit not brought under the Rent Act, is by s. 434 of the Civil Procedure Code, which gives the Courts in British India power to execute decrees passed by the Courts of a foreign State, s. 58 of Bengal Act VIII of 1869. That section is not confined to suits brought under that Act. IN THE MATTER OF THE PETITION OF HUKUM CHUND ASWAL. *HUKUM CHAND ASWAL v. GYANENDER CHUNDER LAHIRI*.

[I L. R. 14 Calc. 570]

[Reviewing s.c. I L. R. 13 Calc. 95]

—, ss. 59, 61, 65.

See EXECUTION OF DECREE—DECREES  
UNDER RENT LAW.

[I. L. R. 14 Calc. 14]

## BENGAL TENANCY ACT (VIII OF 1885).

—, s. 12.—*Transfer of a permanent tenure—Permanent tenure, Registration of.* ] The transfer of a permanent tenure under s. 12 of the Bengal



**BENGAL TENANCY ACT (VIII of 1885).**  
—continued.

Tenancy Act is complete as soon as the document is registered. *KRISTO BULLUV GHOSE v. KRISTO LAL SINGH.*

[I. L. R. 16 Calc. 642]

1. —, ss. 20, 21.—*Suits pending at time Act came into force—Suit for ejectment—Acquisition of right of occupancy—General Clauses Act I of 1868, s. 6.* S. 21 of the Bengal Tenancy Act applies to suits pending at the time the Act came into force, viz., 1st November 1885, which had not then resulted in a decree. In a suit instituted on 8th October 1885, to eject the defendants after notice to quit, it was held that, although the defendant had held the land from which it was sought to eject him for less than twelve years and therefore would not, if the Bengal Rent Act VIII of 1869 had been applicable, have acquired a right of occupancy, yet the effect of ss. 20 and 21 of the Bengal Tenancy Act was to give him a right of occupancy, and therefore he could not be ejected. *JOGESSUR DAS v. AISANI KOYBURTO.*

[I. L. R. 14 Calc. 553]

2. —, ss. 20, 21.—*General Clauses Act (I of 1868), s. 6—Retrospective Enactment when applicable to pending suit—Pending suit—Landlord and tenant—Right of occupancy.* S. 21, sub-section 2 of Act VIII of 1885 is expressly retrospective, and applies to suits pending at the date of the commencement of that Act. *JOGESSUR DAS v. AISANI KOYBURTO*, I. L. R. 14 Calc. 553, followed. *TUPSEE SING v. RAMSARUN KOERI*

[I. L. R. 15 Calc. 376]

—, s. 53.—*Established usage, Meaning of.* The words “established usage” in s. 53 of the Bengal Tenancy Act, 1885, do not refer to a practice previously prevailing between the landlord and his tenant, but to the established usage of the pergunnah in which the holding is situate. *HIRA LAL DAS v. MOTHURA MOHUN ROY CHOWDHRY.*

[I. L. R. 15 Calc. 714]

—, ss. 61, 62.—*Deposit of rent—Review of order receiving deposit of rent.* When under ss. 61 and 62 of the Bengal Tenancy Act, a deposit of rent is made by a tenant, and the Court grants him a receipt, the zemindar has no right to come in and be heard in the matter, there being no machinery whatsoever provided by the Act for the Court to enter into judicial enquiry in connection with the matter of the deposit. As far as the tenant is concerned, after such deposit is made and receipt granted, the Court is *functus officio*, and is not authorized to return the money to the tenant upon an application made by the zemindar. The words “the full amount of the money then due” in s. 61, and the words “the amount of rent payable by the tenant” in s. 62 mean nothing more than the words “what he

**BENGAL TENANCY ACT (VIII of 1885),**  
ss. 61, 62—continued.

shall consider the full amount of rent due from him at the date of the tender to the zemindar” as used in Bengal Act VIII of 1869, and have no relation whatever to the amount of rent justly due or justly payable by the tenant. IN THE MATTER OF SIRDHAR ROY. *SIRDHAR ROY v. RAMESWAR SING*

[I. L. R. 15 Calc. 166]

—, s. 65.—“Charge” meaning of—*Transfer of Property Act (IV of 1882), s. 100.* Semble. The “charge” referred to in s. 65 of the Bengal Tenancy Act is not such a charge as that defined by s. 100 of the Transfer of Property Act. *POTICK CHUNDER DEY SIKKAR v. FOLEY.*

[I. L. R. 15 Calc. 492]

—, s. 74.

See CESS.

[I. L. R. 15 Calc. 828]

—, s. 88.—*Suit for rent—Question as to amount of rent—sub-division of tenancy—Rent receipts signed by one of several co-sharers.* Several plaintiffs, co-sharers, sued two defendants to recover the sum of Rs. 78 odd for arrears of rent in respect of a tenure, the annual amount of rent payable being alleged to be Rs. 15. One of the defendants appeared and pleaded that the tenure had been some time previously divided by the principal plaintiff (who was the *kurta* of the family and collected the rent), and that after the division he had paid Rs. 7-8 per annum, being the rent in respect of his half of the tenure, to the *kurta*; in support of such payments he produced *dakhilas* or rent receipts signed by the *kurta*. The suit was dismissed by the Munsiff, but on appeal the Additional Judge gave the plaintiffs a decree for the amount of rent claimed, less the amount proved to have been paid by the defendant who contested the suit, as shown by the *dakhilas*. He held that the division had not been proved, and that the *dakhilas* did not amount to the written consent required by s. 88 of the Bengal Tenancy Act: *Held*, on appeal to the High Court, that the *dakhilas* or rent receipts did not amount to a written consent as required by s. 88 of the Bengal Tenancy Act, and that the decree of the lower Court must be upheld. *ABHOY CHURN MAJI v. SHOSHI BHUSAN BOSE.*

[I. L. R. 16 Calc. 155]

—, s. 93.

See APPEAL—ACTS—BENGAL TENANCY ACT.

[I. L. R. 14 Calc. 312]

—, s. 93.—*Manager—co-sharers—Practice in making applications under s. 93 of Act VIII of 1885, where the co-sharers hold various and complicated shares in the property—Notice.* Where a property consisted of 243 estates or



**BENGAL TENANCY ACT (VIII OF 1885),  
s. 93—continued.**

tenures, sixty of which were entered under separate numbers in the Land Register of the Collector, other portions of the property being taluks, dependent tenures, and ryoti holdings, and a single application is made by twelve of the co-sharers in such property (many of whom held shares in several of the tenures and estates) calling upon the remaining four sharers in the property to show cause why a common manager should not be appointed under s. 93 of the Bengal Tenancy Act, the Court should, before granting the application, call upon the applicants to state whether all of them are entitled in common to the various estates and tenures, and, if not so entitled, should call upon them to divide themselves into as many groups as there are properties held by them in common; and in the latter case each group of shareholders should put in separate applications, on which separate court-fees should be levied. The notice in the case of tenures should be as provided by s. 93 of the Act, and should be of the same character and to the same effect as in the case of estates. **IN THE MATTER OF THE PETITION OF FAZEL ALI CHOWDHRY FAZEL ALI CHOWDHRY v. ABDUL MOZID CHOWDHRY.**

[I. L. R. 14 Calc. 659]

—, s. 105.

See SPECIAL OR SECOND APPEAL—  
ORDERS SUBJECT TO APPEAL.

[I. L. R. 16 Calc. 596]

See SUPERINTENDENCE OF HIGH COURT  
—CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 16 Calc. 596]

—, s. 143

See APPEAL—ACTS—BENGAL TENANCY  
ACT.

[I. L. R. 14 Calc. 312]

—, s. 148. (h)—*Decree for arrears of rent, Assignment of—Execution of decree by Assignee.* [The fact that an assignment of a decree for arrears of rent was made before the Tenancy Act will not protect from the provisions of s. 148 (h) an assignee who proceeds to execution afterwards, but execution cannot be refused where, before that Act came into operation, the assignment had been recognised by a Court of execution under s. 232 of the Civil Procedure Code. **KOILASH CHUNDER ROY v. JODU NATH ROY.**

[I. L. R. 14 Calc. 380]

—, s. 149.—*Suit by third party claiming rent paid into Court in rent suit. Nature of—Title suit—Institution Stamp.* [A suit by a third person under clause (3) of s. 149 of the Bengal Tenancy Act is not a title suit and need not be stamped as such. *Per* **TOTTENHAM, J.**—Such suit is in the nature of a suit for an injunction under the Specific

**BENGAL TENANCY ACT (VIII OF 1885),  
s. 149—continued.**

Relief Act, or else a declaratory suit. **JAGADAMBA DEVI v. PRATAP GHOSE.**

[I. L. R. 14 Calc. 537]

—, s. 153.

See RIGHT OF APPEAL.

[I. L. R. 15 Calc. 107]

See APPEAL—ACTS—BENGAL TENANCY  
ACT.

[I. L. R. 16 Calc. 155]

See SPECIAL APPEAL—ORDERS SUBJECT  
TO APPEAL

[I. L. R. 15 Calc. 107, 231]

[I. L. R. 16 Calc. 638]

—, s. 153.—*Revisional power of District Judge in rent suits—Judicial Officer.* [The words "Judicial Officer as aforesaid" as used in the proviso to s. 153 of the Bengal Tenancy Act have reference to the "Judicial Officer" spoken of in cl. (b) of that section and to such officer only, and the District Judge has no power to revise decrees or orders passed by a District Judge, Additional Judge, or Subordinate Judge referred to in cl. (a) of the section. **SANKARMANI DEBYA v. MATHURA DHUPINI.**

[I. L. R. 15 Calc. 327]

—, s. 158.—*Incidents of tenancy, Application to determine—Validity of lease.* [In a proceeding under s. 158 of the Bengal Tenancy Act (Act VIII of 1885), it is open to a petitioner, if he acknowledges the opposite party to be a tenant, to dispute the validity of the lease under which he alleges he is holding, and the Court is bound to go into and decide that question if raised. **BHUPENDRO NARAYAN DUTT v. NEMYE CHAND MUNDAL.**

[I. L. R. 15 Calc. 627]

—, s. 170.—*Decree for rent under Bengal Act VIII of 1869—Attachment under decree obtained under Rent Law of 1869, subsequently to the passing of Act (VIII of 1885—General Clause's Consolidation Act (I of 1868), s. 6.* [Before the Bengal Tenancy Act of 1885 came into operation, a decree for rent was obtained under Bengal Act VIII of 1869. After the Bengal Tenancy Act of 1885 had become law, the tenancy in respect of which the rent had become due, was attached in execution of such decree. A claim was subsequently put in to the attached property by a third person, which claim was disallowed as being forbidden by s. 170 of the Bengal Tenancy Act of 1885: *Held*, that the provisions of the Bengal Tenancy Act of 1885 were applicable to the proceedings in execution; the term "proceedings" in s. 6 of Act I of 1868 not including proceedings in execution after decree. **DEB NARAIN DUTT v. NARENDRA KRISHNA.**

[I. L. R. 16 Calc. 267]

**BENGAL TENANCY ACT (VII OF 1885)**  
—continued.

1. —, s. 174.—*Deposit, Nature of—Power to set aside sale* ] The deposit under s. 171 of the Tenancy Act must be of such a nature as to be at once payable to the parties, and a Court has no power to set aside a sale under that section unless the judgment-debtor has complied strictly with its provisions. *RAHIM BUX v. NUNDO LAL GOSSAMI*.  
[I. L. R. 14 Calc. 321]

2. —, s. 174.—*Act creating new rights, Effect of—Application for execution* ] The provision of an Act which creates a new right cannot, in the absence of express legislation or direct implication, have a retrospective effect. *Held* accordingly, that a judgment-debtor's right under s. 174 of the Bengal Tenancy Act to set aside a sale did not avail where the sale was held in pursuance of a decree, the execution whereof had been applied for before that Act came into operation. *LAL MOHUN MUKERJEE v. JOGENDRA CHUNDER ROY; BONOMALI CHUNDER GHOSAL v. RAMKALI DUTT*.  
[I. L. R. 14 Calc. 636]

3. —, s. 174.—*Execution applied for after passing of Act VIII of 1885—Decree being previous to the Act—Bengal Act VIII of 1869—Construction of statute* ] A sale in execution of a decree passed under Bengal Act VIII of 1869, execution having been applied for after Act VIII of 1885 had come into force, cannot be set aside under s. 174 of the latter Act. Principle of *Lal Mohun Mukerjee v. Jogendra Chunder Roy*, I. L. R. 14 Calc. 636, applied. *UZIR ALI v. RAM KOMAL SHAHA*.  
[I. L. R. 15 Calc. 333]

4. —, s. 174.—*Judgment-debtor, Meaning of* ] The word "judgment-debtor" as used in s. 174 of Act VIII of 1885 does not include a transferee or assignee from a judgment-debtor, but must be construed strictly as referring to a judgment-debtor alone. *RAJENDRO NARAIN ROY v. PHUDY MONDUL*.  
[I. L. R. 15 Calc. 482]

—, s. 178.—*Right of occupancy—Agreement restricting right of occupancy—Suits pending when Act came into force* ] S. 178 of the Bengal Tenancy Act (Act VIII of 1885) has no application to suits instituted before the date on which that Act came into force. So where a landlord sued to eject a tenant who had executed a *solanamah* agreeing to hold the land in suit for a specified period at a specified rent, and providing that the landlord was to be at liberty to enter on the lands at the expiry of the period, and the suit was instituted on the 6th October 1885, and where it was found that at the date of the *solanamah* the tenant had acquired a right of occupancy with respect to some of the lands in suit: *Held*, that the tenant was not entitled to the benefits conferred by s. 178, cl. 1, sub-clause (b) of the Bengal Tenancy

**BENGAL TENANCY ACT (VIII OF 1885),**  
s. 178—continued.

Act, but was liable to be ejected. *MOHESHWAR PERSHAD NARAIN SINGH v. SHEOBARAN MAHTO, MOHESHWAR PERSHAD NARAIN SINGH v. DURSUN RAUT*.  
[I. L. R. 14 Calc. 621]

—, s. 179.  
*See CESS*.

[I. L. R. 15 Calc. 828]

—, s. 184 and Sch. III, Part I, Art. 3.—*Occupancy ryot—Suit—Limitation* ] The suit mentioned in s. 184 and sch. III, part I, art. 3 of the Bengal Tenancy Act, 1885, means a suit by an occupancy ryot as such, that is an occupancy ryot claiming a right of occupancy as against his landlord. *CHUNDER KISHORE DAY alias MUKHORI DEY v. RAJ KISHORE MOZUMDAR*.  
[I. L. R. 15 Calc. 450]

—, s. 188.  
*See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE 1882,*  
s. 622.

[I. L. R. 15 Calc. 47]

1. —, s. 188.—*Co-sharers, Suit by—Parties* ] S. 188 of the Bengal Tenancy Act applies only to such matters as a landlord is, under the Act, authorized or required to do; there is nothing in that Act which requires or authorizes a landlord to sue thereunder for arrears of rent. One of several joint landlords is competent to sue for the entire rent due from a tenant making his co-sharers parties to the suit. *PREM CHAND NUSKUR v. MOKSHODA DEBI*.  
[I. L. R. 14 Calc. 201]

2. —, s. 188.—*Suit for rent—Co-sharers, Suit by—Joint undivided estate—Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 622* ] A District Judge, in deciding a rent suit, held that s. 188 of the Bengal Tenancy Act prohibited the Court from entertaining the suit in the form in which it had been framed, and therefore dismissed the suit. *Held*, on an application under s. 622 of the Civil Procedure Code to have the judgment of the District Judge set aside, that the District Judge had acted in the exercise of his jurisdiction illogically, inasmuch as s. 188 had no application to the case, and that his decision must be set aside. *Prem Chand Nuskur v. Mokshoda Debi*, I. L. R. 14 Calc. 201, and *Umesh Chander Roy v. Nasir Mullick*, I. L. R. 14 Calc. 203 (note), followed; *Amir Hassan Khan v. Sheo Baksh Singh*, I. L. R. 1 Calc. 6; I. L. R. 11 I. A. 237, distinguished. *JUGOBUNDHU PATTAUCK v. JADU GHOSE ALKUSHI*.  
[I. L. R. 15 Calc. 47]

—, Sch. III, Art. 3  
*See s. 184*.

[I. L. R. 15 Calc. 450]

**BENGAL TENANCY ACT (VIII OF 1885)**  
—concluded.

1. ———, Sch. III, Art. 3.—*Limitation—Suit by occupancy ryot to recover possession from trespasser, Limitation for.* Art. 3. Sch. III of the Bengal Tenancy Act (Act VIII of 1885) relates to suit brought by an occupancy ryot against his landlord and not to a suit brought against a third party who is a trespasser. *RAMJANEE BIBEE v. AMOO BEPAREE*.

[I. L. R. 15 Calc. 317]

2 ———, Sch. III, Art. 3.—*Suit by occupancy ryot to recover possession after dispossession by landlord—Question of title—Possessory suits—Bengal Act VIII of 1869, s. 27—Limitation.* A suit by an occupancy ryot to recover possession of land of which he has been dispossessed by his landlord in which the title of the tenant is denied and put in issue, is governed by the special period of limitation prescribed by the Bengal Tenancy Act, Sch. III, Art. 3, namely, two years from the date of dispossession. It was intended by that enactment to provide for all suits to recover possession of land brought by an occupancy ryot, and to limit the period previously allowed by the Courts for suits to recover possession by reason of a title set up and proved by the plaintiff; and not to provide only for suits of a possessory nature such as were previously dealt with by s. 27 of Bengal Act VIII of 1869. *SARASWATI DASI v. HORITARUN CHUCKERBUTTI*.

[I. L. R. 16 Calc. 741]

**BETROTHAL.**

See **CONTRACT—BREACH OF CONTRACT.**  
[I. L. R. 11 Bom. 412]

See **HINDU LAW—MARRIAGE—BETROTHAL.**

[I. L. R. 11 Bom. 412]

**BETTING ON RAINFALL.**

See **GAMBLING.**

[I. L. R. 13 Bom. 681]

**BHAGDARI TENURE.**

See **CASES UNDER BOMBAY ACT V OF 1862.**

**BIGAMY.**

*Penal Code, ss. 103 and 494—Native Christian—Marriage by relapsed convert.* A was baptized in infancy into the Roman Catholic Church, but subsequently relapsed, with the rest of her family, into Hinduism and was married to a Hindu. Her Hindu husband afterwards discarded her, and alleged that he would not have married her if he had known that she had been baptized. A was subsequently re-admitted into the Roman Catholic Church and married by B a priest, to a Roman Catholic during the lifetime of her Hindu husband: *Held*, that A's marriage with the Hindu was subsisting and valid at the time

**BIGAMY—concluded.**

of her Christian marriage: that she was guilty of the offence of bigamy; and that B was guilty of abetting that offence—*Lopez v. Lopez*, I. L. R. 12 Calc 706, discussed. *IN RE MILLARD*.

[I. L. R. 10 Mad. 11]

**BILL OF EXCHANGE.**

See **DECREE—FORM OF DECREE—BILL OF EXCHANGE.**

[I. L. R. 16 Calc. 804]

See **STAMP ACT, 1879, SCH. I, ART. II**

[I. L. R. 16 Calc. 432]

**BILL OF LADING.**

—*Stowage—Negligence of the crew or other servants of the ship—Period of loading covered by the contract of carriage—Fitness or unfitness of the ship* The plaintiffs shipped certain bags of sugar on the 11th and 12th November 1887 on board the defendant's ship the *Byculla* for conveyance to Bombay. There being a dispute as to the number of bags shipped, no mate's receipts were given and no bill of lading was signed until the 28th November. The *Byculla* started on her voyage on the 15th November and duly delivered the sugar in Bombay. The sugar, however, was found to be damaged by water, which was due to its having been stowed in immediate proximity to a quantity of wet timber. The plaintiffs sued the defendants in the Small Cause Court for the damage so caused. The defendants sheltered themselves under the terms of the exemptive clause in their bill of lading of the 28th November, which clause ran as follows.—“The act of God, the Queen's enemies \* \* \* and all the perils, dangers, accidents of the sea, \* \* \* and accidents, loss or damage from any act, neglect, or default whatsoever of the pilot, master, or mariners, or other servants of the Company, or from any deviation, excepted.” The plaintiffs contended that a bill of lading did not relate to or cover the period of loading and that, even if it did, the exception relied upon in this bill of lading related only to negligence subsequent to the commencement of the voyage. They also contended that the ship was not a ship “reasonably fit for the voyage” within the meaning of the rule laid down in *Steel v. The State Line Steamship Company* (L. R. 3 Ap. Ca. 72). In the Small Cause Court judgment was given in plaintiffs' favour. On appeal to the High Court on a case stated, this judgment was reversed. *Held*, that this was not a case to which the rule laid down in *Steel v. The State Line Steamship Company* (L. R. 3 Ap. Ca. 72) applied, as there was no question here of any defect inherent in the ship. It was simply a case of negligent and improper stowage. *Held*, further, following *Hongkong and Shanghai Banking Co. v. Baker*, 7 Bom. O. C. 186, that the reasonable mode of construing the contract evidenced by a bill of lading was to hold the exceptions to be co-extensive with the liability, and that there

**BILL OF LADING—concluded.**

was no evidence to be found in this bill of lading of any other intention. *Held*, further, that the goods were covered by the bill of lading from the time they were put on board to be loaded, consequently, the defendants were protected from liability under the exemptive clause. *The Duero*, L. R. 2 A. & E 393, and *Hayes v. Cuttsford*, L. R. 4 C. P. D. 182. commented on and followed *HASSANBOY VISRAM v. BRITISH INDIA STEAM NAVIGATION COMPANY*.

[I. L. R. 13 Bom. 571]

**BOARD OF EXAMINERS.**

*Pledership examination—Board of Examiners raising standard of marks required for pass certificate without notice to candidates—Petition to High Court by unsuccessful candidates.* The Board of Examiners having, without giving any notice to the candidates at the Annual Examination for Plederships of the Upper Subordinate Grade raised the minimum number of marks qualifying for a pass certificate, some of the unsuccessful candidates petitioned the High Court that the result of the examination might be reconsidered, and the former standard reverted to: *Held*, that the Court having delegated its powers in connection with the examination to the Board of Examiners, and the Board having exercised its powers legally, properly, and for the benefit of the public, there was no cause for interference. *IN THE PETITION OF DWARKA PRASAD*.

[I. L. R. 9 All. 611]

**BOMBAY ABKARI ACT (V of 1878).**

—, ss. 29, 67.—*Parties—Suit for money illegally levied by a farmer of abkari revenue—Collector not a necessary party to such a suit.* The Collector is not a necessary party to a suit brought against a farmer of abkari revenue for a refund of money illegally levied at his instance by the Collector under section 29 of the Bombay Abkari Act (V of 1878). S. 67 of the Act expressly exempts the Collector from responsibility. Though a person subjected to an undue demand may, under section 29 of the Act, take steps by which the Collector's proceedings may be stayed; still his abstention from such a course will not deprive him of his ordinary right to recover money wrongfully taken from him for the benefit of a third person. *NARAYAN VENKU v. SAKHARAM NAGU*.

[I. L. R. 11 Bom. 519]

—, s. 45.

See **CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—GENERALLY.**

[I. L. R. 12 Bom. 422]

**BOMBAY ACT—1862—V.**

See **ATTACHMENT—SUBJECTS OF ATTACHMENT—BUILDINGS AND HOUSE MATERIALS.**

[I. L. R. 12 Bom. 363]

**BOMBAY ACT—1862—V—concluded.**

—, ss 1 and 2—*Sale of unascertained shares in an undivided bhag—Dismemberment—Physical dismemberment—Right to sue to set aside illegal sales.* S 1 of the Bombay Bhagdari Act (V of 1862) does not prohibit the sale of an unascertained share of an undivided bhag. The object and intention of the Act is to prevent a physical dismemberment of a bhag, or recognized sub-divisions thereof, and not a mere increase in the number of persons who may from time to time be owners of the bhag. S. 2 of the Act does not bar the right of any person prejudicially affected by any illegal sale from suing to set aside the sale. Four brothers owned a bhag in common. In 1871 the right, title, and interest of three of the brothers in the bhag was sold in execution of decrees against them. The defendants were the auction-purchasers. They were put in joint possession of the whole bhag. In 1878 the plaintiff purchased the whole bhag from the four brothers, and filed a suit in 1883 to oust the defendants, and to obtain possession, alleging that the defendants' purchase of a portion of the bhag was illegal and invalid under s. 1 of the Bombay Bhagdari Act (V of 1862). The suit was dismissed, on the ground that though the defendants' purchase was illegal under the Act, the plaintiff had no right to oust the defendants until the Collector had taken action, under s. 2 of the Act, to set aside the defendants' purchase: *Held*, reversing the decision of the lower Court, that the suit was not barred by s. 2 of the Bombay Bhagdari Act (V of 1862): *Held*, also, that the defendants' purchase of unascertained shares in the undivided bhag was not opposed to s. 1 of the Act. *BAI KUVARBAI v. BHAGVAN ICHHARAM*.

[I. L. R. 13 Bom. 203]

**BOMBAY ACT, 1862—VI (TALUKDARI ACT)**

1. —, s. 12.—*Inability of guardian to contract on behalf of infant ward, so as to bind him personally—Effect of Act VI of 1862 (Bombay), s. 12, in regard to a charge upon a talukdari estate in the Ahmedabad District during the period of management.* A guardian cannot contract in the name of a ward, so as to impose on him a personal liability. Act VI of 1862 (Bombay), "for the amelioration of the condition of talukdars in the Ahmedabad Collectorate and for their relief from debt," was intended to deal with all debts and liabilities which could possibly impose a charge upon the talukdari estate at the end of the period of management; when the estate was to be restored to the talukdar free of incumbrance, excepting the Government revenue. If debts amounted to more than the surplus of rents during the management, of which the maximum period was twenty years, they were not to be paid. A widow, as guardian of her infant son, the heir of talukdari estate in the above district, validly transferred villages, part thereof, and in the deed of transfer, to which her ward was by her as his guardian

**BOMBAY ACT 1862—VI (TALUKDARI ACT), s 12—concluded.**

nominally a party, contracted to indemnify the purchaser in case the Government should claim and enforce a right to revenue upon the villages which she transferred as being rent-free. The deed purported to make both guardian and ward personally liable in this respect, and also charged the liability upon other parts of the talukdari estate. The infant attained majority, and the estate was then placed under management, within Act VI of 1862. During the period of management the Government claimed and enforced payment of revenue upon the villages: *Held*, that there was no personal liability on the part of the talukdar created by the above; also, that if the charge on the estate had been validly made, it fell, at all events, within the terms of s. 12 of Act VI of 1862, absolving estates from liability for debts incurred, not only before, but during the period of management. *WAGHELA RAJSANJI v. MASLUDIN.*

[I. L. R. 11 Bom. 551 : L. R. 14 I. A. 89]

2. — s. 12 and s. 20.—*Talukdar's power of disposal over his landed estates after the expiration of the management by the Talukdari Settlement Officer.* Under s. 12 of the Ahmedabad Talukdars' Act (VI of 1862), debts or liabilities incurred by a talukdar during the management of the Talukdari Settlement Officer are not enforceable against landed estates. His personal liability for the same remains unaffected by the Act. This personal liability furnishes a sufficient consideration for a subsequent obligation, so as to bind the landed estates by a contract made after the period of the management by the Talukdari Officer had expired. From and after the expiration of that period, the talukdar becomes, under s. 20, the absolute proprietor of his estate, and he is then at liberty to create a valid charge upon his estate for debts contracted during the period of the management. Accordingly, where a talukdar had, after the withdrawal of the management by the Talukdari Settlement Officer, encumbered his landed estate under several mortgage bonds, passed partly in renewal of old bonds and partly in consideration of old debts contracted during the period of the management: *Held*, that the mortgage bonds created valid and binding encumbrances upon the estate. *BOO JINATBOO v. SHA NAGAR VALAB KANJI.*

[I. L. R. 11 Bom. 78]

—, 1865—III.

*See EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS.*

[I. L. R. 12 Bom. 585]

—, 1866—XII.

*See JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS*

[I. L. R. 12 Bom. 561]

**BOMBAY ACT—concluded.**

—, 1869—XIV.

*See BOMBAY CIVIL COURTS ACT.*

—, 1872—III.

*See BOMBAY MUNICIPAL ACT.*

—, 1873—VI.

*See BOMBAY DISTRICT MUNICIPAL ACT 1873.*

—, 1874—III.

*See HEREDITARY OFFICES ACT (BOMBAY).*

—, 1876—III.

*See MAMLATDARS COURTS ACT*

—, 1876—X.

*See BOMBAY REVENUE JURISDICTION ACT. See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, BOMBAY.*

[I. L. R. 13 Bom. 442]

—, 1878—V.

*See BOMBAY AKBARI ACT.*

—, 1879—V.

*See BOMBAY LAND REVENUE ACT.*

—, 1880—I.

*See KHOTI TENURE.*

[I. L. R. 13 Bom. 373]

*See LEASE—CONSTRUCTION*

[I. L. R. 13 Bom. 373]

—, 1887—IV.

*See GAMBLING.*

[I. L. R. 13 Bom. 681]

**BOMBAY CIVIL COURTS (ACT XIV of 1869), s. 8.**

*See APPEAL—BOMBAY ACTS—BOMBAY CIVIL COURTS ACT.*

[I. L. R. 12 Bom. 675]

*See VALUATION OF SUIT—SUITS.*

[I. L. R. 12 Bom. 675]

—, s. 21.

*See SUBORDINATE JUDGE, JURISDICTION OF.*

[I. L. R. 12 Bom. 486]

—, s. 32

*See SUBORDINATE JUDGE, JURISDICTION OF.*

[I. L. R. 12 Bom. 358]

**BOMBAY DISTRICT MUNICIPAL ACT**  
(VI of 1873).

— ss. 17 and 33.—*Street—Authority of the Municipality under s 33—Civil Courts interference with the discretion given to public bodies.* ] The word “street” in s. 17 of the Bombay District Municipal Act (VI of 1873) means and includes not merely the surface of the ground, but so much above and below it as is requisite or appropriate for the preservation of the street for the usual and intended purposes. The plaintiff proposed to make a balcony projecting over a public road. The Municipality objected to the work, as an encroachment on a public street. He therefore sued the Municipality to establish his right to build the proposed balcony: *Held*, that, so far as the column of space standing over the street was vested in the Municipality, the plaintiff had no right to occupy it with a balcony, which by intercepting light and air would greatly impair the use of the area as a street. S. 33 of the Bombay District Municipal Act (VI of 1873) gives the Municipality a discretion to issue such orders as it thinks proper with reference to a proposed building. Civil Courts cannot interfere with that discretion, unless it is exercised in a capricious, wanton, and oppressive manner. The plaintiff was the owner of two houses on each side of the passage of a *khidki*, or open square, containing three or four other houses. He proposed to connect the two houses by building a story across the passage at such a height as not to interfere with the passage of those who were entitled to go and fro. He applied to the local Municipality for permission to build in the manner he proposed. The Municipality forbade the work, on the ground that it was likely to interfere with the access of light and air to the neighbouring houses. The plaintiff thereupon sued the Municipality to establish his right to build the proposed structure. It was contended for the plaintiff that the Municipality ought not to have refused permission in the interests of the neighbouring house-holders, who were able to protect their own rights in case of injury: *Held*, that the suit would not lie, as the order of the Municipality refusing permission was not an unreasonable one under the circumstances of the case: *Held*, further, that the authority of the Municipality was not in any way affected by the circumstance that the proposed erection might be an encroachment on private rights subjecting the plaintiff to an action by the persons injured **NAGAR VALAB NARSI v. MUNICIPALITY OF DHANDHUKA.**

[I L. R. 12 Bom. 490

—, s. 36.—*Privy, power of Municipality to order to be built by owner of a house—Such order not imperative, but permissive—Discretion of Court.* ] The terms of s. 36 of Bombay Act VI of 1873 are not imperative in requiring a Municipality to call on the owner of a house to build a privy, but are permissive, leaving it to the discretion of the Municipality to determine when the power conferred on them shall be ex-

**BOMBAY DISTRICT MUNICIPAL ACT**  
(VI of 1873) s. 36—*concluded.*

ercised. Accordingly, where the plaintiff complained that the defendants had erected a privy so close to his house as to be a nuisance, and the lower Appellate Court found it to be a nuisance, but rejected the plaintiff's claim on the ground that the defendants had erected the same under the orders of the Municipality issued under s. 31 of the Act: *Held*, reversing the decree of the lower Appellate Court, that the Municipality had no authority to order the defendants to erect the privy regardless of the plaintiff's right, and that the defendants, therefore, could not plead that they acted under the orders of the Municipality. The High Court directed an injunction to remove the privy within three months from the date of its decision. **JAFIR SAHEB v. KADIR RAHMAN.**

[I. L. R. 12 Bom. 634

—, s. 66.—*Sale of fruit in a private shop—Power of the Municipality to prevent such a sale—Market, Definition of* ] The Municipality of Ahmedabad issued a notification to the effect that no one should, within six hundred yards of the municipal market, open or establish a shop for the purpose of selling vegetables or fruits without a license, and that, if any one acted in contravention of this notification, he would be dealt with according to law. The accused hired a house, and opened a shop for selling fruit within six hundred yards of the Municipal market without obtaining a license from the Municipality. The second class Magistrate convicted and sentenced each of the accused to pay a fine of Rs. 5. The District Magistrate relying on the case of *Paba Khaji*, I. L. R. 9 Bom 272, reversed the conviction and sentence. *Held*, that what the Municipality had authority to direct, under s. 66 of (Bombay) Act VI of 1873, was that no place, other than the Municipal market or other places licensed as markets, should be used by anybody as a market; but they had no authority to issue a notification affecting other places which might be used for selling vegetables, &c, otherwise than as a market; that, inasmuch as the using of the shop by the accused was confined simply to the selling of fruit, and not of “vegetables” in the popular sense, it could not be affected by the prohibition contemplated by s. 66 of the Act: that, if the prohibition of the Municipality was meant to affect the private rights of persons to use their shops for selling their own commodities, that would amount to an excess of the authority conferred by the District Municipal Act (Bombay) VI of 1873: that the shop used by the accused for the sale of their own commodities was not a “market” within the meaning of s. 66 of Bombay Act VI of 1873. *Mayor of London v. Low*, 49 L. J. Q. B. 144, and *Mayor of Manchester v. Lyons*, L. R. 2 Ch. D. 287, followed. The case of *Paba Khaji*, I. L. R. 9 Bom. 272, explained. **QUEEN-EMPRESS v. MAGAN HARJIVAN.**

[I. L. R. 11 Bom. 106

**BOMBAY LAND REVENUE ACT (V OF 1879), s 74**

*See* LANDLORD AND TENANT—ABANDONMENT OR RELINQUISHMENT OF TENURE.

[I L R. 13 Bom. 294]

—, s 113.

*See* COLLECTOR.

[I L R. 12 Bom. 371]

—, s 125.

*See* MAGISTRATE, JURISDICTION OF — SPECIAL ACTS — BOMBAY LAND REVENUE ACT (V OF 1879)

[I L R. 13 Bom. 291]

—, s 214

*See* RULES MADE UNDER ACTS

[I L R. 13 Bom. 291]

**BOMBAY MUNICIPAL ACT (III OF 1872).**

—, s 195—*Obstruction—Power given in Act for public benefit—Construction.*] The eaves of certain buildings belonging to the plaintiff projected over the public road. On the 17th May 1886, the Municipal Commissioner of Bombay gave notice to the plaintiff requiring him within thirty days to remove the said eaves as being “a projection, encroachment or obstruction” within the meaning of s. 195 of Acts III of 1872 and IV of 1878. The plaintiff thereupon filed this suit, praying for an injunction against the Municipal Commissioner. The eaves in question projected to the extent of one foot eight inches. The width of the road in front of the buildings was about forty feet, and the length of the eaves varied from seven feet to nine feet two inches above the roadway. At the time this suit was filed there was an open drain or gutter, one foot three inches wide, running along by the side of the plaintiff's buildings and between them and the road. That gutter, however, subsequently to the filing of this suit, but before the hearing, was covered over, and so much additional width was thereby added to the road: *Held*, that the eaves constituted an obstruction within the meaning of the above section, and that the Municipal Commissioner was entitled to remove them. Under the above section the question to be decided is not whether there is a real practical inconvenience to the public traffic in the street. Those are not the words used in the section, and if that was the intention of the Legislature it would have been expressed. Where an Act gives power to a Municipality or Corporation for the public benefit, a more liberal construction should be given to it than where powers are to be exercised merely for private gain or other advantage. *OLLIVANT v. RAHIMTULA NUR MAHOMED.*

[I L R. 12 Bom. 474]

**BOMBAY REGULATION, 1827—II.**

*See* HINDU LAW—INHERITANCE—LAW GOVERNING PARTICULAR CASES

[I L R. 11 Bom. 285]

*See* JURISDICTION OF CIVIL COURT—CASTE.

[I L R. 11 Bom. 534]

[I L R. 13 Bom. 429]

—, 1827—V.

*See* MORTGAGE — POSSESSION UNDER MORTGAGE.

[I L R. 11 Bom. 475]

*See* PLEADER—APPOINTMENT AND APPEARANCE.

[I L R. 12 Bom. 85]

*See* RIGHT OF SUIT—CASTE QUESTIONS.

[I L R. 13 Bom. 429]

—, 1827—VIII.

*See* CASES UNDER CERTIFICATE OF ADMINISTRATION — CERTIFICATE UNDER BOMBAY REGULATION VIII OF 1827, &c.

—, 1827—XVIII, s. 10.

*See* STAMP ACT, 1879, s. 31.

[I L R. 13 Bom. 493]

—, 1827—XXIX, s. 6.

*See* PENSIONS ACT, s. 4.

[I L R. 11 Bom. 222]

**BOMBAY REVENUE JURISDICTION ACT (X OF 1876), s. 4.**

*See* JURISDICTION OF CIVIL COURT—OFFICES, RIGHT TO.

[I L R. 12 Bom. 614]

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, BOMBAY.

[I L R. 13 Bom. 442]

*See* PENSIONS ACT, s. 4.

[I L R. 11 Bom. 222]

*See* RIGHT OF SUIT—OFFICE OR EMOLUMENT.

[I L R. 12 Bom. 614]

—, s. 15.

*See* SUBORDINATE JUDGE, JURISDICTION OF.

[I L R. 12 Bom. 358]

—, s. 4. prov. (k)—“*Competent officer*”—*Governor in Council—Powers conferred by Act XI of 1852,* per BIRDWOOD, J.—The words “com-



**BOMBAY REVENUE JURISDICTION ACT (X OF 1876), s. 4 prov. (k).—concluded.**

petent officer" as used in proviso (k) of s. 4 of the Bombay Revenue Jurisdiction Act X of 1876, includes the Governor in Council, who is one of the authorities upon whom judicial powers were conferred by Act XI of 1852. *JANARDANRAV v. SECRETARY OF STATE FOR INDIA*

[I. L. R. 13 Bom. 442]

**BOND.**

See CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—GENERALLY.

[I. L. R. 13 Bom. 150]

See LIMITATION ACT, 1877, ART. 132.

[I. L. R. 9 All. 158]

See MORTGAGE—FORM OF MORTGAGE.

[I. L. R. 9 All. 158]

See STAMP ACT, 1879, s. 3, CL. 4.

[I. L. R. 10 Mad. 158]

—, As security for Costs of Appeal

See COURT FEES ACT, SCH. II, ART. 6.

[I. L. R. 10 All. 16]

See STAMP ACT, 1877, SCH. I, ART. 13.

[I. L. R. 10 All. 16]

—, Suit on bond.

1.—*Civil Procedure Code 1889, ss. 268, 274—Sale of interest of obligee in a hypothecation bond* ] The interest of the obligee in a bond hypothecating certain land as security for a debt having been attached under s. 274 of the Code of Civil Procedure an sold, a suit was brought by the purchaser upon the said bond; it was objected that the suit was not maintainable because the bond had not been also attached as a debt under s. 268: *Held*, that the fact of the bond not having been attached as a debt under s. 268, did not affect the right of the purchaser to realize the amount due under it. *SAMI AYYAR v. KRISHNASAMI*.

[I. L. R. 10 Mad. 169]

2.—*Novation of Bond—Verbal assignment of rent of land in satisfaction of interest—"Jamog"* —*Mutation of names in favour of assignee not effected—Suit on bond—Claim for interest notwithstanding assignment.* ] Subsequent to the execution and registration of a bond, a jamog was made orally between the creditor and the debtor, by which the former agreed to take the rents of certain tenants of the latter in satisfaction of interest, the latter agreed to release the tenants from payment of rent to himself, and the tenants (who were parties to the arrangement) agreed to pay their rents to the creditor. No mutation of names in favour of the creditor was effected in the revenue registers. The creditor brought a suit against the debtor to recover the principal and

**BOND—concluded.**

interest agreed to be paid under the bond, alleging that he had never received any rents under the jamog. *Held*, that the effect of the jamog or novation was that the plaintiff's right to recover interest from the defendant was gone, and the plaintiff was therefore not entitled to maintain his suit against the defendant in respect of the interest which was payable under the bond. *AUTU SINGH v. AJUDHIA SAHU*.

[I. L. R. 9 All. 249]

3.—*Penalty—Stipulation to pay double the amount of debt on default of payment of any instalment.* ] A stipulation by which on default of payment of one instalment, double the entire amount of the debt due under an instalment bond was to become at once payable. *Held* to be in the nature of a penalty. *JOSHI KALIDAS v. KELI DADA ABHESANG*.

[I. L. R. 12 Bom. 555]

**BOUNDARY.**

See EVIDENCE—CIVIL CASES—MAPS.

[I. L. R. 16 Calc. 186]

**BOUNDARY ACT (MADRAS ACT XXVIII of 1860), s. 25.**

See RES JUDICATA — PARTIES — SAME PARTIES OR THEIR REPRESENTATIVES.

[I. L. R. 11 Mad. 309]

See MINOR—REPRESENTATION OF MINOR IN SUITS.

[I. L. R. 11 Mad. 309]

**BOUNDARY MARK.**

See MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—BOMBAY LAND REVENUE ACT (V OF 1879)

[I. L. R. 13 Bom. 291]

See RULES MADE UNDER ACTS

[I. L. R. 13 Bom. 291]

**BREACH OF CONTRACT.**

See JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION.

[I. L. R. 11 Bom. 649]

**BURMAH COURTS ACT (XVII of 1875), ss 49, 95.**

*Certificate of Administration—Act XL of 1858, s. 28—Appeal under Act XL of 1858* ] The appeal given by s. 28 of Act XL of 1858 is subject to the ordinary law of appeal laid down in the Burmah Courts Act. No appeal, therefore, will lie from an order refusing an application for the issue of a certificate of administration under Act XL of 1858, it being impossible to place any specific money valuation on such an application. IN THE MATTER OF THE PETITION OF MULLA ADJIM.

[I. L. R. 14 Calc. 351]



**BUTCHER'S LICENSE.**

See MADRAS DISTRICT MUNICIPALITIES ACT, s. 198.

[I. L. R. 10 Mad. 216]

**CANTONMENT ACT (III OF 1880)**

—, s. 14.—*Bengal Excise Act (Bengal Act VII of 1878), ss. 4, 11, 29, 32—Spirituous liquor—Tari—Cantonment Magistrate's Powers of, to cancel license—Revenue Authorities.* "Tari" or "toddy" is "spirituous liquor" within the meaning of s. 14 of Act III of 1880. The words "spirituous liquor," "wine," and "intoxicating drugs" in that section must be taken in their popular and ordinary meaning. *QUEEN-EMPRESS v. RAMDHANI PASSI.*

[I. L. R. 15 Calc 452]

**CANTONMENT MAGISTRATE.**

1.—*Jurisdiction—Power to cancel license—Bengal Excise Act III of 1880.* A Cantonment Magistrate in his judicial capacity has no authority to cancel a license under the Bengal Excise Act III of 1880. The power to cancel licenses belongs to the revenue authorities. *QUEEN-EMPRESS v. RAMDHANI PASSI*

[I. L. R. 15 Calc 452]

2.—*Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 15.* The plaintiff, who was a money-lender residing within the limits of the Ahmedabad Cantonment, sued the defendants, who resided within the jurisdiction of the City Small Cause Court at the same place, upon a bond executed by them at the Cantonment. He presented his plaint to the Cantonment Magistrate, whose pecuniary jurisdiction extended to Rs 200 only; but that officer, being of opinion that the suit was cognizable by the City Small Cause Court, returned it to the plaintiff who subsequently presented it to the Judge of the City Small Cause Court, whose pecuniary jurisdiction extended to Rs. 500. On reference by him to the High Court: *Held*, that both the Courts had jurisdiction to try the suit, but that the Court of the Cantonment Magistrate was to be regarded as the Court of lower grade and, therefore, under s. 15 of the Civil Procedure Code (Act XIV of 1882) was the proper Court to try the suit. *Dwarkanath Dutt v. Bhattacharya*, 22 W. R. 457, followed. *MOHANLAL RAICHAND v. VIRA PUNJA*

[I. L. R. 12 Bom. 169]

**"CASH ON DELIVERY," MEANING OF.**

See CONTRACT—CONSTRUCTION OF CONTRACTS.

[I. L. R. 16 Calc. 417]

**CASTE.**

See CUSTOM.

[I. L. R. 12 Mad. 495]

See DEFAMATION

[I. L. R. 12 Mad. 495]

**CASTE—concluded.**

See HINDU LAW — CUSTOM — CASTE USAGE.

[I. L. R. 10 Mad. 133]

See CASES UNDER JURISDICTION OF CIVIL COURT—CASTE.

See CASES UNDER RIGHT OF SUIT—CASTE QUESTIONS.

See RIGHT OF SUIT—INTEREST TO SUPPORT RIGHT.

[I. L. R. 13 Bom. 131]

**CATTLE TRESPASS ACT (I OF 1871).**

See DAMAGES — SUITS FOR DAMAGES — TORTS.

[I. L. R. 11 Calc. 159]

See RIGHT OF SUIT—COMPENSATION.

[I. L. R. 16 Calc. 159]

—, s. 22.

See APPEAL IN CRIMINAL CASES—ACTS —CATTLE TRESPASS ACT.

[I. L. R. 15 Calc. 712]

[I. L. R. 11 Mad. 359]

—, s. 22.—*Joint fine—Fine and compensation.* Proceedings under s. 22 of the Cattle Trespass Act are *quasi*-civil in their nature: a Magistrate being at liberty under that section to assess and enforce, in a summary manner, compensation for an injury for which a civil action might be brought. An order, therefore, for the payment of a sum as fine and compensation, passed against two persons under that section which does not specify the proportionate amount payable by each, is good. *IN THE MATTER OF NEAZ v. MONSOR.*

[I. L. R. 14 Calc. 175]

**CAUSE OF ACTION.**

See RIGHT OF SUIT

**CERTIFICATE OF ADMINISTRATION.**

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**CERTIFICATE OF ADMINISTRATION—**  
*continued.*

*See* MINOR — CASES UNDER BOMBAY  
MINORS' ACT 1864.

[I. L. R. 13 Bom. 285]

(1) **CERTIFICATE UNDER BOMBAY REGULA-  
TION VIII OF 1827 AND ACT XX OF 1841.**

1.—*Bombay Regulation VIII of 1827, s. 7—Holder of such certificate a transferee of decree within the meaning of s. 232 of the Civil Procedure Code (Act XIV of 1882)—Right of such person to execute decree.* A holder of a certificate of administration granted under s. 7 of Regulation VIII of 1827 is a transferee by law of a decree obtained by the deceased within the meaning of s. 232 of the Civil Procedure Code (Act XIV of 1882), and is competent to apply for execution of such a decree. **KHANDERAV RAYAJIRAV v. GANESH SHASTRI.**

[I. L. R. 11 Bom. 368]

2.—*Certificate under Act XXVII of 1860—Bombay Regulation VIII of 1827, s. 9—Jurisdiction to grant certificate of administration—Foreigners residing abroad.* Under s. 3 of Act XXVII of 1860, a certificate can be granted only for the estate of a British subject either resident within the district where the certificate is sought, or else having no fixed place of residence. The Act does not make provision for administration of the effects of a foreigner domiciled abroad. While Act XXVII of 1860 has regard to the person, Regulation VIII of 1827 on the other hand, looks simply to the locality of the assets as the ground of the Court's jurisdiction to grant a certificate of administration. The intention of s. 9 seems to be that when there are assets within a *zilla*, and the circumstances exist which are specified in the section, a certificate of administration may be granted. The authority given under s. 9 must be understood to be the same as under s. 7. *B*, a *sardar* of Baroda, residing within the Gaikwar's territory, died there, leaving considerable property in the district of Surat. On his death, Mr. Lely, the Assistant Collector of Surat, was appointed administrator of *B*'s estate, under s. 9 of Regulation VIII of 1827. Shortly after his appointment as administrator, Mr. Lely went to England on furlough. During his absence, the plaintiffs sued, as heirs of *B*, to recover the balance of principal and interest due on a bond executed by the defendants in favour of *B*: *Held*, that the plaintiffs were incompetent to sue. Mr. Lely having been appointed administrator of *B*'s estate, and never having been relieved of his office as administrator by the Court, as contemplated by s. 9 of Regulation VIII of 1827, his *status* still subsisted, and while it subsisted, no one else could represent the state. The appointment of an administrator excludes other representatives so long as it endures. **IBRAHIM ALIKHAN v. ZIAUL-NISSA LADLI BEGAM.**

[I. L. R. 12 Bom. 150]

**CERTIFICATE OF ADMINISTRATION—**  
*continued.*

(1) **CERTIFICATE UNDER BOMBAY REGU-  
LATION VIII OF 1827 AND ACT XX OF  
1841—concluded.**

3.—*Bombay Regulation VIII of 1827, s. 9—Construction of the words "may appoint"—Appointment of administrator—Discretion of Court.* Where the right of succession to the estate of a deceased person is disputed between two or more claimants, and none of them have taken possession, the District Judge within whose jurisdiction the property is situate is bound, on the application of one of the parties concerned, to appoint an administrator under s. 9 of Regulation VIII of 1827. The words of the section are imperative and not permissive. The use of the words "*may appoint*" in this section does not imply that the District Judge has any discretion in a proper case to appoint or not to appoint an administrator. If any discretion is given as to the exercise of the power thereby conferred, it is that of determining whether the occasion has arisen in the particular case. **VISHWAMBHAR PUNDIT v. VASUDEB PUNDIT.**

[I. L. R. 13 Bom. 37]

(2) **ACT XXVII OF 1860 (OBJECT OF ACT AND  
GRANT OF CERTIFICATE).**

4.—*Jurisdiction to grant certificate of administration—Foreigners residing abroad.* Under s. 3 of Act XXVII of 1860 a certificate can be granted only for the estate of a British subject either resident within the district where the certificate is sought, or else having no fixed place of residence. The Act does not make provision for administration of the effects of a foreigner domiciled abroad. **IBRAHIM ALIKHAN v. ZIAUL-NISSA LADLI BEGAM.**

[I. L. R. 12 Bom. 150]

(3) **RIGHT TO SUE OR EXECUTE DECREE  
WITHOUT CERTIFICATE.**

5.—*Act XXVII of 1860, s. 2.—Suit by representative of deceased creditor—Special defence when not put in issue, Effect of—Want of certificate under Act XXVII of 1860, Plea of.* The want of a certificate under Act XXVII of 1860 is not of itself necessarily a bar to a suit by the representative of a deceased creditor, and such a special defence, unless insisted upon and put in issue in the Court of First Instance, should not be entertained in appeal. *Semble.*—The word "*debtor*" in s. 2 of Act XXVII of 1860 does not include the purchaser of a mortgaged property, who is in no sense a debtor; nor does that section contemplate a case of a decree other than a personal decree. *Janaki Ballav Sen v. Hafiz Mahomed Ali*, I. L. R. 13 Calc. 47, doubted. **ROGHU NATH SHAHA v. PORASH NATH PUNDARI.**

[I. L. R. 15 Calc. 54]

# CERTIFICATE OF ADMINISTRATION— *continued.*

## (3) RIGHT TO SUE OR EXECUTE DECREE WITHOUT CERTIFICATE—*concluded.*

6—*Act XXVII of 1860—Adoptive son of deceased creditor.* Suit by the adoptive son of the obligee (deceased) of a hypothecation bond to recover principal and interest due on the bond against the land comprised in the hypothecation. Defendant No. 1, the obligor of the bond, had executed it as manager of a joint Hindu family, of which defendant No. 2 was a member, and for the rightful purposes of the family. The family subsequently became divided, and the hypothecated property was divided between defendants Nos. 1 and 2. Defendant No. 1 afterwards hypothecated part of his share for a private debt to defendant No. 3, who having sued on his hypothecation and brought the land to sale in execution became the purchaser: *Held*, that the plaintiff was under no obligation to obtain a certificate under Act XXVII of 1860 for the purpose of maintaining the suit *GOPALA v SAMINATHAYAN*.

[I. L. R. 12 Mad. 255]

## (4) ISSUE OF AND RIGHT TO CERTIFICATE.

7—*Right to guardianship of Hindu widow—Grant of certificate of administration under Act XL of 1858* The relations of her deceased husband are entitled to be the guardians of a Hindu widow in preference to her paternal relations. A certificate of administration, under Act XL of 1858, was, therefore, granted to one of the former in preference to the latter. *KHUDIRAM MOOKERJEE v. BONWARI LALL ROY*.

[I. L. R. 16 Calc. 584]

## (5) NATURE AND FORM OF CERTIFICATE.

8.—*Joint certificate to widows of two sons of owner of estate.* R and his sons, L and S, were members of an undivided family. S predeceased R, who subsequently died, leaving L him surviving, and on the death of L, the widows of L and S applied for a joint certificate of heirship to the estate of R. Before their application was heard, L's widow repudiated the joint application, and prayed for the grant of a certificate to her alone. The District Judge, however, ordered a joint certificate to be issued to the two widows. On appeal from this order by L's widow, *held*, that, under Act XXVII of 1860, a joint certificate could not be granted. S having predeceased R, his interest in the family property and *sacra* reverted to R and L, and after L's death the estates vested in L's widow who had, therefore, a better claim to be entrusted with getting in the debts. The order of the lower Court was varied by directing the certificate to go to L's widow alone on her giving security for half the amount of the outstandings. *JANNABAI v HASTUBAI*.

[I. L. R. 11 Bom. 179]

9.—*Act XXVII of 1860, s. 6.—“Fresh certificate.”* The fresh certificate contemplated by s. 6

# CERTIFICATE OF ADMINISTRATION— *continued.*

## (5) NATURE AND FORM OF CERTIFICATE— *concluded.*

of Act XXVII of 1860, means a certificate granted to a person other than the person to whom the first certificate was granted. *NAURANGI KUNWAR v. RAGHUBANSI KUNWAR*.

[I. L. R. 9 All. 231]

## (6) PROCEDURE.

10—*Act XXVII of 1860—Rival claimants for certificate—Procedure—Trial of questions of title* In a case of rival claimants to a certificate under Act XXVII of 1860 to the estate of a deceased Mahomedan lady, A based his claim on the ground that the deceased was a Sunni, and that he being a Sunni was her nearest heir. B's claim was founded on the allegation that the deceased was a Shiah and that he being a Shiah had the preferential title. The Judge declined to receive the whole of the evidence tendered, and to go into the question of title. On appeal the case was remanded to the Judge for determination of the question whether the deceased was a Sunni or a Shiah, and which of the parties had the preferential title the certificate upon the entire evidence. *Per GHOSE, J.*—Where the question as to right to a certificate is between two parties, one of whom according to certain given facts would be the heir and the other a total stranger, those facts must be gone into and determined, although such procedure involve to a certain extent the trial of a question of title. Cases distinguished where the question of the title to obtain a certificate is raised between one who is undoubtedly a natural heir and another who sets up a special title, or between two persons equally entitled to the succession, but one of whom claims exclusive title upon some special grounds. *ASGAR REZA v. ABDUL HOSSEIN*.

[I. L. R. 15 Calc. 574]

## (7) CANCELMENT OR RECALL OF CERTIFICATE

11.—*Act XXVII of 1860, s. 6—Grant of certificate by District Court—Petition to High Court by objector for fresh certificate—Supersession of certificate granted by District Court.* S. 6 of Act XXVII of 1860 contemplates two different proceedings which may arise under different circumstances. One of these proceedings is an appeal, which has the effect of suspending the “granting,” i.e., the issuing of the certificate; and the intention of the Legislature was that, upon an adverse order being made, the person objecting to it might thereupon appeal, and the effect of this would be to oblige the District Judge to hold his hand and not to issue the certificate until the decision of the appeal. The other proceeding is by way of petition to the High Court, after the certificate has been granted by the District Court, to grant a fresh certificate in supersession of the first: and the latter portion of s. 6 shows that the person who obtains the

**CERTIFICATE OF ADMINISTRATION—concluded.****(7) CANCELMENT OR RECALL OF CERTIFICATE—concluded.**

fresh certificate need not be the person who obtained the first, and there is nothing to limit the powers of the Court on petition to grant a fresh certificate to any person, including the person who opposed the granting of the original certificate who may prove himself entitled thereto, or to confine the exercise of such powers to case, where the first certificate was defective in form. *GANGIA v. RANGI SINGH*.

[I. L. R. 9 All. 173]

**CERTIFICATE OF CONCILIATOR.**

See *DEKKAN AGRICULTURISTS RELIEF ACT*, s. 39.

[I. L. R. 13 Bom. 424]

**CERTIFICATE OF SALE.**

See *CIVIL PROCEDURE CODE*, 1882, s. 316

[I. L. R. 13 Bom. 670]

See *CASES UNDER SALE IN EXECUTION OF DECREE—PURCHASERS TITLE OF—CERTIFICATES OF SALE*

**CESS.**

See *CASES UNDER ROAD CESS ACTS.*

1.—*Madras Rent Recovery Act*, s. 11—*Water-Cess—Tenants—Cultivation improved by water taken from landlord's tank* A landlord has a right to charge water-cess when his tenant cultivates a wet crop on dry land or a second wet crop on wet land by means of water taken from the landlord's tank. *THAYAMMAL v. MUTTIA*.

[I. L. R. 10 Mad. 232]

2.—*Illegal Cess—Abwabs—Bengal Tenancy Act (VIII of 1885) ss. 74, 179—Bengal Regulations VIII of 1793, s. 54; V of 1812, ss. 2 and 3; and XVII of 1812, s. 2* What is or not an *abwab* must depend upon the circumstances of each particular case in which the question arises. Where by a *kabuliat* dated 1869 the defendant, as holder of a *mokurari* tenure, agreed to pay a certain fixed sum as rent, and also certain items designated *tehwari* and *salami*, it was held that they were not illegal cesses within the Full Bench Ruling of *Chultun Mahton v. Tulukdari Singh*, I. L. R. 11 Calc. 175, not being uncertain and arbitrary in their character, but specific sums which the tenants agreed to pay to the landlords, and the payment of which, no less than the payment of the rent itself, formed part of the consideration upon which the tenancy was created, and which were in fact part of the rent agreed to be paid, although not so described; they were recoverable therefore under Reg. V of 1812. *PUDMANUND SINGH BAHADUR v. BAIJ NATH SINGH*.

[I. L. R. 15 Calc. 823]

**CESS—concluded.**

3.—*Abwabs—Illegal Cess—Bengal Regulation VIII of 1793, ss. 54, 55, 61.* Abwabs which have been paid according to long standing customs, cannot be recovered unless they were payable at the time of the permanent settlement, and have been consolidated with the rent, under s. 54 of Reg. VIII of 1793. Section 61 prevents their being so recovered unless consolidated, while s. 55 renders new abwabs illegal. *TILUKDARI SINGH v. CHULTAN MAHTON*.

[L. R. 16 I. A 152]

[I. L. R. 17 Calc. 171]

**CHAMPERTY.**

1.—*Agreement to divide property after litigation if successful—Furnishing money under such agreement.* An agreement to furnish money for litigation on the terms of sharing the property to be recovered thereby is not necessarily void in India, unless accompanied by circumstances which lead to the conclusion that it was not a "*bona fide* one for the acquisition of an interest in the subject-matter of litigation, but an illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt and improper motive." *TARACHAND v. SUKLAL*.

[I. L. R. 12 Bom. 559]

2.—*Maintenance—Gambling in litigation—Agreement opposed to public policy—Act IX of 1872 (Contract Act), s. 23.* The judgment of the Privy Council in *Ram Coomarr Coondoo v. Chunder Canto Mookerjee*, L. R. 4 I. A 23; I. L. R. 2 Calc. 233, shows that while the specific English law of maintenance and champerty has not been introduced into India, and while fair agreements to supply funds to carry on litigation in consideration of having a share of the property if recovered should not be regarded as *per se* opposed to public policy, yet such agreements should be carefully watched, and if extortionate and unconscionable, or made not with the *bona fide* object of assisting, for a reasonable recompense, a claim believed to be just, but for the purpose of gambling in litigation, or of injuring or oppressing others by encouraging unrighteous suits, should be held contrary to public policy, and not enforced. For the purposes of meeting the expenses of an appeal to the High Court, the appellant, on the advice of his legal advisers, executed a bond for Rs. 25,000 in consideration of the obligee agreeing to defray such expenses. The obligor agreed to pay the Rs. 25,000 within one year from his recovering possession of the property in suit; and, at the request of the obligor's pleader, the obligee advanced Rs. 3,700, which was applied to the expenses of the appeal. The High Court dismissed the appeal; and in a deed executed by the obligor in favour of the obligee and others for the purpose of defraying the expenses of a further appeal to the Privy Council, he admitted his liability under the former bond. The Privy Council decreed his appeal, and he

**CHAMPERTY—concluded.**

obtained possession of the property in suit, but declined to pay the Rs. 25,000, upon which the obligee sued upon the bond. It was found that, apart from the moneys borrowed by the obligor from time to time, he was without even the means of subsistence: that he executed the bond with his eyes open and perfectly understood his position and the effect of both the instruments executed by him; that no fraud or improper pressure appeared to have been applied to him; that his legal advisers had acted honestly and to the best of their ability in his interests; that there was nothing to show that, having regard to the risks of the litigation, he could have obtained the assistance necessary for the prosecution of his appeal on better terms than those contained in the bond; that without such assistance he could not have appealed to the High Court; and that the obligee gave him such assistance upon his application. *Held*, also, that the obligee could not, under the circumstances, have considered both that the obligor's claim was a just one and reasonably likely to succeed, and that the Rs. 25,000 was a reasonable recompense in the event of success for the advance of Rs. 3,700: and the bond was therefore a gambling in litigation, which it would be contrary to public policy to enforce. The Court gave the plaintiff a decree for the Rs. 3,700 actually advanced, with simple interest at 20 per cent, per annum from the date of the bond to the date of the decree, with costs in proportion, and interest at 6 per cent, per annum on the Rs. 3,700, interest and costs, from the date of the decree until payment.

CHUNNI KUAR v. RUP SINGH

[I. L. R. 11 All. 57]

See LOKE INDAR SINGH v. RUP SINGH.

[I. L. R. 11 All. 118]

and HUSAIN BAKSH v. RAHMAT HUSAIN.

[I. L. R. 11 All. 128]

3.—*Bona-fide litigation—Absence of corrupt motive—Inadequacy of price*] In consideration of a loan of Rs. 30 made by plaintiff to defendant to enable defendant to recover from strangers certain land, defendant sold to plaintiff a portion of the said land, the value of which was about Rs. 100. The District Court held that the transaction was champertous and dismissed a suit by plaintiff to enforce his rights: *Held*, that the inadequacy of the price was not of itself sufficient to invalidate the transaction. GURUSAMI v. SUBBARAYA.

[I. L. R. 12 Mad. 118]

**CHARGE—concluded.**

s. 193 of the Penal Code, upon which the prisoner had not been committed for trial. *Queen-Empress v. Appa Subhanu Mendrr*, I. L. R. 8 Bom. 200, dissented from. *QUEEN-EMPRESS v. GORDON*.

[I. L. R. 9 All. 525.]

**CHARGE TO JURY.**

Col.

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| 1. Summing up in General Cases | ... 98 |
| 2. Misdirection                | ... 98 |

**(1) SUMMING UP IN GENERAL CASES.**

1.—*Criminal Procedure Code (Act X of 1882), s. 298—Duty of Judge when the jury are uncertain as to the offence committed*] A jury, after retiring, returned to the box, and after unanimously finding both prisoners not guilty of the charges framed against them, stated to the Judge that they thought an offence had been committed by one of the prisoners, but were uncertain as to the section of the Penal Code applicable to his case; the Judge thereupon made over to them a copy of the Penal Code, leaving them to decide under what section the offence fell. *Held*, that he had failed in his duty, and that he should have asked the jury what doubts they had as to the crime which had been committed, and should have explained to them the law and informed them what offence the facts would prove against the prisoner if they believed those facts. *JASPATH SINGH v. QUEEN-EMPRESS*.

[I. L. R. 14 Calc. 164]

**(2) MISDIRECTION.**

2.—*Criminal Procedure Code, s. 297—Evidence of accomplice—Corroboration.*] A Judge should caution a jury not to accept the evidence of an approver unless it is corroborated: the omission to do so amounts to misdirection. *QUEEN-EMPRESS v. ARUMUGA*.

[I. L. R. 12 Mad. 196]

**CHARITABLE TRUST, SUIT RELATING TO.**

See RIGHT OF SUIT—CHARITIES.

[I. L. R. 10 Mad. 185]

**CHEATING.**

1.—*Criminal Procedure, ss. 269, 417, and 420—Communicating syphilis by the act of sexual intercourse—Cheating.*] A prostitute, who, while suffering from syphilis, communicates the disease to a person who has sexual intercourse with her, is not liable to punishment under s. 269 of the Indian Penal Code (Act XLV of 1860) "for a negligent act and one likely to spread infection of any disease dangerous to life." *Semble*—She may be charged with cheating under ss. 417 or 420, if the intercourse was induced by any misrepresentation on her part. *QUEEN-EMPRESS v. RAKHMA*.

[I. L. R. 11 Bom. 59]

**CHEATING—concluded.**

2.—*Attempt to cheat—Penal Code, ss. 417, 463, 464, 465, 511—Forgery—False document—Fraudulent entry in a book of account.* Prisoner was requested to make an entry in a book of account belonging to the complainant to the effect that he was indebted to the complainant in a certain sum found due on a settlement of accounts instead of making this entry as requested, prisoner entered in a language not known to complainant that this sum had been paid to complainant. He was convicted of forgery under s 465 of the Penal Code: *Held*, that the offence was not forgery but an attempt to cheat. *QUEEN-EMPRESS v. KUNJU NAYAR.*

[I. L. R. 12 Mad. 114]

**CHEATING BY PERSONATION.**

*Penal Code, ss. 415, 419, 463—Forgery.* A falsely represented himself to be B, at a University examination, got a hall ticket under B's name. and headed and signed answer papers to questions with B's name. *Held*, that A committed the offences of forgery and cheating by personation. *QUEEN-EMPRESS v. APPASAMI*

[I. L. R. 12 Mad 151]

**"CHEQUE."**

*See* STAMP ACT 1879, SCH. I, ART. 11.

[I. L. R. 16 Calc 432]

**CHILD—CUSTODY OF.**

*See* CRIMINAL PROCEDURE CODE, 1882, s 51.

[I. L. R. 16 Calc. 487]

**CHOTA NAGPORE ENCUMBERED ESTATES ACTS (VI OF 1876 AND V OF 1884).**

*See* SPECIFIC PERFORMANCE—SPECIFIC PERFORMANCE ALLOWED

[L. R. 16 I A. 221]

[I. L. R. 17 Calc. 223]

**CITATION.**

*See* LETTERS OF ADMINISTRATION.

[I. L. R. 12 Bom. 164]

**CIVIL PROCEDURE CODE, 1882, s. 2.**

*See* CASES UNDER APPEAL—DECREES.

**—, s. 11.**

*See* INJUNCTION—SPECIAL CASES—INTRUSION UPON OFFICE.

[I. L. R. 11 Mad. 450]

*See* JURISDICTION OF CIVIL COURT—OFFICES, RIGHT TO.

[I. L. R. 15 Calc. 159]

[I. L. R. 11 Mad. 450]

[I. L. R. 13 Bom. 429]

**CIVIL PROCEDURE CODE, 1882, s 11—continued.**

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W P  
[I. L. R. 11 All 224]

*See* RIGHT OF SUIT—LANDLORD AND TENANT, SUITS CONCERNING.  
[I. L. R. 10 Mad. 368]

*See* RIGHT OF SUIT—OFFICE OR EMOLUMENT.  
[I. L. R. 15 Calc. 159  
[I. L. R. 13 Bom. 429]

**—, s. 12**

*See* RES JUDICATA—MATTERS IN ISSUE  
[I. L. R. 11 All. 148]

**—, s. 13.**

*See* CASES UNDER RES JUDICATA.

**—, s. 15.**

*See* CANTONMENT MAGISTRATE.  
[I. L. R. 12 Bom. 169]

**—, s. 19.**

*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION  
[I. L. R. 14 Calc. 661]

*See* SALE IN EXECUTION OF DECREE—INVALID SALES—WANT OF JURISDICTION.  
[I. L. R. 14 Calc. 661]

**—, s. 20.**

*See* STAY OF PROCEEDINGS.  
[I. L. R. 13 Bom. 178]

**—, s. 25.**

*See* CASES UNDER TRANSFER OF CIVIL CASE—GENERAL CASES.

**—, s. 26.**

*See* PARTIES—PARTIES TO SUITS—PARTNERSHIP, SUITS CONCERNING.  
[I. L. R. 9 All. 486]

*See* PARTNERSHIP—SUITS CONCERNING PARTNERSHIPS.  
[I. L. R. 9 All. 486]

**—, s. 27.**

*See* LIMITATION ACT, 1877, s. 22.  
[I. L. R. 14 Calc. 400]

*See* PARTIES—ADDING PARTIES TO SUITS—PLAINTIFFS.  
[I. L. R. 14 Calc. 400]

CIVIL PROCEDURE CODE, 1882—*contd.*

—, s. 30.

See PARTIES—ADDING PARTIES TO  
SUITS—PLAINTIFFS.

[I. L. R. 10 Mad 322

See CASES UNDER PARTIES—SUITS BY  
SOME OF A CLASS AS REPRESENTATIVES OF CLASS.

See RIGHT OF SUIT—CHARITIES.

• [I. L. R. 11 All. 18

—, s. 31.

See MISJOINDER.

[I. L. R. 14 Calc. 435

See PLAINT—AMENDMENT OF PLAINT.

[I. L. R. 11 Mad 42

See PLAINT—REJECTION OF PLAINT.

• [I. L. R. 14 Calc. 435

—, s. 32

See APPEAL—ORDERS.

[I. L. R. 12 Mad 483

See LIMITATION ACT, 1877, s. 22.

[I. L. R. 14 Calc. 400

See PARTIES—ADDING PARTIES TO SUITS  
—PLAINTIFFS.

[I. L. R. 14 Calc 400

See PARTIES—SUBSTITUTION OF PAR-  
TIES—RESPONDENTS.

[I. L. R. 9 All. 447

[I. L. R. 10 All. 223

—, s. 36.

See ADVOCATE.

[I. L. R. 9 All. 617

See PLEADERS—APPOINTMENT AND  
APPEARANCE.

[I. L. R. 9 All. 613

See RULES OF HIGH COURT—N.-W. P.

[I. L. R. 9 All. 613

—, s. 37.

See LEGAL PRACTITIONER'S ACT, s. 32.

[I. L. R. 14 Calc. 556

1.—*Authority of the Political Agent appointed by Government as manager of the estate of a minor Chief to sue in respect of the Chief's property in British territory—Recognized agent* [A suit was brought by the Political Agent, Southern Maratha Country, as administrator of the estate of the Chief of Mudhol, who was described in the plaint as being nineteen years of age, to eject the defend-

CIVIL PROCEDURE CODE, 1882, s. 37—*continued.*

ants from certain lands, belonging to the Chief situated in the Satara District. The defendants raised a preliminary objection to the institution of the suit by the Political Agent on the ground (among others) that he was not a *recognized agent* within the meaning of s. 37 of the Civil Procedure Code. *Held*, that the Political Agent was not a "recognized agent" of the Chief of Mudhol within the meaning of s. 37, cl. (c) of the Code of Civil Procedure. *VENKATRAV RAJE GHORPADE v. MADHARAV RAMCHANDRA*

[I. L. R. 11 Bom. 53

2.—*Recognized agents—Agent's right to execute decree obtained by him as agent—Waiver—Execution of decree.* [P filed a suit in the Second Class Subordinate Judge's Court at Mahad. As P resided at Thana, outside the jurisdiction of the Mahad Court, she authorized her agent, under a general power of authority, to conduct the suit on her behalf. The agent carried on the litigation up to the final decree passed by the High Court on appeal in P's favour. The agent then sought to execute the decree. The Court at Mahad passed an order upon his *darkhast* granting only partial execution. Against this order the agent filed an appeal in the District Court at Thana. Then, for the first time, the judgment-debtors challenged the agent's right to represent P who was residing within the District Court's jurisdiction. This objection prevailed, and the appeal was dismissed: *Held*, that the agent could not be prevented from executing the decree which he had obtained as agent. No objection had been taken to the agent's right to represent P at any stage of the litigation prior to the final decree. That objection must, therefore, be deemed to have been virtually waived, and could not be raised after the defendants had had their chance of success in the litigation. *PARVATIBAI v. VINAYEK PANDURANG*

[I. L. R. 12 Bom. 68

—, s. 39.

See ADVOCATE.

[I. L. R. 9 All. 617

See PLEADER—APPOINTMENT AND AP-  
PEARANCE.

[I. L. R. 9 All. 613

See RULES OF HIGH COURT—N.-W. P.

[I. L. R. 9 All. 613

—, s. 43.

See CASES UNDER RELINQUISHMENT OR  
OMISSION TO SUE FOR PORTION  
OF CLAIM.

—, s. 44

See CASES UNDER JOINDER OF CAUSES  
OF ACTION.

See MISJOINDER

[I. L. R. 9 All. 221

CIVIL PROCEDURE CODE, 1882—*contd.*

—, s. 50.

See PLAINT—AMENDMENT OF PLAINT.

[I. L. R. 10 Mad. 152]

See PLAINT—REJECTION OF PLAINT.

[I. L. R. 15 Calc. 533]

—, s. 53

See MISJOINDER.

[I. L. R. 14 Calc. 435]

See PLAINT—AMENDMENT OF PLAINT.

[I. L. R. 9 All. 188]

[I. L. R. 11 Mad. 42, 94]

See PLAINT—FORM AND CONTENTS OF PLAINT—DEFENDANTS.

[I. L. R. 9 All. 188]

See PLAINT—REJECTION OF PLAINT.

[I. L. R. 14 Calc. 435]

[I. L. R. 15 Calc. 533]

See PLAINT—VERIFICATION AND SIGNATURE.

[I. L. R. 9 All. 188]

—, s. 54.

See APPEAL—DECREES.

[I. L. R. 11 All. 91]

See PLAINT—AMENDMENT OF PLAINT.

[I. L. R. 11 Mad. 106]

See PLAINT—REJECTION OF PLAINT.

[I. L. R. 13 Bom. 517]

See VALUATION OF SUIT—SUITS.

[I. L. R. 13 Bom. 517]

—, s. 57.

See APPELLATE COURTS—EXERCISE OF POWERS IN VARIOUS CASES — SPECIAL CASES—PLAINT.

[I. L. R. 11 Mad. 482]

See PLAINT—RETURN OF PLAINT.

[I. L. R. 10 Mad. 211]

[I. L. R. 11 Mad. 482]

—, s. 72.

See SERVICE OF SUMMONS.

[I. L. R. 13 Bom. 500]

—, ss. 97, 98

See APPEAL—DEFAULT IN APPEARANCE.

[I. L. R. 10 Mad. 270]

—, ss. 97, 98 — *Default in appearance of parties.* A District Munsif struck a cause off the file of his Court on neither party appearing. *Held*, that the order to strike off the case was illegal. *ALWAR v. SESHAMMAL.*

[I. L. R. 10 Mad. 270]

CIVIL PROCEDURE CODE, 1882—*contd.*

—, s. 98.

See MUNSIF, JURISDICTION OF.

[I. L. R. 10 Mad. 290]

—, s. 99.

See MUNSIF, JURISDICTION OF.

[I. L. R. 10 Mad. 290]

—, s. 99a.

See SERVICE OF SUMMONS.

[I. L. R. 13 Bom. 500]

—, s. 100.

See MINOR—REPRESENTATION OF MINOR IN SUITS.

[I. L. R. 14 Calc. 204]

—, ss. 102, 103.

See APPEAL—DEFAULT IN APPEARANCE.

[I. L. R. 9 All. 427]

*Identity of causes of action in two suits, notwithstanding difference of relief claimed.* To a suit brought in 1883, for redemption of a mortgage made in 1853, of villages in Oudh, subsequently included in the mortgagee's *talukdari* estate and *sanad*, the defence was that, the mortgagor having brought a suit in 1864 to redeem, and not having appeared at the hearing, in person or by pleader, judgment was passed, the mortgagee having appeared to defend against the plaintiff under s. 114 of Act VIII of 1859: *Held*, that although the plaintiff, who had claimed in the prior suit the under-proprietary right in virtue of a sub-settlement, claimed in the present suit the superior proprietary right, the difference in the mode of relief claimed did not affect the identity of the cause of action, which was in both cases, the refusal of the right to redeem; and that under s. 114 of the Act the judgment of 1864 was final. *SHANKAR BAKSH v. DAYA SHANKAR*

[I. L. R. 15 Calc. 422]

[L. R. 15 I. A. 66]

2.—*Dismissal of suit for default—Difference in causes of action—Civil Procedure Code, ss. 13, 102, 103* The dismissal of a suit in terms of s. 102, Civil Procedure Code, is not intended to operate in favor of the defendant as *res judicata*. When read with s. 103, it precludes a fresh suit in respect of the same cause of action, referring, irrespectively of the defence or the relief prayed, entirely to the grounds, or alleged *media*, on which the plaintiff asks the Court to decide in his favor. Brother's sons, as nearest agnates of a deceased proprietor, sued for a decree, declaring that a gift, before then made by the widow in favor of her daughter's son, of the estate of her late husband, would not operate against their right of succession on her death. A prior suit, before the date of the gift, brought by two of the plaintiffs for a declaratory decree, and an injunction restraining the



**CIVIL PROCEDURE CODE, 1882, ss. 102, 103—continued.**

widow from alienating the same estate, had been dismissed under the provisions of ss. 102 and 103 (Act X of 1887), Civil Procedure Code. *Held*, that the causes of action in the two suits were not identical, and the fresh suit was not precluded by s. 103, the gift having afforded the new ground of claim, which also had subsequently arisen. **CHAND KOUR v. PARTAB SINGH.**

[I. L. R. 16 Calc. 98

[L. R. 15 I. A. 156

—, s. 103.

*See* SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 10 All. 119

*Application to set aside order of dismissal made under s. 102—Sufficient cause for non-appearance of plaintiff when suit called on for hearing.* The plaintiff duly attended the Court on the day fixed for the hearing of his case, and waited for some time as the Judge happened to be sitting on that day at first in the Appeal Court. Believing that when the Judge took his seat in his own Court, a part heard case would be proceeded with and would occupy some time, the plaintiff left the Court-house and went to assist his employer, who had sent for him to explain some matters connected with a mercantile transaction. The plaintiff returned to the Court in about half an hour, and found that in his absence his suit had been called on for hearing and dismissed under s. 102 of the Civil Procedure Code (Act XIV of 1882). On application under s. 103 to set aside the order of dismissal: *Held*, refusing the application, that the above circumstances did not amount to "sufficient cause" for his non-appearance when his suit was called on for hearing. He was not taken unawares. He was under no compulsion to leave the Court, nor was his absence due to any weighty cause. He accepted the risk of the case being called on in his absence. **MUNILAL DHUNJI v. GULAM HUSEIN VAZEER.**

[I. L. R. 13 Bom. 12

—, s. 103.

*See* APPEAL—EX-PARTE CASES.

[I. L. R. 16 Calc. 426

—, s. 111.

*See* COURT-FEES ACT s. 6.

[I. L. R. 13 Bom. 672

*See* SET-OFF—SET-OFF ALLOWED.

[I. L. R. 12 Bom. 31

[I. L. R. 10 All. 587

[I. L. R. 16 Calc. 711

*See* SUBORDINATE JUDGE, JURISDICTION OF.

[I. L. R. 12 Bom. 31

**CIVIL PROCEDURE CODE, 1882—contd.**

—, ss. 125, 127.

*See* PRACTICE—CIVIL CASES—INTERROGATORIES.

[I. L. R. 14 Calc. 703

—, ss. 131-341.

*See* INSPECTION OF DOCUMENTS.

[I. L. R. 14 Calc. 768

*See* PRACTICE—CIVIL CASES—INSPECTION AND PRODUCTION OF DOCUMENTS.

[I. L. R. 14 Calc. 768

—, s. 146.

*See* INSPECTION OF DOCUMENTS.

[I. L. R. 14 Calc. 768

*See* PRACTICE—CIVIL CASES—INSPECTION AND PRODUCTION OF DOCUMENTS.

[I. L. R. 14 Calc. 768

—, s. 146.

*See* VARIANCE BETWEEN PLEADING AND PROOF—SPECIAL CASES—TITLE

[I. L. R. 11 Mad. 367

—, ss. 146, 147.

*See* RELIEF.

[I. L. R. 10 Mad. 375

—, s. 149.

*See* CASES UNDER ISSUES.

—, ss. 157, 158.

*See* APPEAL—DEFAULT IN APPEARANCE.

[I. L. R. 10 Mad. 270

—, s. 158.

*See* RES-ADJUDICATA—ADJUDICATIONS.

[I. L. R. 10 Mad. 272

—, s. 158.—*Dismissal of suit for insufficient court-fee on plaint.* The Court of First Instance being of opinion that the plaint bore an insufficient court-fee, and the plaintiff not making good the deficiency, dismissed the suit after recording evidence, but without entering into the merits. On appeal the lower Appellate Court held that the Court-fee was sufficient, and remanded the case for trial on the merits: *Held*, that s. 158 of the Civil Procedure Code was not applicable to the case. **MUHAMMAD SADIK v. MUHAMMAD JAN.**

[I. L. R. 11 All. 91

—, s. 174

*See* PRODUCTION OF DOCUMENTS.

[I. L. R. 12 Bom. 63

*See* WITNESS—CIVIL CASES—ABSCONDING WITNESSES.

[I. L. R. 12 Bom. 63

CIVIL PROCEDURE CODE, 1882—*contd.*

—, s. 206.

*See* APPEAL—ORDERS.

[I. L. R. 11 All. 314]

*See* CASES UNDER DECREE—ALTERATION  
OR AMENDMENT OF DECREE.

[I. L. R. 10 All. 51.]

[I. L. R. 11 All. 267]

*See* EXECUTION OF DECREE—DECREE TO  
BE EXECUTED AFTER APPEAL &c.

[I. L. R. 11 All. 267]

*See* LIMITATION ACT 1877, s. 178.

[I. L. R. 10 Mad. 51]

[I. L. R. 11 Bom. 284]

[I. L. R. 9 All. 364]

*See* SUPERINTENDENCE OF HIGH COURT  
—CIVIL PROCEDURE CODE, 1882,  
s. 622.

[I. L. R. 10 Mad. 51]

—, s. 209.

*See* INTEREST—OMISSION TO STIPULATE  
OR STIPULATED TIME HAS EXPIRED  
—CONTRACTS.

[I. L. R. 12 Mad. 485]

—, s. 213.

*See* ADMINISTRATION.

[I. L. R. 15 Calc. 202]

*See* EXECUTION OF DECREE—STAY OF  
EXECUTION.

[I. L. R. 15 Calc. 202]

—, s. 214.

*See* CASES UNDER PRE-EMPTION.

—, s. 216.

*See* APPEAL—BOMBAY ACTS - BOMBAY  
CIVIL COURTS ACT.

[I. L. R. 10 All. 587]

*See* COURT FEES ACT, s. 6.

[I. L. R. 13 Bom. 672]

*See* SET-OFF—SET-OFF ALLOWED.

[I. L. R. 10 All. 587]

—, s. 223

*See* CASES UNDER EXECUTION OF DECREE  
—TRANSFER OF DECREE FOR EXE-  
CUTION.

—, s. 224 cl. (c)

*Meaning of the words "a copy of any  
order for the execution of the decree." The words  
"a copy of any order for the execution of the*CIVIL PROCEDURE CODE, 1882, s. 224—  
*continued.**decree*" in s. 224, cl. (c), of the Code of Civil  
Procedure (Act XIV of 1882) mean a copy of any  
*subsisting* order HATHIBHAI NAHANSI v. PATEL  
BECHAR PRAGJI

[I. L. R. 13 Bom. 371]

—, s. 229.

*See* EXECUTION OF DECREE—TRANSFER  
OF DECREE FOR EXECUTION AND  
POWER OF COURT, &c.

[I. L. R. 15 Calc. 365]

—, s. 230.

*See* EXECUTION OF DECREE—APPLICA-  
TION FOR EXECUTION, &c.

[I. L. R. 12 Bom. 400]

1.—s. 230—*Decree—Execution—Decree more  
than twelve years old—Limitation*] An appli-  
cation for execution of a decree obtained against  
the judgment-debtor in 1876 was presented by the  
applicant on the 26th January 1885. Several  
previous applications for execution had been made,  
and the last two, *viz.*, on the 29th July 1881 and  
29th June 1882, had been granted. The judg-  
ment-debtor was arrested and brought before the  
Court. He contended that execution of the decree  
was barred. Both the lower Courts were of opin-  
ion that the decree was not barred, and allowed  
execution to issue. On appeal by the judgment-  
debtor to the High Court: *Held*, that the appli-  
cation for execution was too late. As there had  
been an application made and granted on the 29th  
July 1881, under the Code of 1877, and twelve  
years from the date of the decree would have  
elapsed before June 1885, the application in  
question was barred, and was not saved by the  
concluding clause of s. 230 of the Code (Act XIV  
of 1882). MOTICHAND v. KRISHNARAY GANESH.

[I. L. R. 11 Bom. 524]

2.—s. 230—*Execution proceedings—Limita-  
tion*] An application was made in 1886 for execu-  
tion of a decree dated 1873. In the interval, *viz.*,  
in October 1879, the judgment-debtor was arrested  
on an application in execution by the decree-  
holder, but execution was not proceeded with  
further: *Held*, that an application made in 1886  
was time-barred under s. 230 of the Code of Civil  
Procedure. PATUMMA v. MUSE BEARI.

[I. L. R. 11 Mad. 132]

3.—s. 230.—*Limitation—Execution of decree—  
Order directing payment of money at a certain  
date.*] A judgment-debtor on being arrested in  
execution of a decree, presented a petition asking  
for fifteen days' time to pay the amount of the  
decree, and, the decree-holders consenting, the  
Court made an order in the terms, "let the peti-  
tion be filed:" *Held*, that this order did not  
amount to one directing payment of money to be  
made at a certain date within the meaning of

**CIVIL PROCEDURE, CODE, 1882, s. 230—**  
*continued.*

s. 230, cl (b), of the Civil Procedure Code. *Bul Chand v Raghunath Das*, I. L. R. 4 All. 155, followed. *JOGOBUNDHOO DAS v HORI RAWOOT*.  
[I. L. R. 16 Calc. 16]

4.—s. 230.—*Application to transfer decree for execution—Application for execution of decree—“Granting” application, Meaning of—Issue of process.* An application to the Court which passed a decree for a certificate to allow execution to be taken out in another Court, is not an application for the execution of the decree within the terms of s. 230 of the Code of Civil Procedure. The “granting” of an application under that section includes the issue of process for execution of the decree. *NILMONEY SING DEO v. BIRESSUR BANERJEE*.  
[I. L. R. 16 Calc. 744]

—, s. 232.

*See* s. 244—PARTIES TO SUITS.

• [I. L. R. 15 Calc. 371]

*See* APPEAL—ORDERS.

[I. L. R. 12 Mad. 511]

*See* EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES.

[I. L. R. 15 Calc. 371]

1.—s. 232.—*Bengal Tenancy Act, s 148 (h) Decree for arrears of rent, Assignment of—Execution of decree by Assignee.* The fact that an assignment of a decree for arrears of rent was made before the Tenancy Act will not protect from the provisions of s. 148(h) an assignee who proceeds to execution afterwards but execution cannot be refused where before that Act came into operation, the assignment had been recognised by a Court of execution under s. 232 of the Civil Procedure Code. *KOILASH CHUNDER ROY v. JODONATH ROY*.  
[I. L. R. 14 Calc. 380]

2.—s. 232.—*Assignment of decree—Execution of a decree of the Agent for Sardars—Rights of transferee of a decree.* A in 1839 obtained a decree against B, a sardar, in the Court of the Agent for Sardars. The decree was executed in the agent's Court until B's death in 1868. B's status as a sardar under the exclusive jurisdiction of the Agent did not descend to his sons, and the decree was transferred to the Court of the First Class Subordinate Judge at Ahmednagar for execution. The case went up twice to the High Court, under whose orders the execution was for several years continued in favour of A's representative against the estate of B's sons. In 1885, one of A's representatives assigned his interest under the decree to C and D. Thereupon the transferees C and D applied to the First Class Subordinate Judge at Ahmednagar to have their names substituted in the place of the transferor in the execution proceedings. The Subordinate Judge

**CIVIL PROCEDURE CODE, 1882, s. 232—**  
*continued.*

rejected this application, on the ground that he could not recognise the transfer of the decree either under ss 372 or 232 of the Civil Procedure Code (Act XIV of 1882) : *Held*, reversing the order of the lower Court, that the assignment of the decree-holder's rights to execution in the case was one approved by the law as contained in s 232 of the Code of Civil Procedure (Act XIV of 1882). The transferee of a decree gains by the transfer the rights of the transferor. *VISHNU SAKHARAM NAGARKAR v. KRISHNARAO MALHAR*

[I. L. R. 11 Bom. 153]

3.—s 232.—*Certificate of administration under Bombay Regulation VIII of 1827, S. 7—Holder of such certificate—Right to execute decree as transferee.* A holder of a certificate of administration granted under s. 7 of Regulation VIII of 1827 is a transferee by law of a decree obtained by the deceased within the meaning of s 232 of the Civil Procedure Code (Act XIV of 1882), and is competent to apply for execution of such a decree. *KHANDERAV RAYAJIRAV v. GANESH SHASTRI*.

[I. L. R. 11 Bom. 368]

4.—s. 232.—*Transfer of decree—Notice of transfer—Transferee's rights—Legal representative of a deceased judgment-debtor.* The transferee of a decree stands in the same position for getting execution as the transferor. If a decree is transferred by assignment after the death of the judgment-debtor, notice of the transfer, as required by s. 232 of the Civil Procedure Code (Act XIV of 1882), may be served on the legal representative of the deceased judgment-debtor. The death of the judgment-debtor does not render the transferred decree incapable of execution. *KHUSHROBHAI NASARANJI v. HORMAZSHA PHIROZSHA*.

[I. L. R. 11 Bom. 727]

5.—s. 232.—*Assignee of decree, Execution by—Execution by assignee—Cross decrees—Discretionary power of Court under s. 232 of Act XIV of 1882.* The discretion given to a Court under s. 232 of the Code of Civil Procedure as to allowing execution of decree by assignees must be exercised reasonably. The mere fact of the existence of a cross claim against the assignor of a decree by his judgment-debtor is no reason for refusing issue of execution on the application of the assignee. *KRISHNA MOHINI DOSSEE v. KEDARNATH CHUCKERBUTTY*.

[I. L. R. 15 Calc. 446]

6.—s 232.—*Transfer of decree by operation of law—Representative of original decree-holder—Civil Procedure Code (Act XIV of 1882), s. 244—Right to appeal against order refusing execution.* R died in May 1859, leaving his property to his executors in trust for the appellant P, and he

CIVIL PROCEDURE CODE, 1882, s. 232—  
*continued.*

directed that the property should be assigned by them to the appellant as soon as he came of age. In August 1868, the executors filed this suit against *L* as manager of certain landed property belonging to the Hallai Bhattia caste, and known as *Mahajan Wadi*, to recover certain loans made by them as executors to him as manager of the said *wadi*. On the 11th May 1870, while this suit was pending, the executors assigned all the property of their testator to the appellant *P*. By the deed of assignment they assigned to him (*inter alia*) "all moveable property, debts, claims and things in action whatsoever vested in them as such executors." No steps were taken, subsequently to this assignment, to make the assignee *P* a party to the suit, which proceeded without amendment. On the 23d January 1873, a decree was passed for the plaintiffs on the record for Rs. 31,272-13-5, and it was declared that the said sum should be a first charge on the rents and income of the said *wadi*. Subsequently to this decree, *L* opened an account in the name of the appellant *P*, and from time to time made payments to him on account of the decree. The last of these payments was made on the 19th November 1884. None of these payments were certified to the Court. In 1885 the respondent *V* was appointed to the office of manager of the Hallai Bhattia caste in the place of *L*, the original defendant in the suit. On the 4th January 1886, his attorneys wrote to the appellant's attorneys offering to pay the appellant the balance due to him under the decree. Subsequently, however, he refused to make any payment to the appellant, whereupon the appellant applied for execution of the decree against him as manager of the said *wadi*. He claimed to be a transferee of the decree under s. 232 of the Civil Procedure Code (Act XIV of 1882). His application was refused by the Judge in chambers: *Held*, that the appellant was a transferee of the decree within the meaning of s. 232 of the Civil Procedure Code (Act XIV of 1882). The decree had been transferred to him "by operation of law." As such, he was entitled to sue out execution, and was to be regarded as the representative of the original decree-holder within the meaning of cl. (c) of s. 244 of the Civil Procedure Code (Act XIV of 1882), and had a right of appeal against the order of the Judge in chambers refusing execution. *PARMANANDAS JIWANDAS v. VALLABDAS WALLJI*.

[I. L. R. 11 Bom. 506]

7.—s. 232.—*Transfer of decree—Representatives of intermediate transferee—Omission to give notice of application for substitution of names—Title of Assignee.* The holders of a decree for the sale of mortgaged property having transferred the same to *M* by registered instrument, *M* transferred the decree to other persons, and the co-transferees applied under s. 232 of the Civil Procedure Code to have their names substituted for those of the original decree-holders. The judgment-debtor opposed the application on the ground that *M*'s

CIVIL PROCEDURE CODE, 1882, s. 232—  
*continued.*

name had not been substituted for the names of the original decree-holders who had transferred to him. It appeared that no notice had been issued to *M* under s. 232 of the Code, that he was dead, and that his legal representative had not been cited as required by law. The application was allowed by the Courts below: *Held*, that, even assuming that the judgment-debtor had a *locus standi* to raise the objection that notice had not been issued to the applicants' transferor, he had no possible interest in the question, and could not be prejudiced by the passing of the order; that it was not necessary to cite the representatives of the transferor; and that the order not being one upon which execution of the decree could issue, but merely for a transfer of names, the objection that the transferor had not been cited under s. 232 was not a substantial one: *Held*, that it could not be said that where a decree has been assigned by one assignor to another, the substitution of his name on the record in lieu of that of the original decree-holder was a condition precedent to the assignor's passing title under the assignment. *GULZARI LAL v. DAYA RAM*.

[I. L. R. 9 All. 46]

8.—s. 232.—*Transfer of decree for execution by operation of law—Civil Procedure Code (Act XIV of 1882), s. 232—Right of procedure—Execution under Bengal Act VIII of 1869 and Act VIII of 1885.* Upon the death of the full owner, the mother took out probate of a will in which she was appointed executrix. The will was afterwards disputed by the minor son of the testator, and probate was revoked but while the mother was in possession of the estate as executrix, she sued and obtained a decree for rent under Bengal Act VIII of 1869. Upon the application of the minor for the execution of the decree: *Held*, that the minor was in a position to execute the decree, his succession to the estate of his father being a succession or transfer by operation of law within the meaning of s. 232 of the Code of Civil Procedure: *Held*, also that the mode in which the decree was executed under the old Rent Act, Bengal Act VIII of 1869, was, in so far as it was a right at all that belonged to the judgment-creditor, not a private right, but a mere right of procedure, and the execution was, therefore, to be governed by Act VIII of 1885. *UMASOONDURY DASSY v. BROJONATH BHUTTACHARJEE*.

[I. L. R. 16 Calc. 347]

—, s. 234.

See EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES.

[I. L. R. 10 Mad. 283]

See EXECUTION OF DECREE—MODE OF EXECUTION—MAINTENANCE.

[I. L. R. 10 Mad. 283]

CIVIL PROCEDURE CODE, 1882, s. 234—  
*continued.*

See REPRESENTATIVE OF DECEASED PERSON.

[I. L. R. 12 Mad. 90]

See SALE IN EXECUTION OF DECREE—  
DECREES AGAINST REPRESENTA-  
TIVES.

[I. L. R. 12 Mad. 90.]

—, s. 235.

See EXECUTION OF DECREE—APPLICA-  
TION FOR EXECUTION.

[I. L. R. 12 Bom. 400]

See EXECUTION OF DECREE—STAY OF  
EXECUTION.

[I. L. R. 10 All. 389]

See SALE IN EXECUTION OF DECREE—  
DISTRIBUTION OF SALE PROCEEDS.

[I. L. R. 12 Bom. 400]

—, s. 243.

See APPEAL—ORDERS.

[I. L. R. 10 All. 389]

See EXECUTION OF DECREE—STAY OF  
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[I. L. R. 10 All. 389]

—, s. 244.

*Col.*

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TION FOR EXECUTION AND POWERS  
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[I. L. R. 10 Mad. 367]

See MESNE PROFITS—ASSESSMENT IN  
EXECUTION AND SUITS FOR MESNE  
PROFITS.

[I. L. R. 14 Calc. 484, 605]

See RES JUDICATA—COMPETENT COURT—  
GENERAL CASES.

[I. L. R. 14 Calc. 640]

See RES JUDICATA—ORDERS IN EXECU-  
TION OF DECREE.

[I. L. R. 14 Calc. 640]

## (1) QUESTIONS IN EXECUTION OF DECREE.

1—s. 244.—*Meaning of section*] S. 244 of the Civil Procedure Code contemplates that

CIVIL PROCEDURE CODE, 1882, s. 244—  
*continued.*(1) QUESTIONS IN EXECUTION OF DECREE  
—*continued*

there must be some question in controversy and conflict in execution, which has been brought to a final determination and conclusion, so as to be binding upon the parties to the proceedings and which must relate in terms to the execution, discharge, or satisfaction of the decree. *HULAS RAI v. PIRTHI SINGH.*

[I. L. R. 9 All. 500]

2—s. 244—*Hindu Law—Obligation of son to pay debt of deceased father—Nature of obligation*] *D* obtained a decree against the father of *A* and *R*, Hindus, on a hypothecation bond, whereby certain land was pledged as security for repayment of a loan. The decree declared the land liable to be sold for repayment of the debt. The judgment-debtor having died before the decree was executed, *A* and *R* were made parties to the proceedings in execution and the land was attached. *A* and *R* objected to the attachment on the ground that their shares in the land were not liable to be sold in execution of the decree, as they were not parties to the suit. This objection was allowed, and *D* brought a suit for a declaration that the property was liable to be sold. That suit was dismissed on the ground, that a suit for a declaration would not lie. *D* then sued to recover from *A* and *R* the balance due under the decree against their father after crediting the amount recovered by the sale of their father's share. It was objected that the suit was barred by s. 244 of the Code of Civil Procedure. *Held*, that the duty of a son under Hindu law to pay his father's debt out of his own share of ancestral estate is not a matter which can be decided under s. 244 of the Code of Civil Procedure. The questions contemplated by s. 244 are those which relate to the enforcement of the obligation created by the decree. The obligation to pay the father's debts out of the son's share of the ancestral estate is not an obligation created by a decree against the father. *ARIABUDRA v. DORASAMI.*

[I. L. R. 11 Mad. 413]

3.—s. 244—*Question as to amount of security on stay of execution pending appeal*] The question as to the amount of security to be given by a defendant against whom a decree has been passed, when a stay of execution is granted pending appeal is a question relating to the execution of the decree as contemplated by s. 244 of the Civil Procedure Code. *ISHWAGAR v. CHUDASAMA MANABHAI.*

[I. L. R. 12 Bom. 30]

4—s. 244.—*Claim to attached property—Question to be decided in execution—Liability of property to be sold in execution.*] The question whether property is liable to be sold in execution of a decree is one to be determined under s. 244 of the Code of Civil Procedure. *Chowdhry Wahed*

CIVIL PROCEDURE CODE, 1882, s. 244—  
*continued.*(1) QUESTIONS IN EXECUTION OF DECREE  
*—continued.*

*Ali v. Jumace*, 11 B. L. R. 149; 18 W. R. 185, followed in principle. *MUNGESHUR KUAR v. JUMOONA PERSAD*.

[I. L. R. 16 Calc. 603]

5.—s. 244—*Suit to set aside sale—Fraud—Sale under Act X of 1859—Act XXIII of 1861, s. 11.* *B* obtained an *ex parte* decree for arrears of rent against *S* under Act X of 1859, and in execution of that decree brought the tenure to sale. At the sale the tenure was purchased by *N*. *S* then brought a suit against *B* and *N* to set aside the sale, on the ground that the rent decree and all execution proceedings taken thereunder were fraudulent, and alleging that *B* was the actual purchaser in the name of *N*. An objection was taken that the suit would not lie, and that the questions in the suit were such as could have been determined, and were determined, by the Court executing the decree: *Held*, that neither s. 244 of the Civil Procedure Code, nor the corresponding s. 11 of Act XXIII of 1861, had any application to proceedings in execution of a decree under Act X of 1859, and that the suit, being one to set aside the sale on the ground of fraud, was maintainable. *Saroda Churn Chuckerbutty v. Mahomed Isuf Meah*, I. L. R. 11 Calc. 376, distinguished. *BROJO GOPAL SARKAR v. BUSIRUNNISSA BIBI*.

[I. L. R. 15 Calc 179]

6.—s. 244—*Adjustment of decree—Suit to recover instalments due under a mortgage made in adjustment of a decree* [A suit will not lie to enforce an uncertified agreement of adjustment of a decree against a judgment-debtor, the consideration for which is, that it shall operate in satisfaction of the decree; as there is, in that case, no consideration which the Court can recognize, and therefore no valid consideration for the judgment-debtor's agreement. The plaintiff was the assignee of a decree obtained by one *O K* against the defendants on the 5th May 1883. By that decree *O K* was declared entitled to recover Rs. 9,961-5-6, with interest at nine per cent, from the defendants; and payment was ordered to be made to him of the said sum by weekly instalments of Rs. 200. In order to secure the payment of the said instalments, the defendants were required to execute a mortgage to *O K* of certain property, with power to him to sell the same, and to execute the decree for the whole amount, in case of default for six months. *OK* assigned the decree to the plaintiff in the present suit, and subsequently to the assignment (*viz*, on the 21st July 1883), the defendants executed to the plaintiff the mortgage on which the present suit was brought. The mortgage-deed, after reciting the above facts, stated that the defendants had agreed to satisfy the amount of the decree, and it contained a covenant, by the defendants, that they would pay Rs. 9,961-5-6,

CIVIL PROCEDURE CODE, 1882, s. 244—  
*continued.*(1) QUESTIONS IN EXECUTION OF DECREE  
*—continued.*

with interest at six per cent. by *monthly* instalments of Rs. 400 from the 21st August 1883. The mortgage, therefore, differed from the decree, both with regard to the instalments and the rate of interest. The plaintiff sued to recover the sum of Rs. 4,207, being the amount of instalments due to him under the said mortgage: *Held*, that the suit would not lie, as the mortgage was an adjustment of the decree, and had not been certified to the Court, as required by s. 258 of the Civil Procedure Code (Act XIV of 1882) *ABDUL RAHMAN v. KHOJA KHAKI ARUTH*.

[I. L. R. 11 Bom. 6]

7.—s. 244—*Civil Procedure Code 1882 ss. 257a and 258—Adjustment of decrees more than three years old—Reference under s. 617 of a question arising under these sections* [On the 22nd March, 1886, the applicant presented an application to a Subordinate Judge, praying that the adjustment of certain decrees, dated the 28th March, 1867, and 11th July 1871, might be certified, and a sanction granted to a *sankhat*, dated 18th March 1880, passed to him by the defendant in satisfaction of the said decrees and in substitution of two bonds, dated February 1879. The Subordinate Judge being of opinion that the application could not be granted, inasmuch as the execution of the decrees was then barred by limitation, referred the case to the High Court under s. 617 of the Civil Procedure Code (Act XIV of 1882): *Held*, that the question could not be referred under s. 617 of the Civil Procedure Code (Act XIV of 1882), as the order applied for to the Subordinate Judge was appealable under s. 2 of the Code. The question raised by the application related to the satisfaction of the decree within the meaning of s. 244 of the Code, *RANGJI v. BHAIJI HARJIVAN*.

[I. L. R. 11 Bom. 57]

8.—s. 244.—*Application to set aside sale—Civil Procedure Code 1882, s. 294.* [An application under s. 294 of the Civil Procedure Code to have a sale set aside on the ground that the purchaser took nothing by his purchase, inasmuch as he was the holder of the decree in execution of which the property was sold is a matter in execution falling under s. 244 of the Code. *Viraraghava v. Venkata*, I. L. R. 5 Mad. 217, followed. *CHINTA-MANRAY NATTHU v. VITHABAI*.

[I. L. R. 11 Bom. 588]

9.—s. 244—*Compromise for larger amount than that claimed—Refusal of execution for larger amount—Suit for amount of compromise.* [The parties to a suit agreed upon a compromise, the result of which was that the plaintiff obtained by the decree a greater quantity of land than he had originally claimed, and a decree was drawn up in accordance with the compromise. In the execution

CIVIL PROCEDURE CODE, 1882, s. 244—  
*continued.*(1) QUESTIONS IN EXECUTION OF DECREE  
—*continued.*

proceedings, the defendant raised an objection that the plaintiff could not have execution for a greater quantity of land than he had claimed originally, and the Court executing the decree allowed the objection. No appeal from the Court's order was made, but the plaintiff brought a suit to recover possession of the larger amount of land mentioned in the compromise: *Held*, that the order of the Court executing the decree was erroneous in law and might properly be reconsidered upon an application for review; but that the present suit came within s. 244 of the Civil Procedure Code, and therefore could not be maintained. *MOHIBULLAH v. IMAMI.*

[I. L. R. 9 All. 229]

10.—s. 244—*Judgment-debtor as part-purchaser of a decree.* Suit by *J H D* and *R D* owned a 6-anna share in certain decrees. The other decree-holder subsequently sold their 10-anna share to *H S* and *S M*, two of the judgment-debtors. *H D* and *R D* then proceeded to execute the decrees, and in satisfaction thereof were allowed to receive, upon giving security under s. 231 of the Code, the full 16-anna share of the decretal amount from *H S* and *S M*, notwithstanding the objection of the latter on the ground of their purchase. Thereupon *H S* and *S M* brought a suit for declaration of their right of purchase and the recovery of a 10-anna share of the money in the hands of *H D* and *R D*. *Held*, that the plaintiffs were entitled to the relief sought for: *Held*, also, that the provisions of s. 238 of the Civil Procedure Code did not affect the suit, which was brought, not upon the allegation that the decrees were satisfied by the plaintiffs' purchase, but, on the contrary, was founded upon the proposition that the decrees were not so satisfied. *Abdul Rahman v. Khoja Khaki Aruth*, I. L. R. 11 Bom. 6, referred to: *Held*, further, that the claim was not within the words "relating to the execution of the decree" in s. 244 of the Civil Procedure Code, inasmuch as it did not raise any question in respect to the furtherance of, or hindrance to, or the manner of carrying out, the execution of the decrees. *HARAGOBIND DAS KOIBURTO v. ISSURI DAS.*

[I. L. R. 15 Cal. 187]

11.—s. 244 — *Question whether lands were included in decree—Act VIII of 1859, s. 337—Act XXIII of 1861, s. 11.* The father of the defendant in 1853 obtained a decree against the father of the plaintiff and other persons for partition of village lands. The decree directed that in effecting the partition certain *dhara* lands then occupied by the plaintiff's father were not to be included. Application for execution of that decree was made in 1861, but the execution proceedings remained pending until 1882. On the 12th December 1882, the decree was executed, and the defendant (his

CIVIL PROCEDURE CODE, 1882, s. 244—  
*continued.*(1) QUESTIONS IN EXECUTION OF DECREE  
—*continued.*

father being then dead) was put into possession of the lands now in dispute as being part of the lands to which he was entitled under the decree. The plaintiff objected that these lands were not subject to partition under the decree, and he applied for an order that they should be delivered back to him. His application was rejected, and he thereupon brought the present suit to recover the lands from the defendant. The Court of First Instance was of opinion that the question raised in the suit related to the execution of the decree made in 1853, and under s. 244 of the Civil Procedure Code, Act XIV of 1882, could not be raised again by a separate suit. The plaintiff appealed to the Assistant Judge, who reversed the lower Court's decree. On appeal by the defendant to the High Court: *Held*, reversing the decree of the lower Appellate Court, that the plaintiff's suit should be dismissed. The question whether the *dhara* lands received by the defendant in execution of the decree of 1853, were included in that decree, was a question relating to the execution of the decree within the meaning of s. 244 of the Civil Procedure Code, Act XIV of 1882, which barred a separate suit. *RAGHUNATH GANESH v. MULNA AMAD.*

[I. L. R. 12 Bom. 449]

12.—s. 244 — *Question as to legality of purchase by judgment-debtors of right of some of decree-holders* [Disputes as to the legality of the purchase by judgment-debtors of the rights of some of the decree-holders in the property to which the decree relates, and the extent of the share acquired under the purchase, are questions falling within the purview of cl (c) of s. 244 of the Code of Civil Procedure, and must be determined by order of the Court executing the decree. *KHUDAI v. SHEO DYAL.*

[I. L. R. 10 All. 570]

13.—s. 244 — *Separate suit—Auction-purchaser not a representative of either party to a suit—Sale in execution of property belonging to a person other than the judgment-debtor.* In execution of a decree on a mortgage, certain property was sold, which the plaintiff in this suit claimed as his own under sale to himself by the sons of the judgment-debtor. He applied to the Court to have the sale set aside, but failing in his application, he sued both the decree-holder and the auction-purchaser for a declaration of his title to the property in question. The Assistant Judge held on appeal, that the suit was not maintainable, on the ground that the greater part of the property being included in the decree, the question of title ought to have been settled in execution proceedings under s. 244 of the Code of Civil Procedure (Act XIV of 1882) and not by a separate suit: *Held*, reversing the decision of the Assistant Judge, that s. 244 did not bar the



CIVIL PROCEDURE CODE, 1882, s. 244—  
*continued.*(1) QUESTIONS IN EXECUTION OF DECREE  
*—concluded.*

present suit. It could not apply, except as regards property affected by the decree, and a part of the property claimed by the plaintiff was not included in the decree. Moreover, the question in the present suit did not arise between the parties to the former suit, or their representatives. *SHIVRAM CHINTAMAN v. JIVU.*

[I. L. R. 13 Bom. 34]

14.—s. 244.—*Separate suit on disallowance of objection to execution.*] In execution of a decree the defendant, who was sued as the representative of her deceased brother, objected under s. 244 of the Code of Civil Procedure to the attachment of certain lands to which she set up independent title. The objection was disallowed, and the land was sold. She then sued the execution purchaser to set aside the Court-sale and obtained a decree against which no appeal was preferred. She now sued for possession. *Held*, that the suit lay notwithstanding the order under s. 244. *KETILAMMA v. KELAPPAN.*

[I. L. R. 12 Mad. 228]

## (2) PARTIES TO SUITS.

15.—s. 244.—*Separate Suit.*] *R* having obtained a decree for money against *K*, the karnavan of the defendants, *K* died, and the defendants were made parties to the suit as representatives of *K*. Tarwad property was then attached by *R*, and the defendants having objected, the Court raised the attachment. *R* sued for a declaration that the property released was liable to be sold. *Held*, that the suit was barred by s. 244 of the Code of Civil Procedure. *RAVUNNI MENON v. KUNJU NAYAR.*

[I. L. R. 10 Mad. 117]

16.—s. 244.—*Transfer of decree by operation of law—Representative of original decree-holder—Right to appeal against order refusing execution.*] *R* died in May 1859, leaving his property to his executors in trust for the appellant *P*, and he directed that the property should be assigned by them to the appellant as soon as he came of age. In August 1868, the executors filed this suit against *L*, as manager of certain landed property belonging to the Hallai Bhattia caste, and known as *Mahajan Wadi*, to recover certain loans made by them as executors to him as manager of the said *wadi*. On the 11th May 1870, while this suit was pending, the executors assigned all the property of their testator to the appellant *P*. By the deed of assignment they assigned to him (*inter alia*) "all moveable property, debts, claims, and things in action whatsoever vested in them as such executors." No steps were taken, subsequently to this assignment, to make the assignee *P* a party to the suit, which proceeded without amendment. On the 23rd January 1873, a decree was passed for the plaintiffs on the record for Rs. 31,272-13-5,

CIVIL PROCEDURE CODE, 1882, s. 244—  
*continued.*(2) PARTIES TO SUITS—*continued.*

and it was declared that the said sum should be a first charge on the rents and income of the said *wadi*. Subsequently to this decree *L* opened an account in the name of the appellant *P*, and from time to time made payments to him on account of the decree. The last of these payments was made on the 19th November 1884. None of these payments were certified to the Court. In 1885 the respondent *V* was appointed to the office of manager of the Hallai Bhattia caste in the place of *L*, the original defendant in the suit. On the 4th January 1886, his attorneys wrote to the appellant's attorneys offering to pay the appellant the balance due to him under the decree. Subsequently, however, he refused to make any payment to the appellant, whereupon the appellant applied for execution of the decree against him as manager of the said *wadi*. He claimed to be a transferee of the decree under s. 232 of the Civil Procedure Code (Act XIV of 1882). His application was refused by the Judge in chambers. *Held*, that the appellant was a transferee of the decree within the meaning of s. 232 of the Civil Procedure Code (Act XIV of 1882). The decree had been transferred to him "by operation of law." As such, he was entitled to sue out execution, and was to be regarded as the representative of the original decree-holder within the meaning of cl (c) of s. 244 of the Civil Procedure Code (Act XIV of 1882), and had a right of appeal against the order of the Judge in chambers refusing execution. *PURMANANDAS JIWANDAS v. VALLABDAS WALLJI.*

[I. L. R. 11 Bom. 506]

17.—s. 244.—*Representatives of transferor of decree—Application for substitution of names by transferees—Non-registration of transfer.*] The holders of a decree for the sale of mortgaged property transferred the same to *M* by instruments which were registered at a place where a small portion only of the property was situate. Subsequently, *M* transferred the decree to other persons, and the co-transferors applied under s. 232 of the Civil Procedure Code to have their names substituted for those of the original decree-holders. The judgment-debtor opposed the application on the grounds that his name had not been substituted for those of the original decree-holders, who had transferred to him, and that the transfers to *M* were inoperative, as the instruments of transfer had not been registered at the place where the substantial portion of the mortgaged property was situate, in accordance with s. 20 of the Registration Act of 1877. It appeared that no notice had been issued to *M* under s. 232 of the Civil Procedure Code, that he was dead, and that his legal representatives had not been cited as required by law. The application was allowed by the Courts below. *Held*, that the matter involved questions arising between the parties to the decree, or their representatives, within the meaning of s. 244 (c) of the Code, and that the order allowing the application



CIVIL PROCEDURE CODE, 1882, s. 244—  
*continued.*(2) PARTIES TO SUITS—*continued.*

was, therefore, a decree within the definition of s. 2, and was appealable as such. *GULZARI LAL v. DAYA RAM*,

[I. L. R. 9 All. 46]

18.—s. 244.—*Application by Collector in pauper suit—Civil Procedure Code, s. 411—Recovery of Court Fees by Government*] *Held*, that a Collector applying on behalf of Government, under s. 411 of the Civil Procedure Code, for recovery of court-fees by attachment of a sum of money payable under a decree to a plaintiff suing *in forma pauperis*, might be deemed to have been a party to the suit in which the decree was passed, within the meaning of s. 244 (c) of the Code, and that an appeal would, therefore, lie from an order granting such application. *JANKI v. COLLECTOR OF ALLAHABAD*

[I. L. R. 9 All. 64]

19.—s. 244.—*Decree passed against representative of debtor—Attachment of property as belonging to debtor—Objection to attachment by judgment-debtor setting up an independent title—Appeal from order disallowing objection—Civil Procedure Code, ss. 2, 283.*] The decree-holders in execution of a simple money decree passed against the legal representatives of their debtor, and which provided that it was to be enforced against the debtor's property, attached and sought to bring to sale a house as coming within the scope of the decree. The judgment-debtors objected to the attachment and proposed sale on the ground that the house was their own private property and not the property of the debtor within the meaning of the decree, having been validly transferred to them during the debtor's life-time. The objection was disallowed by the Court of First Instance. *Held* that s. 283 of the Civil Procedure Code had no application, that the case fell within s. 244, and that an appeal would lie from the first Court's order. *Ram Ghulam v. Hazari Khar*, I L R. 7 All. 547, and *Sita Ram v. Bhagwan Das*, I. L. R. 7 All. 733, followed. *Shankar Dial v. Amir Haidar*, I. L. R. 2 All. 752; *Abdul Rahman v. Muhammad Yar*, I. L. R. 4 All. 190; *Awadh Khar v. Roktu Twari*, I. L. R. 6 All. 109; *Chowdhry Wahed Ali v. Jumace*, 11 B. L. R. 149; *Ameeroonissa Khatoun v. Meer Mahomed*, 20 W. R. 280; and *Kurriyali v. Mayan*, I. L. R. 7 Mad. 253, referred to. *MULMANTRI v. ASHFAK AHMAD*.

[I. L. R. 9 All. 605]

20.—s. 244.—*Representative of decree-holder—Attachment of decree—Civil Procedure Code (Act XIV of 1882), ss. 232, 273.*] A person attaching a decree is a representative of the decree-holder within the meaning of that term as used in s. 244 cl. (c) of the Civil Procedure Code, and in every case is entitled to enforce execution of the decree which he has attached. When the decree attached has been passed by the same Court as the decree in execution of which it has been attached, the

CIVIL PROCEDURE CODE, 1882, s. 244—  
*continued.*(2) PARTIES TO SUITS—*continued.*

Court has jurisdiction to execute the attached decree on the application of the attaching creditor. *PEARY MOHUN CHOWDHRY v. ROMESH CHUNDER NUNDY*.

[I. L. R. 15 Calc. 371]

21.—s. 244.—*Representatives of judgment-debtor*] *Held*, that proceedings in execution of a decree taken against the plaintiff's father and elder brother on previous occasions, did not bind the plaintiffs under s. 244 of the Civil Procedure Code (Act XIV) of 1882, the plaintiffs not having been parties to them within the meaning of that section. *KRISHNAJI v. VITHALRAV*.

[I. L. R. 12 Bom. 80]

22.—s. 244.—*Civil Procedure Code, s. 291—Sale in execution of decree—Transfer of debt by transferee of property—Separate suit*] *Held*, that the assignees of a purchaser from a judgment-debtor of property, the subject-matter of a decree for enforcement of hypothecation were entitled to come in and protect the property from sale in execution of the decree by tendering the debt and costs under s. 291 of the Civil Procedure Code, and that the executing Court was bound to accept the money and stop the sale. *Held*, also, where the executing Court had refused to accept the money, and the sale had taken place, that a suit by the assignees to set aside the sale and for a declaration of their right to come in under s. 291 was not barred by s. 244 of the Code. *BEHARI LAL v. GANPAT RAI*.

[I. L. R. 10 All. 1]

23.—s. 244.—*Money paid into Court by pre-emptor—Suit for pre-emption dismissed on appeal—Suit for refund of money paid into Court.*] A suit for pre-emption was decreed conditionally on the plaintiff paying Rs. 1,595, which the Court determined was the amount of the sale-consideration. He paid the amount to the vendees, and the payment was certified under s. 258 of the Civil Procedure Code. Subsequently the decree was modified on appeal by increasing the amount of sale-consideration to Rs. 1,995, which the plaintiff was required to pay as the condition of pre-emption. He never paid the difference between the amount fixed by the first Court and the sum fixed as the true price by the Appellate Court, and the suit consequently stood dismissed. He then assigned to the plaintiff in the suit his right to recover the amount, Rs. 1,595, from the vendees, who, after unsuccessful application made to the Court of First Instance, under s. 244 of the Civil Procedure Code, to recover the amount, instituted this suit. *Held*, that the assignee was a representative of the plaintiff in the pre-emption suit within the meaning of s. 244 of the Civil Procedure Code, and the suit was therefore barred under the provisions of that section. *ISHUR DAS v. KOTI RAM*.

[I. L. R. 10 All. 354]

CIVIL PROCEDURE CODE, 1882, s. 244—  
*continued.*(2) PARTIES TO SUITS—*continued.*

24.—s. 244—*Deceased Judgment-debtor—Execution against a person not the legal representative.* The defendants along with one N and C, had brought a suit against one A, in the Civil Court at Peshawar in the Punjab, and obtained a decree on the 23rd July 1878, for Rs. 805,545-12-0. In 1881 application for transfer of the decree to the Court at Moradabad for execution was made, and it was granted, but no steps were taken thereupon. On the 12th June 1883, A died. On the 30th April 1884, the defendants again applied to the Court at Peshawar, treating their judgment-debtor as being then alive, for a fresh certificate to execute their decree in the Moradabad district and obtained it. On the 20th August 1885, they made an application to the District Judge of Moradabad for execution of their decree, and in it it was stated that the application was "for execution against Ajudhia Prasad and after his death against Angan Lal, the own brother, and Durga Kuar, widow, and Lachman Prasad and others, sons of Ajudhia Prasad, residents of Kundarki, and the said Angan Lal at present residing at Umballa and employed in the Commissariat Transport Department, judgment-debtors." It was further stated that "the judgment-debtor was dead and his heirs are living and in possession of his estate, and Angan Lal himself has realised Rs. 9,637-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta and appropriated the same, therefore, to that extent the person of the said Angan Lal was liable." Notification of this application was issued to Angan Lal as also to the other persons named therein. Angan Lal objected to the application as against him, stating that, although he was the brother of A, deceased, yet he always lived separate and carried on business separately; and that there was no connection or partnership between him and the deceased judgment-debtor, and that he had no property of the deceased in his possession. Further, that as A left issue it was wrong to call him an heir to A, and take out execution process against him. In reply to these objections the judgment-creditors (defendants) did not contend that Angan Lal was the legal representative of the deceased judgment-debtor, but treated him as a person in possession of a sum of money belonging to the deceased, and therefore liable to the extent of the sum so received by him. The Subordinate Judge holding that Angan Lal was the brother of the deceased and had realised the amount from the Commissariat Office, which he failed to prove that he paid to the deceased, ordered execution to proceed against him. Angan Lal then instituted this suit to set aside the order of the Subordinate Judge. It was contended, that the proceedings of the Subordinate Judge were held under s. 244 of the Code, and, therefore no separate suit would lie: *Held*, that the contention must fail, as the Subordinate Judge never treated the proceedings in execution against Angan Lal upon the footing that he was the legal

CIVIL PROCEDURE CODE, 1882, s. 244—  
*continued.*(2) PARTIES TO SUITS—*continued.*

representative of the deceased judgment-debtor. *Mahomed Aqa Ali Khan v. Balmukund*, L. R. 3 I. A. 241, and *Nadir Hossain v. Bipen Chand Basarat*, 3 O. L. R. 437, were referred to. *ANGAN LAL v. GUDAR MAL*,

[I. L. R. 10 All. 479]

25.—s. 244—*Question relating to execution of decree—Representatives.* K and M were brothers alleged to be joint in food, dwelling, and business. In a suit which was brought against K, and which was unsuccessfully defended by him on behalf of himself and the joint family, a decree for costs was passed against him. K died after decree, and the decree-holder in execution had K's sons put on the record as his representatives. Certain property was attached in execution, and the sons objected that the property in question had come to them as the self-acquired property of their uncle M, who had died after K, and that they had inherited no property from their father K. Their objection was allowed by the Court executing the decree, and the property was ordered to be released from attachment. In a suit brought by the assignee of the decree-holder against the sons of K to establish his right to proceed against the property in question in execution of the decree against K. *Held*, that the question of the liability of the property to be taken in execution in the hands of the defendant was a "question arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, &c., of the decree" within the meaning of s. 244 of the Civil Procedure Code, and that the suit was consequently not maintainable. The cases as to the position of representatives added to the suit either before or after decree referred to and discussed, *RAJRUP SINGH v. RAMGOLAM ROY*.

[I. L. R. 16 Calc. 1]

26.—s. 244—*Decree against mortgagor for mortgage money, and directing sale of mortgaged property as against him and a third party—Attachment of other property in possession of third party as that of the mortgagor—Claim by third party to ownership of such property—Suit by decree-holder to establish mortgagor's right to property.* In a suit upon a hypothecation bond a third party was made defendant, as she claimed the hypothecated property. The mortgagee obtained a decree for recovery of the amount of the bond, and for enforcement of the mortgage. In execution of the decree, the debt not being satisfied by sale of the mortgaged property, the decree-holder caused certain other immoveable property in the possession of the third party to be attached. She objected to the attachment on the ground that this property was her own, and was not liable to sale in execution of the decree. The objection was allowed, and the decree-holder then

CIVIL PROCEDURE CODE, 1882, s. 244—  
*continued.*(2) PARTIES TO SUITS—*continued.*

sued for a declaration that the property belonged to the mortgagor judgment-debtor, and was liable to attachment and sale in execution of the decree. *Held*, that as no claim in the former suit was made against the objector personally, or in a representative character, but as regards her, the only claim was virtually for a declaration that she was not entitled to the hypothecated property, the decree affected her only so far as it negatived her alleged interest in that property, and, so far as it was sought to be enforced against other property, she was a stranger to that suit, and her objection must be taken to have been decided under ss. 278 and 280 of the Civil Procedure Code, and the present suit was rightly brought under s. 253 and was not barred by s. 244. *Kameshwar Pershad v. Run Bahadur Singh*. I. L. R. 12 Calc. 458, referred to; *Mulmantri v. Ashfaq Ahmad*. I. L. R. 9 All. 605; and *Nimba Harshet v. Setaram Paraji*. I. L. R. 9 Bom. 458, distinguished. *JANGI NATH v. PHUNDO*.

[I. L. R. 11 All. 74]

27.—s. 244.—*Representative of judgment-debtor—Purchaser at execution sale—Private purchase—Purchase pendent lite* ] The defendants Nos. 2, 3, and 4 were, together with one *M*, the owners of certain immoveable property, including two mehals, Olipore and Ekdhala, subject to a mortgage, on which the mortgagee obtained a decree on 30th July 1875. Whilst that suit was pending, one *K D* took out execution of a money-decree which he had obtained in 1871 against defendant No. 3, and put up for sale the mahal Olipore, which was purchased by the father of the plaintiff *A*, who eventually obtained possession of it through the Court. The plaintiff *B* purchased privately the mahal Ekdhala from the mortgagors and from *M* some time after the date of the decree on the mortgage. That decree was in course of execution when the mortgagee died, and his estate came into the hands of the Administrator-General, who, on 13th August 1878, sold the decree to *G*, defendant No. 1. After this sale several applications were made to have the name of *G* substituted for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree, or any order made for substitution of the name of *G*, until 18th July 1885, when, after notice to the defendants under s. 232 of the Civil Procedure Code, *G*'s name was substituted as decree-holder, and execution was taken out against the mortgaged property including Olipore and Ekdhala. The plaintiffs each claimed the mahal they had respectively purchased, but their claims were disallowed. In suits brought by the plaintiffs for a declaration of their right to hold the properties free of the mortgage, the Court found that *G* was only a *benamidar* so far as his purchase of the mortgage-decree was concerned. *Held*, the plaintiff *A*, being the purchaser at a public sale in execution of a decree, was not the representative of the judgment-debtors,

CIVIL PROCEDURE CODE, 1882, s. 244—  
*continued.*(2) PARTIES TO SUITS—*concluded.*

the mortgagors, within the meaning of s. 244 of the Civil Procedure Code: but the case was different with respect to plaintiff *B*, who claimed by private purchase and must be considered the representative of the judgment-debtors within the meaning of that section. *Dinendronath Sanyal v. Raj Coomar Ghose*. L. R. 8 I. A. 65. I. L. R. 7 Calc. 107; *Anundmoyee Dossce v. Dhanendra Chunder Mookerjee*, 14 Moore's I. A. 101. 8 B. L. R. 122; and *Lalla Prabhulal v. Mylne*. I. L. R. 14 Calc. 401, referred to. *GOUR SUNDAR LAHIRI v. HEM CHUNDER CHOWDHURY GOUR SUNDER LAHARI v. HAFIZ MAHOMED ALI KHAN*.

[I. L. R. 18 Calc. 355]

28.—s. 244.—*Civil Procedure Code, 1882, ss. 293, 306—Liability of defaulting purchaser—Appeal from order under s. 293—Re-sale.* ] At a sale in execution of a decree a decree-holder, who had obtained leave to bid, was alleged to have made a bid through his agent of Rs. 90,000, but he shortly afterwards repudiated the bid and did not pay the deposit. The property was put up for sale again on the following day under s. 306 of the Code of Civil Procedure, and was in due course knocked down for a smaller sum. The judgment-debtor filed a petition under s. 293 to recover from the decree-holder the loss by re-sale; the petition was rejected. On appeal. *Held*, that the question at issue was one arising between the parties to the suit, and that an appeal lay against the order rejecting the petition. *VALLABHAN v. PANGUNNI*.

[I. L. R. 12 Mad. 454]

## —, s. 245

*See* LIMITATION ACT 1877, ART. 179—  
NATURE OF APPLICATION—IRREGULAR AND DEFECTIVE APPLICATIONS

[I. L. R. 14 Calc. 124]

## —, s. 246.

*See* SALE IN EXECUTION OF DECREE—  
SETTING ASIDE SALE—IRREGULARITY—GENERAL CASES.

[I. L. R. 14 Calc. 18]

*See* CASES UNDER SET-OFF—CROSS DECREES

## —, s. 247.

*See* CASES UNDER SET-OFF—CROSS DECREES.

## —, s. 253.

*See* RIGHT OF APPEAL.

[I. L. R. 12 Bom. 71]

*See* CASES UNDER SURETY—ENFORCEMENT OF SECURITY.

## CIVIL PROCEDURE CODE, 1882, s. 257—

s. 257.—*Practice—Order for payment of costs of day—Payment into Court or to party.*] Where a party to a suit was directed by the High Court to pay the costs of the day, and his solicitor paid the money into Court under s. 257 of the Code of Civil Procedure: *Held*, that section was not applicable as the order was not a decree *SHANKS v. SECRETARY OF STATE FOR INDIA.*

[I. L. R. 12 Mad. 120]

—, s. 257 (a).

*See* COMPROMISE—COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE.

[I. L. R. 11 All. 228]

1.—s. 257 (a)—*Havala or undertaking by a third party to pay decreed debt for the judgment-debtor—Agreement incorporating the havala, in substitution of the decree, capable of execution at the date of the agreement—Suit on such agreement.*] The plaintiff obtained a money-decree against the defendant, Hur Patel, and, in execution thereof, attached his property. Thereupon, at Hur Patel's request, five persons gave a *havala* or oral undertaking to pay the amount of the decree, and the attachment was removed. It appeared that some payment was made under the *havala*. Subsequently Hur Patel and the defendants Nos. 2 and 3 executed a bond to the plaintiff reciting the *havala*, the payment thereunder, and agreeing to pay the amount of the decree with interest. Neither the *havala*, nor the bond was brought to the notice of the Court for sanction, and the decree, which was capable of execution, was then destroyed. The plaintiff now sued to recover the debt due under the bond. The District Judge was of opinion that the part of the bond which contained a promise to pay interest was void, but that in respect of the principal amount of the decree it was not void. On reference to the High Court: *Held*, that the whole bond was void. The *havala* was an agreement such as is contemplated in para. 1 of s. 257A of the Civil Procedure Code (Act XIV of 1882), and was void for want of the sanction of the Court under that section. The bond, regarded as one in consideration of the *havala*, or as an agreement for satisfaction of the decree, was also void under para. 2 of the same section for a similar reason. *VISHNU VISHWANATH v. HUR PATEL.*

[I. L. R. 12 Bom. 499]

2.—s. 257 (a).—*Agreement extending time of payment under decree without sanction of Court—Application for such sanction after the decree was barred.*] The decree in a redemption suit directed that the lands mortgaged should be allowed to be redeemed on payment of Rs. 30-7-0 by the plaintiff to the defendant. The decree was subsequently modified by substituting Rs. 91-2-6 for Rs. 30-7-0. On the 3rd October 1885, the parties, entered into an agreement whereby (*inter alia*)

## CIVIL PROCEDURE CODE, 1882, s. 257(a) —continued.

the time to pay the decreed debt was extended to five years from that date, but no sanction of the Court was obtained. On the 18th February 1888, the parties applied to the Court to sanction the agreement of 1885. On reference to the High Court: *Held*, that the agreement in question required the Court's sanction under s. 257A of the Civil Procedure Code (Act XIV of 1882), for want of which it was void, so far as it related to the judgment-debt, and that the sanction could not be given at the date it was applied for. *NARU KOLI v. CHIMA BHOSLE.*

[I. L. R. 13 Bom. 54]

3.—s. 257 (a)—*Agreement for, or to give, time for satisfaction of judgment-debt—Agreement without sanction of Court—Illegal contract—Contract Act (IX of 1872, s. 23)—Consideration.*] The plaintiff obtained a decree against the defendant under which the judgment-debtor was liable to pay the amount by instalments with interest at 4 per cent. Eventually, the defendant failing to pay, the plaintiff accepted a bond executed jointly by the defendant and T, his father, by which they both became liable for the amount of the decree with interest at 18½ per cent. In a suit on the bond, it was contended that the bond was void under s. 257A of the Civil Procedure Code, as being an agreement to give time for the satisfaction of the judgment-debt made for no consideration, and without the sanction of the Court, and also without such sanction providing for payment of a sum in excess of the amount due under the decree, that it was void within the meaning of s. 23 of the Contract Act as being forbidden by, or of a nature to defeat the provisions of, s. 257A of the Civil Procedure Code; and that, consequently, the suit on it was not maintainable. *Held*, that s. 257A of the Code was not applicable. That section was framed to prohibit the enforcement of an agreement of the kind mentioned therein, if made without the sanction of the Court, in execution of the decree, but was not intended to take away the right of parties of entering into a fresh contract, either for payment of the judgment-debt, to give time for such payment, or for the payment of a larger sum than may be covered by the decree, if it be for a proper consideration. In this case the consideration for the bond was a lawful consideration; it could not be said that because satisfaction of the decree was not certified to the Court, there was no consideration: *Held*, also, the bond was not void under s. 23 of the Contract Act. *Semble* The words "any law" in that section refer to some substantive law, and not to an adjective law, such as the Procedure Code is. *HUKUM CHAND OSWAL v. TAHARUNNESSA BIBI.*

[I. L. R. 16 Cal. 504]

4.—s. 257 (a)—*Decree, adjustment of, by strangers—Consideration—Bond on such adjustment.*] Having obtained a decree against B, the son of

CIVIL PROCEDURE CODE 1882, s 257 (a)  
—continued.

the latter gave the son of the former an instalment bond for the judgment-debt without the sanction of the Court. In a suit by P's son to recover the debt on the bond. *Held*, that the suit would lie. S. 257A of the Civil Procedure Code (Act XIV of 1882) applies only to agreements between the parties to the suit or decree. **RAMJI PANDU v. MAHOMED WALLI.**

[I. L. R. 13 Bom. 671]

—, s. 258.

See s. 244—QUESTIONS IN EXECUTION OF DECREE.

[I. L. R. 11 Bom. 57]

See APPEAL—EXECUTION OF DECREE—QUESTION IN EXECUTION.

[I. L. R. 11 Bom. 57]

See PENAL CODE, s. 210.

[I. L. R. 16 Calc. 126]

[I. L. R. 10 Bom. 288]

1.—s. 258.—*Adjustment of decree without certifying—Proof of payment of decree otherwise than by certificate—Fraudulent execution of decree after adjustment.* Where a decree has been satisfied out of Court, and the payment has not been recorded in accordance with s. 258 of the Civil Procedure Code, it is nevertheless open to the *quondam* judgment-debtor when suing to have a sale made by the *quondam* decree-holder after satisfaction of the decree set aside, to prove the payment of the decretal money otherwise than by a certificate under that section. **PAT DAS v. SHARUP CHAND MALA.**

[I. L. R. 14 Calc. 376]

But See **MOTHURA MOHUN GHOSE MONDUL v. AKKOY KUMAR MITTER.**

[I. L. R. 15 Calc. 557]

2.—s. 258.—*Adjustment of decree—Suit to recover instalments due under a mortgage made in adjustment of decree* Under s. 258 of the Civil Procedure Code (Act XIV of 1882) no Court can recognize an uncertified adjustment of a decree for any judicial purpose whatever. **Pattankar v. Dey**, I L R. 6 Bom 146, overruled. A suit will not lie to enforce an uncertified agreement of adjustment of a decree against a judgment-debtor, the consideration for which is, that it shall operate in satisfaction of the decree; as there is, in that case, no consideration which the Court can recognize, and therefore no valid consideration for the judgment-debtor's agreement. The plaintiff was the assignee of a decree obtained by one O K against the defendants on the 5th May 1883. By that decree, O K was declared entitled to recover Rs. 9,961-5-6, with interest at nine per cent from the defendants; and payment was ordered to be

W. D.

CIVIL PROCEDURE CODE 1882, s. 258—  
continued.

made to him of the said sum by *weekly* instalments of Rs. 200. In order to secure the payment of the said instalments, the defendants were required to execute a mortgage to O K of certain property, with power to him to sell the same, and to execute the decree for the whole amount, in case of default, for six months. O K assigned the decree to the plaintiff in the present suit, and subsequently to the assignment (*viz.*, on the 21st July 1883) the defendants executed to the plaintiff the mortgage on which the present suit was brought. The mortgage-deed, after reciting the above facts, stated that the defendants had agreed to satisfy the amount of the decree, and it contained a covenant by the defendants that they would pay Rs. 9,961-5-6, with interest at six per cent. by *monthly* instalments of Rs. 400 from the 21st August 1883. The mortgage, therefore, differed from the decree, both with regard to the instalments and the rate of interest. The plaintiff sued to recover the sum of Rs. 4,207, being the amount of instalments due to him under the said mortgage. *Held*, that the suit would not lie, as the mortgage was an adjustment of the decree, and had not been certified to the Court, as required by s. 253 of the Civil Procedure Code (Act XIV of 1882) **ABDUL RAHIMAN v. KHOJA KHAKI ARUTH.**

[I. L. R. 11 Bom. 6]

3.—s. 258.—*Payment made towards decree, but uncertified—Effect of such payments on limitation for application for execution of decree.* Where certain payments had been made on account of a decree, but such payments had not been certified to the Court under s. 258 of the Civil Procedure Code, it was *held*, following **Fakir Chand Bose v. Madan Mohan Ghose**, 4 B.L.R. F. B. 130, that such payments, although not certified to the Court, were effectual to prevent the appellant's application for execution from being barred by limitation. It would, however, be necessary for the appellant to certify these payments. **PURMANANDAS JIWANDAS v. VALLABDAS WALLJI.**

[I. L. R. 11 Bom. 506]

4.—s. 258.—*Payment made by defendant in satisfaction of decree not certified—Subsequent reversal of decree on appeal—Application by defendant for refund of money paid in satisfaction.* The plaintiff obtained a decree against the defendant for Rs. 60 and costs, Rs. 29-10-1, against which the defendant immediately appealed. Shortly afterwards the defendants sent Rs. 70 to the plaintiff's *rakul*, intimating by a letter that the remittance was in part payment of the decree, and that an arrangement would be made to pay the balance. The plaintiff did not take out execution of the decree, but the part payment was not certified to the Court. On appeal, the decree was reversed, and the defendant applied for the refund of the amount which he had paid to the plaintiff. The

**CIVIL PROCEDURE CODE 1882, s. 258—**  
*continued.*

Court of First Instance granted the application. The plaintiff appealed, and the Appellate Court reversed the order, holding that, under the provisions of s. 258 of the Civil Procedure Code, the payment made by the defendant not having been certified could not be recovered. *Held*, by the High Court that the defendant was entitled to recover the amount paid to the plaintiff. The decree having been reversed on appeal, the payment, whether certified to the Court or not, could only be regarded as made without consideration, and the defendant was entitled to have it restored. The Court accordingly under s. 622 of the Civil Procedure Code discharged the order of the lower Appellate Court, and restored the order of the Court of First Instance. *VASUDEV GOVIND v. VISHNU VITHAL.*

[I. L. R. 11 Bom. 724]

5.—s. 258.—*Judgment-debtor as part-purchaser of a decree, Suit by.* *H D* and *R D* owned a 6-anna share in certain decrees. The other decree-holders subsequently sold their 10-anna share to *H S* and *S M*, two of the judgment-debtors. *H D* and *R D* then proceeded to execute the decrees, and in satisfaction thereof, were allowed to receive, upon giving security under s. 231 of the Code, the full 16-anna share of the decretal amount from *H S* and *S M*, notwithstanding the objection of the latter on the ground of their purchase. Thereupon *H S* and *S M* brought a suit for declaration of their right of purchase and the recovery of a 10-anna share of the money in the hands of *H D* and *R D*: *Held*, that the plaintiffs were entitled to the relief sought for: *Held*, also, that the provisions of s. 258 of the Civil Procedure Code did not affect the suit, which was brought not upon the allegation that the decrees were satisfied by the plaintiffs' purchase, but, on the contrary, was founded upon the proposition that the decrees were not so satisfied. *Abdul Rahman v. Khoja Khaki Aruth*, I [L. R. 11 Bom. 6, referred to: *Held*, further, that the claim was not within the words "relating to the execution of the decree" in s. 244 of the Civil Procedure Code, inasmuch as it did not raise any question in respect to the furtherance of, or hindrance to, or the manner of carrying out, the execution of the decrees. *HARAGOBIND DAS KOIBURTO v. ISSURI DASI.*

[I. L. R. 15 Calc. 187]

6.—s. 258.—*Mortgage in satisfaction of decree—Adjustment not certified.* In a suit brought by a Hindu to recover certain land, defendant pleaded that he held the same under a mortgage granted to him by plaintiff's mother and guardian in satisfaction of a decree obtained against plaintiff's deceased father. Plaintiff contended that, as the mortgage was in adjustment of a decree, and the adjustment had not been certified to the Court, the mortgage could not be recognized by virtue of s. 258 of the Code of Civil Procedure: *Held*,

**CIVIL PROCEDURE CODE 1882, s. 258—**  
*continued.*

that as there had been no certified adjustment of the decree, the mortgage could not prevail against plaintiff's claim—*Abdul Rahman v. Khoja Khaki Aruth*, I. L. R. 11 Bom. 6, followed, and *Mallamma v. Venkappa*, I. L. R. 8 Mad. 277, distinguished. *THIRUMALAI v. SUNDARA.*

[I. L. R. 11 Mad. 469]

7.—s. 258.—*Decree—Satisfaction of decree out of Court—Payment uncertified—Suit to recover money paid in satisfaction of decree.* The plaintiff had been a surety for the defendant on a bond for Rs. 50 passed to *G* by the defendant. *G* obtained a decree against the plaintiff on this bond, and the plaintiff satisfied the decree by paying *G* Rs. 38 in full satisfaction. The payment was made out of Court, and was not certified to the Court. The plaintiff now sued the defendant to recover the money so paid by him to *G*. He called *G* as a witness, who acknowledged he had received Rs. 38 from the plaintiff in full satisfaction of the decree: *Held*, that the last clause of s. 258 of the Civil Procedure Code (Act XIV of 1882) did not apply to such a case, and that the payment made by the plaintiff to *G* might be proved. *BALAJI LAKSHMAN v. DADA JOTI.*

[I. L. R. 12 Bom. 235]

8.—s. 258.—*Omission to certify satisfaction of decree—Suit to enforce mortgage* In 1877 *M* executed a mortgage to *S* in consideration of a sum paid in cash and a debt due by *M* to *S* under a decree. *S* did not certify satisfaction of the decree to the Court under s. 258 of the Code of Civil Procedure, nor was this stipulated for in the instrument of mortgage: *Held*, in a suit to enforce the mortgage, that s. 258 was no bar to the plaintiff's right to recover. *SELLAMAYYAN v. MUTHAN*

[I. L. R. 12 Mad. 61]

—, ss. 261, 262.

See REGISTRAR OF HIGH COURT  
 AUTHORITY OF.

[I. L. R. 16 Calc. 330]

—, s. 264.

See HINDU LAW—JOINT FAMILY—SALE  
 OF JOINT FAMILY PROPERTY IN  
 EXECUTION, &c.

[I. L. R. 10 Mad. 241]

See SALE IN EXECUTION OF DECREE—  
 JOINT PROPERTY.

[I. L. R. 10 Mad. 241]

—, s. 265.

See COLLECTOR.

[I. L. R. 11 Bom. 662]

[I. L. R. 12 Bom. 371]

CIVIL PROCEDURE CODE 1882, s. 265—  
*continued.*

*See* PARTITION—JURISDICTION OF CIVIL COURT IN SUITS RESPECTING PARTITION.

[I. L. R. 16 Calc. 203]

*See* PARTITION—MODE OF EFFECTING PARTITION.

[I. L. R. 11 Bom. 662]

—, s. 266.

*See* CASES UNDER ATTACHMENT—SUBJECTS OF ATTACHMENT.

—, s. 268.

*See* ATTACHMENT—MODE OF ATTACHMENT AND IRREGULARITIES IN ATTACHMENT.

[I. L. R. 12 Mad. 250]

*See* ATTACHMENT—SUBJECTS OF ATTACHMENT—DEBTS.

[I. L. R. 10 Mad. 194]

[I. L. R. 11 Bom. 448]

*See* BOND.

[I. L. R. 10 Mad. 169]

—, s. 273.

*See* s. 244—PARTIES TO SUITS.

[I. L. R. 15 Calc. 371]

*See* EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES.

[I. L. R. 15 Calc. 371]

—, s. 274.

*See* BOND.

[I. L. R. 10 Mad. 169]

—, s. 276.

*See* ADMINISTRATION.

[I. L. R. 15 Calc. 202]

*See* CASES UNDER ATTACHMENT—ALIENATION DURING ATTACHMENT.

*See* EXECUTION—STAY OF EXECUTION.

[I. L. R. 15 Calc. 202]

*See* SALE IN EXECUTION OF DECREE—DISTRIBUTION OF SALE PROCEEDS.

[I. L. R. 15 Calc. 771]

—, s. 278.

*See* CASES UNDER CLAIM TO ATTACHED PROPERTY.

*See* LIMITATION ACT 1877, ART. 11.

[I. L. R. 11 Bom. 114]

[I. L. R. 15 Calc. 521]

[I. L. R. 12 Bom. 231]

CIVIL PROCEDURE CODE 1882—*contd.*

—, s. 280.

*See* CASES UNDER CLAIM TO ATTACHED PROPERTY.

—, s. 283

*See* APPEAL—EXECUTION OF DECREE—PARTIES TO SUITS.

[I. L. R. 15 Calc. 437]

*See* LIMITATION ACT 1877, ART. 11.

[I. L. R. 11 Bom. 114]

[I. L. R. 11 Bom. 231]

[I. L. R. 10 All. 479]

[I. L. R. 15 Calc. 521, 674]

*See* MUNSIF, JURISDICTION OF.

[I. L. R. 15 Calc. 104]

*See* RIGHT OF SUIT—EXECUTION OF DECREE.

[I. L. R. 15 Calc. 437, 674]

[I. L. R. 10 All. 479]

*See* SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 10 All. 119]

*See* VALUATION OF SUIT—SUITS

[I. L. R. 15 Calc. 104]

—, s. 284.

*See* ATTACHMENT—SUBJECTS OF ATTACHMENT—DEBTS.

[I. L. R. 10 Mad. 194]

—, s. 287.

*See* SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY—GENERAL CASES.

[I. L. R. 16 Calc. 794]

—, s. 289.

*See* SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY—GENERAL CASES.

[I. L. R. 12 Bom. 368]

—, s. 290.

*See* SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY—GENERAL CASES.

[I. L. R. 14 Calc. 1]

—, s. 291.

*See* s. 244—PARTIES TO SUITS.

[I. L. R. 10 All. 1]

*See* SALE IN EXECUTION OF DECREE—STAY OF SALE.

[I. L. R. 10 All. 1]

CIVIL PROCEDURE CODE 1882—*contd.*

—, s. 292.

*See* PLEADER — PURCHASE BY, AT  
SALE IN EXECUTION.

[I. L. R. 10. Mad. 111]

—, s. 293.

*See* APPEAL—EXECUTION OF DECREE—  
QUESTION IN EXECUTION.

[I. L. R. 16 Calc. 535]

*See* CASES UNDER SALE IN EXECUTION  
OF DECREE—RE-SALES.

—, s. 294.

*See* s. 244—QUESTION IN EXECUTION OF  
DECREE.

[I. L. R. 11 Bom. 588]

*See* LIMITATION ACT, 1877, ART. 178.

[I. L. R. 11 Bom. 588]

*See* MORTGAGE—SALE OF MORTGAGED  
PROPERTY — RIGHT OF MORT-  
GAGEES.

[I. L. R. 16 Calc. 132]

*See* SALE IN EXECUTION OF DECREE—  
DISTRIBUTION OF SALE - PRO-  
CEEDS.

[I. L. R. 16 Calc. 132]

—, s. 295.

*See* ADMINISTRATION.

[I. L. R. 15 Calc. 202]

*See* ATTACHMENT—ALIENATION DURING  
ATTACHMENT,

[I. L. R. 15 Calc. 771]

*See* EXECUTION OF DECREE—STAY OF  
EXECUTION.

[I. L. R. 15 Calc. 202]

*See* CASES UNDER SALE IN EXECUTION  
OF DECREE — DISTRIBUTION OF  
SALE-PROCEEDS.

—, s. 301.

*See* ATTACHMENT—SUBJECTS OF AT-  
TACHMENT—DEBTS.

[I. L. R. 10 Mad. 194]

—, s. 306.

*See* SALE IN EXECUTION OF DECREE—  
RE-SALES.

[I. L. R. 12 Mad. 454]

*See* SALE IN EXECUTION OF DECREE—  
SETTING ASIDE SALE—IRREGU-  
LARIY—GENERAL CASES.

[I. L. R. 16 Calc. 33]

CIVIL PROCEDURE CODE 1882—*contd.*

—, s. 311.

*See* APPEAL—SALE IN EXECUTION OF  
DECREE.

[I. L. R. 11 Mad. 319]

[I. L. R. 9 All. 411]

*See* JURISDICTION OF CIVIL COURT—  
REVENUE COURTS—ORDERS OF  
REVENUE COURTS.

[I. L. R. 11 All. 94]

*See* LIMITATION ACT, 1877, s. 18.

[I. L. R. 14 Calc. 679]

*See* RIGHT OF SUIT—SALE IN EXECU-  
TION OF DECREE.

[I. L. R. 14 Calc. 1, 9]

*See* SALE IN EXECUTION OF DECREE—  
SETTING ASIDE SALE—IRREGULA-  
RITY—GENERAL CASES.

[I. L. R. 9 All. 411]

[I. L. R. 14 Calc. 240]

[I. L. R. 10 Mad. 57]

—, s. 312.

*See* APPEAL—APPEAL NEWLY GIVEN BY  
LAW.

[I. L. R. 16 Calc. 429]

*See* APPEAL—SALE IN EXECUTION OF  
DECREE.

[I. L. R. 11 Bom. 603]

[I. L. R. 9 All. 411]

*See* JURISDICTION OF CIVIL COURT—  
REVENUE COURTS—ORDERS OF  
REVENUE COURTS.

[I. L. R. 9 All. 602]

[I. L. R. 11 All. 94]

*See* LIMITATION ACT 1877, s. 18.

[I. L. R. 14 Calc. 679]

*See* RIGHT OF SUIT—SALES IN EXECU-  
TION OF DECREE.

[I. L. R. 14 Calc. 1, 9]

*See* SALE IN EXECUTION OF DECREE—  
SETTING ASIDE SALE—IRREGU-  
LARIY—GENERAL CASES.

[I. L. R. 9 All. 411]

—, s. 313.

*See* COLLECTOR.

[I. L. R. 9 All. 43]

*See* JURISDICTION OF CIVIL COURT—  
REVENUE COURTS—ORDERS OF  
REVENUE COURTS.

[I. L. R. 11 All. 94]



CIVIL PROCEDURE CODE 1882, s. 313—  
*continued.*

*See* SALE IN EXECUTION OF DECREE—  
INVALID SALES—WANT OF SALE-  
ABLE INTEREST.

[I. L. R. 9 All. 43, 167]

*See* SALE IN EXECUTION OF DECREE—  
SETTING ASIDE SALE—RIGHTS OF  
PURCHASERS—RECOVERY OF PUR-  
CHASE-MONEY.

[I. L. R. 11 Mad. 269]

*See* SMALL CAUSE COURT, MOFUSSIL—  
JURISDICTION—PURCHASE-MONEY.

[I. L. R. 11 Mad. 269]

—, s. 315.

*See* LIMITATION ACT 1877, ART. 178.

[I. L. R. 11 All 372]

*See* SALE IN EXECUTION OF DECREE—  
SETTING ASIDE SALE—RIGHTS OF  
PURCHASERS—RECOVERY OF PUR-  
CHASE-MONEY.

[I. L. R. 11 Mad. 269]

*See* SMALL CAUSE COURT, MOFUSSIL—  
JURISDICTION—PURCHASE-MONEY.

[I. L. R. 11 Mad. 269]

—, s. 316

*See* MORTGAGE—SALE OF MORTGAGED  
PROPERTY—PURCHASERS.

[I. L. R. 15 Calc. 546]

—, s. 316.—*Certificate of sale, application  
for—Court Fees Act 1870, s 6.* An application by  
an auction-purchaser for a certificate of sale need  
bear no stamp, since by s 316 of the Civil Pro-  
cedure Code (Act XIV of 1882) it is not even re-  
quired to be in writing. *HIRA AMBAIDAS v. TEK-  
CHAND AMBAIDAS.*

[I. L. R. 13 Bom. 670]

—, s. 318.

*See* RESISTANCE OR OBSTRUCTION TO  
EXECUTION OF DECREE.

[I. L. R. 10 Mad. 53]

*See* RIGHTS OF SUIT—FRESH SUITS.

[I. L. R. 10 Mad. 53]

*See* RIGHT OF SUIT—POSSESSION, SUITS  
FOR.

[I. L. R. 14 Calc. 644]

—, ss. 320—325.

*See* COLLECTOR.

[I. L. R. 11 Bom. 478]

CIVIL PROCEDURE CODE 1882, ss. 320,  
325—*continued.*

*See* EXECUTION OF DECREE—TRANSFER  
OF DECREE FOR EXECUTION AND  
POWER OF COURT.

[I. L. R. 11 Bom 478]

*See* JURISDICTION OF CIVIL COURT—  
REVENUE COURTS—ORDERS OF  
REVENUE COURTS.

[I. L. R. 11 All. 94]

—, s. 331.

*See* RESISTANCE OR OBSTRUCTION TO  
EXECUTION OF DECREE.

[I. L. R. 14 Calc. 234]

—, s. 332.

*See* MAMLATDARS' COURTS' ACT.

[I. L. R. 13 Bom. 213]

*See* PARTIES—SUBSTITUTION OF PARTIES  
—JUDGMENT-DEBTORS.

[I. L. R. 12 Mad. 211]

*See* CASES UNDER RESISTANCE OR OB-  
STRUCTION TO EXECUTION OF  
DECREE.

—, s. 335.

*See* LIMITATION ACT 1877, ART. 167.

[I. L. R. 11 Bom. 473]

*See* RESISTANCE OR OBSTRUCTION TO  
EXECUTION OF DECREE.

[I. L. R. 10 Mad. 53]

*See* RIGHT OF SUIT—FRESH SUITS.

[I. L. R. 10 Mad. 53]

*See* SURETY—ENFORCEMENT OF SECURITY

[I. L. R. 14 Calc. 757]

*See* SURETY—LIABILITY OF SURETY,

[I. L. R. 14 Calc. 757]

—, s. 344.

*See* INSOLVENCY—INSOLVENT DEBTORS  
UNDER CIVIL PROCEDURE CODE.

[I. L. R. 11 Mad. 301]

*See* MUNSIF, JURISDICTION OF.

[I. L. R. 11 Mad. 301]

*See* SURETY—LIABILITY OF SURETY.

[I. L. R. 15 Calc. 171]

—, s. 349.

*See* ARREST.

[I. L. R. 12 Bom. 46]

*See* ATTACHMENT—ATTACHMENT OF  
PERSON.

[I. L. R. 12 Bom. 46]

CIVIL PROCEDURE CODE 1882—*contd.*

—, s. 351.

*See* CLAIM TO ATTACHED PROPERTY.

[I. L. R. 9 All. 232]

*See* INSOLVENCY—INSOLVENT DEBTORS  
UNDER CIVIL PROCEDURE CODE.

[I. L. R. 14 Calc. 691]

[I. L. R. 12 Bom. 424]

—, s. 352.

*See* INSOLVENCY—INSOLVENT DEBTORS  
UNDER CIVIL PROCEDURE CODE.

[I. L. R. 11 Mad. 1]

—, s. 354.

*See* CLAIM TO ATTACHED PROPERTY.

[I. L. R. 9 All. 232]

—, ss. 354—356.

*See* INSOLVENCY—INSOLVENT DEBTORS  
UNDER CIVIL PROCEDURE CODE.

[I. L. R. 12 Bom. 272]

*See* MORTGAGE—SALE OF MORTGAGED  
PROPERTY—RIGHTS OF MORT-  
GAGEES.

[I. L. R. 12 Bom. 272]

—, s. 360.

*See* INSOLVENCY—INSOLVENT DEBTORS  
UNDER CIVIL PROCEDURE CODE.

[I. L. R. 11 Mad. 301]

*See* MUNSIF, JURISDICTION OF

[I. L. R. 11 Mad. 301]

—, s. 361.

*See* ABATEMENT OF SUIT—SUITS.

[I. L. R. 13 Bom. 677]

*See* RIGHT OF SUIT—SURVIVAL OF RIGHT.

[I. L. R. 13 Bom. 677]

—, ss. 365—367.

*See* PARTIES—SUBSTITUTION OF PARTIES  
—RESPONDENTS.

[I. L. R. 9 All. 447]

[I. L. R. 10 All. 223]

—, s. 368.

*See* ABATEMENT OF SUIT—APPEALS.

[I. L. R. 11 All. 408]

*See* LIMITATION ACT 1877, ART. 171B.

[I. L. R. 10 All. 260, 264]

## CIVIL PROCEDURE CODE 1882, s. 368

—*continued.**See* PARTIES—SUBSTITUTION OF PARTIES  
—RESPONDENTS.

[I. L. R. 9 All. 447]

[I. L. R. 10 All. 223]

[I. L. R. 11 All. 408]

—, s. 372.

*See* JURISDICTION—QUESTION OF JURIS-  
DICTION—WHEN IT MAY BE RAISED.

[I. L. R. 10 All. 97]

*See* PARTIES—SUBSTITUTION OF PAR-  
TIES—JUDGMENT-DEBTORS.

[I. L. R. 10 All. 97]

—, s. 373.

*See* DECREE—FORM OF DECREE—NON-  
SUIT.

[I. L. R. 9 All. 690]

*See* LIMITATION ACT 1877, ART. 179—  
NATURE OF APPLICATION—IRRE-  
GULAR AND DEFECTIVE APPLICA-  
TIONS.

[I. L. R. 10 All. 71]

*See* MUNSIF, JURISDICTION OF.

[I. L. R. 10 Mad. 152]

*See* PLAINT—AMENDMENT OF PLAINT.

[I. L. R. 10 Mad. 152]

*See* SUPERINTENDENCE OF HIGH COURT  
—CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 11 Mad. 322]

*See* CASES UNDER WITHDRAWAL OF SUIT

—, s. 374.

*See* LIMITATION ACT, 1877, s 14.

[I. L. R. 12 Bom. 625]

*See* LIMITATION ACT, 1877, ART. 179—  
NATURE OF APPLICATION—IRRE-  
GULAR AND DEFECTIVE APPLICA-  
TIONS.

[I. L. R. 10 All. 71]

*See* CASES UNDER WITHDRAWAL OF SUIT.

—, s. 375.

*See* CASES UNDER COMPROMISE—COM-  
PROMISE OF SUITS UNDER CIVIL  
PROCEDURE CODE.

—, s. 401.

*See* PAUPER SUIT—SUITS.

[I. L. R. 10 All. 467]

—, s. 404—406.

*See* PAUPER SUIT—SUITS.

[I. L. R. 10 Mad. 193]

CIVIL PROCEDURE CODE 1882—*contd.*

—, s. 407.

*See* PAUPER SUIT—SUITS.

[I. L. R. 10 All. 467]

[I. L. R. 13 Bom. 126]

*See* SUPERINTENDENCE OF HIGH COURT  
—CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 10 All. 467]

—, ss. 409, 410.

*See* PAUPER SUIT—SUITS.

[I. L. R. 13 Bom. 234]

—, s. 411.

*See* APPEAL—DECREES.

[I. L. R. 9 All. 64]

*See* CIVIL PROCEDURE CODE, s. 244—  
PARTIES TO SUITS.

[I. L. R. 9 All. 64]

*See* PAUPER SUIT—SUITS.

[I. L. R. 9 All. 64]

[I. L. R. 13 Bom. 234]

*See* SET-OFF—CROSS DECREES.

[I. L. R. 9 All. 64]

—, s. 424.

*See* COLLECTOR.

[I. L. R. 11 Mad. 317]

[I. L. R. 13 Bom. 343]

—, s. 434.

*See* BENGAL RENT ACT, 1869, s. 53.

[I. L. R. 14 Calc. 570]

*See* EVIDENCE ACT, s. 86.

[I. L. R. 14 Calc. 546]

*See* FOREIGN JUDGMENT.

[I. L. R. 14 Calc. 546]

—, s. 440.

*See* MINOR—REPRESENTATION OF MINOR  
IN SUITS.

[I. L. R. 14 Calc. 159]

—, s. 441.

*See* MINOR—REPRESENTATION OF MINOR  
IN SUITS.

[I. L. R. 13 Bom. 234]

—, s. 442.

*See* MINOR—REPRESENTATION OF MINOR  
IN SUITS.

[I. L. R. 13 Bom. 7, 234]

CIVIL PROCEDURE CODE 1882—*contd.*

—, s. 443.

*See* MINOR—REPRESENTATION OF MINOR  
IN SUITS.

[I. L. R. 14 Calc. 204]

—, s. 444.

*See* MINOR—REPRESENTATION OF MINOR  
IN SUITS.

[I. L. R. 13 Bom. 234]

—, 458.

*See* GUARDIAN—APPOINTMENT.

[I. L. R. 12 Bom. 553]

—, s. 462.

*See* APPEAL—ORDERS.

[I. L. R. 12 Mad. 503]

*See* COMPROMISE—COMPROMISE OF SUITS  
UNDER CIVIL PROCEDURE CODE.

[I. L. R. 12 Mad. 483]

*See* OATHS ACT, s. 9.

[I. L. R. 12 Mad. 483]

—, s. 463.

*See* LUNATIC.

[I. L. R. 13 Bom. 656]

—, s. 468.

*See* SERVICE OF SUMMONS.

[I. L. R. 10 Mad. 319]

[I. L. R. 11 Mad. 475]

*See* SOLDIER.

[I. L. R. 11 Mad. 475]

—, ss. 477, 479.

*See* ATTACHMENT—ATTACHMENT BEFORE  
JUDGMENT.

[I. L. R. 14 Calc. 695]

—, s. 484.

*See* SURETY—ENFORCEMENT OF SECUR-  
ITY.

[I. L. R. 12 Bom. 71]

—, s. 490.

*See* EXECUTION OF DECREE—APPLICA-  
TION FOR EXECUTION, &c.

[I. L. R. 12 Bom. 400]

*See* SALE IN EXECUTION OF DECREE—DIS-  
TRIBUTION OF SALE PROCEEDS.

[I. L. R. 12 Bom. 400]

—, ss. 492, 493.

*See* INJUNCTION—UNDER CIVIL PROCEDURE  
CODE.

[I. L. R. 9 All. 497]

[I. L. R. 10 All. 80]

CIVIL PROCEDURE CODE 1882—*contd.*

—, s. 494.

*See* APPEAL—ORDERS.

[I. L. R. 12 Mad 186]

*See* SUPERINTENDENCE OF HIGH COURT—  
CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 12 Mad. 186]

—, s. 503.

*See* APPEAL—RECEIVERS.

[I. L. R. 10 Mad, 179, 180 note]

*See* RECEIVER.

[I. L. R. 14 Calc 323]

—, s. 505.

*See* APPEAL—RECEIVERS

[I. L. R. 10 Mad. 179, 180 note]

—, s. 506.

*See* SPECIFIC RELIEF ACT, s. 21.

[I. L. R. 9 All. 168]

*See* WITHDRAWAL OF SUIT.

[I. L. R. 9 All. 168]

—, ss. 508, 514.

*See* ARBITRATION—AWARDS—VALIDITY  
OF AWARDS AND GROUND FOR  
SETTING THEM ASIDE.

[I. L. R. 10 All. 137]

[I. L. R. 13 Bom 119]

*See* ARBITRATION — SUBMISSION OF  
AWARD.

[I. L. R. 10 All. 137]

[I. L. R. 13 Bom. 119]

—, s. 516.

*See* SUPERINTENDENCE OF HIGH COURT—  
CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 11 Mad. 144]

—, s. 520.

*See* APPEAL—ARBITRATION.

[I. L. R. 16 Calc. 482]

—, s. 521.

*See* APPEAL—ARBITRATION.

[I. L. R. 10 All. 8]

[I. L. R. 16 Calc. 482]

*See* ARBITRATION—AWARDS—VALIDITY  
OF AWARDS AND GROUND FOR  
SETTING THEM ASIDE.

[I. L. R. 10 All. 137]

[I. L. R. 13 Bom. 119]

[I. L. R. 12 Mad. 113]

CIVIL PROCEDURE CODE 1882, s. 521  
— *continued.**See* SPECIAL APPEAL—ORDERS SUBJECT  
TO APPEAL.

[I. L. R. 10 All. 8]

—, s. 522.

*See* APPEAL—ARBITRATION.

[I. L. R. 11 Mad. 85]

[I. L. R. 10 All. 8]

*See* SPECIAL APPEAL—ORDERS SUBJECT  
TO APPEAL.

[I. L. R. 10 All. 8]

—, s. 525.

*See* APPEAL—ARBITRATION.

[I. L. R. 16 Calc. 482]

*See* ARBITRATION—AWARDS—VALIDITY  
OF AWARDS AND GROUND FOR  
SETTING THEM ASIDE.

[I. L. R. 16 Calc 482]

*See* ARBITRATION—PRIVATE ARBITRA-  
TION.

[I. L. R. 12 Mad. 331]

*See* EVIDENCE—CIVIL CASES—SECONDARY  
EVIDENCE—LOST OR DESTROYED  
DOCUMENTS.

[I. L. R. 12 Mad 331]

*See* SUPERINTENDENCE OF HIGH COURT—  
CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 16 Calc. 482]

—, s. 526.

*See* APPEAL—ARBITRATION.

[I. L. R. 16 Calc. 482]

*See* ARBITRATION—AWARDS—VALIDITY  
OF AWARDS AND GROUND FOR  
SETTING THEM ASIDE

[I. L. R. 16 Calc. 482]

*See* SUPERINTENDENCE OF HIGH COURT—  
CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 16 Calc. 482]

—, ss. 532, 538.

*See* DECREE—FORM OF DECREE—BILL OF  
EXCHANGE.

[I. L. R. 16 Calc. 804]

—, s. 539.

*See* RIGHT OF SUIT—CHARITIES.

[I. L. R. 10 Mad. 185, 375]

[I. L. R. 12 Bom. 247]

[I. L. R. 10 All. 18]

[I. L. R. 12 Mad. 157]

## CIVIL PROCEDURE CODE 1882, s. 539

—continued

See RIGHT OF SUIT—INTEREST TO SUPPORT SUIT.

[I. L. R. 12 Mad. 157

—, s. 541.

See LIMITATION ACT, 1877, s. 4.

[I. L. R. 16 Calc. 250

See LIMITATION ACT, 1877, ART. 179—  
PERIOD FROM WHICH LIMITATION  
RUNS—WHERE THERE HAS BEEN  
AN APPEAL.

[I. L. R. 16 Calc 250

1.—s. 544.—Persons not parties to proceedings in appeal not bound by the result of those proceedings.] Decrees in three separate suits for the partition of a certain estate having been referred to the Collector of Ratnagiri for execution under the Civil Procedure Code (Act XIV of 1882), s. 265, B and R (brothers of the first appellant), who were parties to the suits, objected to the Collector's mode of partition, and applied to the Court to set aside the Collector's scheme, and to direct a fresh partition. The Subordinate Judge of Vengurla granted the application, and set aside the partition ordered by the Collector. Against this order, V, who was plaintiff in one of the suits, appealed to the District Court, and in the appeal he made B alone the respondent. The District Court reversed the order of the Subordinate Judge, and upheld the order of the Collector. Thereupon B preferred a second appeal to the High Court against the decision of the District Court. To this appeal neither R nor his brother, the present appellant, were made parties. The High Court having confirmed the decision of the District Court, proceedings were taken to carry out the partition according to the Collector's original scheme. The appellant objected, on the ground that the Collector's scheme had been set aside by the Subordinate Judge, and that he (the appellant) had not been a party to the proceedings in either of the Appellate Courts. He contended that he was, therefore, not bound by the decisions of the Appellate Courts, and that the order of the Subordinate Judge, setting aside the partition ordered by the Collector, was still in force so far as he was concerned. He therefore applied that the property should be divided in accordance with that order. His application was rejected by the Court of First Instance as time-barred, inasmuch as more than a year had elapsed since the date of the order of the Subordinate Judge, and during that time the applicant had taken no steps to enforce the order. On appeal, the Acting District Judge confirmed the order of the lower Court, holding that the order of the Subordinate Judge was no longer in force, having been set aside by the High Court. On second appeal to the High Court: Held, that the appellant was not bound by the final decision of the High Court. The original order being in

## CIVIL PROCEDURE CODE 1882, s. 544

—continued.

his favour, he could not be deprived of the benefit of that order without having the opportunity to defend it. Not having been a party to the proceedings in appeal, he was not affected by the result of those proceedings. Where there are several respondents before the Court of first appeal, though one of them may represent his fellows in a further appeal, he cannot represent a person who was not his co-respondent, and against whom therefore no decree could have been made on a point common to the two, or on any point at all. DEY GOPAL SAVANT v. VASUDEV VITHAL SAVANT.

[I. L. R. 12 Bom. 371

2.—s. 544.—Appeal on full Court-fee from decree dismissing suit in part—Remand of whole case though no cross-appeal or objections preferred—Dismissal of whole suit on remand—High Court competent in second appeal to consider validity of remand order not specially appealed—Civil Procedure Code, ss. 544, 561.] A plaintiff whose suit had been decreed in part appealed from so much of the first Court's decree as was adverse to him, and stamped his memorandum of appeal with a stamp, which would have covered an appeal from the whole decree. The defendant did not appeal or file cross-objections. The lower Appellate Court remanded the whole case to the first Court under s. 562 of the Civil Procedure Code, the plaintiff not appealing under s. 583 (28) from the order of remand. The first Court then dismissed the whole suit, and, on appeal by the plaintiff, the lower Appellate Court confirmed the decree. On a second appeal to the High Court: Held, (i) that the High Court was competent to consider the validity or propriety of the order of remand, though it had not been specifically appealed against; (ii) that the order of remand was *ultra vires*, so far as it related to that part of the first Court's decree, which was favourable to the plaintiff, the lower Appellate Court not having jurisdiction, in the absence of any appeal or objections by the defendant, to disturb that part of the decree. Per MAHMOOD J.—S. 544 had no application to the case, that section relating only to cases where one or more of the parties arrayed on the same side appealed against a decree passed on a ground common to all, and not to cases, where either of two opposite parties appealed from a part of the decree upon a court-fee sufficient for an appeal from the whole. *Moheshur Sing v. Bengal Government*, 7 Moore's I. A. 283, *Forbes v. Ameeroonissa Begum*, 10 Moore's I. A. 340, and *Mukkun Lal v. Sree Kishen Sing*, 12 Moore's I. A. 157, referred to. CHEDA LAL v. BADULLAH.

[I. L. R. 11 All. 35

3.—s. 544.—Appeal by one of several plaintiffs claiming under a joint right—Decree in such appeal binds other co-plaintiffs, although not parties to the appeal—Procedure.] A and B brought a

CIVIL PROCEDURE CODE 1882, s. 554  
—continued.

suit against *C*, and obtained a decree awarding a part of their claim. *B* appealed, and the Appellate Court reversed the decree, and rejected the plaintiff's claim altogether. Subsequently *A* who had not joined in the appeal, applied for execution of the original decree: *Held*, that although *A* had not been a party to the appeal, he was bound by the decision of the Appellate Court, and was not entitled to take out execution. *BABAJI DHONDHET v. COLLECTOR OF SALT REVENUE*.

[I. L. R. 11 Bom. 596]

4.—s. 544.—*Power of Appellate Court to alter decree on appeal by one party—Madras Civil Courts Act, 1873—Jurisdiction of Munsif—Suit for partition and mesne profits.* *N* sued *S* and others for partition of a share of certain land, and claimed mesne profits from other defendants, who were tenants of the land. *S* obtained a decree by consent for her share, and a sum of 99 rupees was decreed to her against the tenants for mesne profits. Against this decree the tenants appealed. The Subordinate Judge finding that the subject-matter of the suit, the land of which partition was claimed, exceeded the jurisdiction of the Munsif, reversed the decree of the Munsif, and directed the plant to be returned for presentation in the proper Court. It was contended, on appeal to the High Court, that the Subordinate Judge could not set aside the decree against the tenants for mesne profits: *Held* that, as the Munsif's Court had no jurisdiction to entertain the suit for partition, it could make no decree for mesne profits, and, therefore, the Subordinate Judge had power to set it aside. *NAGAMMA v. SUBBA*.

[I. L. R. 11 Mad. 197]

—, s. 545.

See APPEAL—DECREES.

[I. L. R. 12 Bom. 279]

See EXECUTION OF DECREE—STAY OF EXECUTION.

[I. L. R. 9 All. 36]

See SURETY—ENFORCEMENT OF SECURITY.

[I. L. R. 12 Bom. 71]

—, s. 546.

See EXECUTION OF DECREE—STAY OF EXECUTION.

[I. L. R. 9 All. 36]

See SURETY—ENFORCEMENT OF SECURITY.

[I. L. R. 12 Bom. 411]

—, s. 549.

See CASES UNDER SECURITY FOR COSTS—APPEALS.

See SURETY—ENFORCEMENT OF SECURITY.

[I. L. R. 15 Calc. 497]

## CIVIL PROCEDURE CODE 1882—contd.

—, s. 561.

See APPEAL—DECREES.

[I. L. R. 10 Mad. 292]

See APPELLATE COURT—GENERAL DUTY OF APPELLATE COURTS.

[I. L. R. 13 Bom. 75]

See SPECIAL APPEAL—ORDERS SUBJECT TO APPEAL.

[I. L. R. 10 Mad. 292]

—, s. 562.

See REMAND—POWER OF REMAND

[I. L. R. 11 All. 488]

See REMAND—PROCEDURE ON REMAND.

[I. L. R. 11 Bom. 663]

—, s. 564.

See REMAND—POWER OF REMAND.

[I. L. R. 11 All. 488]

—, ss. 565, 566.

See SPECIAL APPEAL—PROCEDURE IN SPECIAL APPEAL.

[I. L. R. 9 All. 147]

—, s. 567.

See SPECIAL APPEAL—PROCEDURE ON SPECIAL APPEAL

[I. L. R. 9 All. 147]

—, s. 568

See CASES UNDER APPELLATE COURT—EVIDENCE AND ADDITIONAL EVIDENCE ON APPEAL.

—, s. 574.

See APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES—SUBSTANTIAL QUESTION OF LAW.

[I. L. R. 9 All. 93]

See JUDGMENT—CIVIL CASES—FORM AND CONTENTS OF JUDGMENT.

[I. L. R. 9 All. 26, 93]

—, s. 575.

See REVIEW—GROUND FOR REVIEW.

[I. L. R. 11 All. 176]

1.—s. 575.—*Difference of opinion between Judges hearing appeal—"Judgment"—Reference to Full Bench after delivery of dissentient judgments on the appeal—Reference ultra vires.* Where a Bench of two Judges hearing an appeal and differing in opinion have delivered judgments on the appeal as judgments of the Court, without any reservation, they are not competent to refer the appeal

CIVIL PROCEDURE CODE 1882, s. 575  
—continued.

to other Judges of the Court under s. 575 of the Civil Procedure Code. *Rohilkhand and Kumaon Bank v. Row*, I. L. R. 6 All. 463, referred to. *LAL SINGH v. GHANSHAM SINGH*.

[I. L. R. 9 All. 625]

2—s. 575.—*Practice—Appeal—Difference of opinion on Division Bench regarding preliminary objection as to limitation—Letters Patent, N.W. P., s. 27.* S. 27 of the Letters Patent for the High Court of the N.-W. Provinces has been superseded in those cases only to which s. 575 of the Civil Procedure Code properly and without straining language applies. There are many cases to which s. 575, even with the aid of s. 647, does not apply; and to these s. 27 of the Letters Patent is still applicable. One of the cases to which s. 575 of the Code does not apply is where a preliminary objection being taken to the hearing of a first appeal before the High Court on the ground that the appeal is time-barred, the Judges of the Division Bench differ in opinion as to whether the appellant has shown sufficient cause, within the meaning of s. 5 of the Limitation Act (XV of 1877), for not presenting the appeal within the prescribed period. The decision of such a preliminary objection is not a "hearing" of the appeal, but precedes the hearing or determines that there is no appeal which the Court can hear or decide. Where such a preliminary objection is allowed, it cannot be said that the Court which by reason of the Limitation Act, has no jurisdiction to hear the appeal, should nevertheless "affirm" the decree of the Court below. In the case of such a preliminary objection and such a difference of opinion (the Bench being equally divided), the opinion of the senior Judge should, under s. 27 of the Letters Patent, prevail. *Appaji Bhurav v. Shivalal Khubchand*, I. L. R. 3 Bom. 204, and *Grudharaj Maharaj Tikait v. Purushotum Gossami*, I. L. R. 10 Calc. 814, distinguished. *HUSAINI BEGAM v. COLLECTOR OF MUZUFFARNAGAR*.

[I. L. R. 11 All. 176]

—, s. 578.

See CASES UNDER APPELLATE COURT—OTHER ERRORS AFFECTING MERITS OF SUIT.

—, s. 579.

See DECREE—ALTERATION OR AMENDMENT OF DECREE.

[I. L. R. 11 All. 267]

See DECREE—CONSTRUCTION OF DECREE—GENERAL CASES.

[I. L. R. 11 Bom. 177]

See EXECUTION OF DECREE—DECREE TO BE EXECUTED AFTER APPEAL OR REVIEW.

[I. L. R. 11 All. 267]

## CIVIL PROCEDURE CODE 1882—contd.

—, s. 581

See EXECUTION OF DECREE—STAY OF EXECUTION.

[I. L. R. 10 All. 389]

—, s. 582.

See ABATEMENT OF SUIT—APPEALS.

[I. L. R. 11 All. 408]

See APPEAL—ARBITRATION.

[I. L. R. 10 All. 8]

See LIMITATION ACT, 1877, ART. 171B.

[I. L. R. 10 All. 260, 264]

See PARTIES—SUBSTITUTION OF PARTIES—RESPONDENTS.

[I. L. R. 10 All. 223]

[I. L. R. 11 All. 408]

See SPECIAL APPEAL—ORDERS SUBJECT TO APPEAL.

[I. L. R. 10 All. 8]

—, s. 583.

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT.

[I. L. R. 11 Mad. 258]

[I. L. R. 13 Bom. 485]

See EXECUTION OF DECREE—STAY OF EXECUTION.

[I. L. R. 10 All. 389]

See LIMITATION ACT, 1877, ART. 178.

[I. L. R. 10 Mad. 66]

See MESNE PROFITS—ASSESSMENT OF MESNE PROFITS IN EXECUTION AND SUITS FOR MESNE PROFITS.

[I. L. R. 11 Mad. 258]

See PRE-EMPTION—PURCHASE MONEY.

[I. L. R. 10 All. 400]

See SURETY—ENFORCEMENT OF SECURITY.

[I. L. R. 12 Bom. 411]

—, s. 584.

See APPEAL—DECREES.

[I. L. R. 10 Mad. 292]

See PRIVY COUNCIL, PRACTICE OF—QUESTIONS OF FACT.

[I. L. R. 16 Calc. 753]

See SPECIAL APPEAL—ORDERS SUBJECT TO APPEAL.

[I. L. R. 11 All. 383]

## CIVIL PROCEDURE CODE 1882, s. 584

*—continued.*

*See* SPECIAL APPEAL—PROCEDURE IN  
SPECIAL APPEAL.

[L. R. 16 I. A. 233

[I. L. R. 17 Calc. 291

—, s. 585.

*See* PRIVY COUNCIL, PRACTICE OF—  
QUESTIONS OF FACT.

[I. L. R. 16 Calc. 753

*See* SPECIAL APPEAL—PROCEDURE IN  
SPECIAL APPEAL.

[L. R. 16 I. A. 233

[I. L. R. 17 Calc. 291

—, s. 586

*See* SMALL CAUSE COURT, MOFUSSIL—  
JURISDICTION—CONTRACT.

[I. L. R. 15 Calc. 652

[I. L. R. 12 Mad. 349

*See* SPECIAL APPEAL—SMALL CAUSE  
COURT CASES—CONTRACTS.

[I. L. R. 15 Calc. 652

[I. L. R. 12 Mad. 349

*See* SPECIAL APPEAL—SMALL CAUSE  
COURT CASES—GENERAL CASES.

[I. L. R. 12 Mad. 116

—, s. 587.

*See* DECREE—CONSTRUCTION OF DECREES  
—GENERAL CASES

[I. L. R. 11 Bom. 177

*See* PARTIES—SUBSTITUTION OF PARTIES  
—RESPONDENTS.

[I. L. R. 10 All. 223

*See* SPECIAL APPEAL—PROCEDURE IN  
SPECIAL APPEAL.

[I. L. R. 9 All. 147

—, s. 588.

*See* APPEAL—EX-PARTE CASES.

[I. L. R. 16 Calc. 426

*See* APPEAL—RECEIVERS.

[I. L. R. 10 Mad. 179, 180 note.

*See* APPEAL—SALE IN EXECUTION OF  
DECREE.

[I. L. R. 11 Bom. 603

*See* LETTERS PATENT, HIGH COURT  
N.-W. P., CL. 10.

[I. L. R. 11 All. 375

CIVIL PROCEDURE CODE 1882—*contd.*

—, s. 589.

*See* APPEAL—ORDERS.

[I. L. R. 12 Mad. 472

—, s. 591.

*See* APPELLATE COURT—OTHER ERRORS  
AFFECTING MERITS OF SUIT.

[I. L. R. 9 All. 447

*See* LETTERS PATENT, HIGH COURT,  
N.-W. P., CL. 10.

[I. L. R. 11 All. 375

*See* SPECIAL APPEAL—OTHER ERRORS  
OF LAW OR PROCEDURE—PARTIES.

[I. L. R. 9 All. 447

—, s. 596.

*See* APPEAL TO PRIVY COUNCIL—CASES  
WHERE APPEAL LIES—SUBSTAN-  
TIAL QUESTION OF LAW.

[I. L. R. 16 Calc. 237

—, s. 599.

*See* APPEAL TO PRIVY COUNCIL—PRA-  
CTICE AND PROCEDURE—TIME FOR  
APPEALING.

[I. L. R. 10 Mad. 373

*See* LIMITATION ACT, 1877, s. 12.

[I. L. R. 10 Mad. 373

—, s. 608.

*See* PRIVY COUNCIL, PRACTICE OF—STAY  
OF PROCEEDINGS IN INDIA PEND-  
ING APPEAL.

[I. L. R. 14 Calc. 290

—, s. 617.

*See* APPEAL—EXECUTION OF DECREE—  
QUESTION IN EXECUTION.

[I. L. R. 11 Bom. 57

*See* CIVIL PROCEDURE CODE, 1882, s. 244  
—QUESTIONS IN EXECUTION OF  
DECREE.

[I. L. R. 11 Bom. 57

*See* CASES UNDER REFERENCE TO HIGH  
COURT—CIVIL CASES.

—, s. 620.

*See* COSTS—SPECIAL CASES—REFERENCE  
TO HIGH COURT.

[I. L. R. 15 Calc. 507

*See* SMALL CAUSE COURT, PRESIDENCY  
TOWNS—PRACTICE & PROCEDURE  
—REFERENCE TO HIGH COURT.

[I. L. R. 15 Calc. 507



CIVIL PROCEDURE CODE 1882—*contd.*

—, s. 622.

*See* CIVIL PROCEDURE CODE, s. 253

[I. L. R. 11 Bom 724]

*See* CASES UNDER SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622.

—, s. 623.

*See* CASES UNDER REVIEW.

—, s. 624

*See* REVIEW—REVIEW BY JUDGE OTHER THAN JUDGE IN ORIGINAL CASE.

[I. L. R. 12 Mad, 509]

—, s. 629.

*See* APPEAL—ORDERS.

[I. L. R. 12 Bom. 171]

[I. L. R. 15 Calc. 788]

*See* LETTERS PATENT, HIGH COURT, CL 15.

[I. L. R. 16 Calc. 788]

*See* REVIEW—POWER TO REVIEW.

[I. L. R. 15 Calc. 432]

*See* SPECIAL APPEAL—ORDERS SUBJECT TO APPEAL.

[I. L. R. 13 Bom 496]

[I. L. R. 12 Mad. 125]

[I. L. R. 11 All. 383]

*See* SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 11 All. 383]

—, s. 632.

*See* LETTERS PATENT, HIGH COURT, N.-W. P., CL., 10.

[I. L. R. 11 All. 375]

—, s. 633.

*See* JUDGMENT—CIVIL CASES—FORM AND CONTENTS OF JUDGMENT.

[I. L. R. 9 All. 93]

—, s. 635.

*See* ADVOCATE.

[I. L. R. 9 All 617]

*See* PLEADER—APPOINTMENT AND APPEARANCE.

[I. L. R. 9 All. 613]

*See* RULES OF HIGH COURT, N.-W. P.

[I. L. R. 9 All. 613]

CIVIL PROCEDURE CODE 1882—*contd.*

—, s. 646B.

*See* REFERENCE TO HIGH COURT—CIVIL CASES.

[I. L. R. 11 All. 304]

—, s. 647.

*See* COMPROMISE—COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE.

[I. L. R. 11 All. 228]

*See* EXECUTION OF DECREE—STAY OF EXECUTION.

[I. L. R. 9 All. 36]

*See* JURISDICTION—QUESTION OF JURISDICTION—WHEN IT MAY BE RAISED.

[I. L. R. 10 All. 97]

—, s. 647.

*See* LIMITATION ACT, 1877, ART. 179—NATURE OF APPLICATION—IRREGULAR AND DEFECTIVE APPLICATIONS.

[I. L. R. 10 All. 71]

*See* PARTIES—SUBSTITUTION OF PARTIES—JUDGMENT-DEBTORS.

[I. L. R. 10 All 97]

*See* REFERENCE TO HIGH COURT—CIVIL CASES.

[I. L. R. 12 Bom. 30]

*See* SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 10 All. 119]

*See* TRANSFER OF CIVIL CASE—GENERAL CASES.

[I. L. R. 9 All 180]

*See* WITHDRAWAL OF SUIT.

[I. L. R. 10 All. 71]

## CIVIL PROCEDURE CODE, AMENDMENT ACT (VII of 1888).

—, s. 46.

*See* EXECUTION OF DECREE—REPEAL OF ACT PENDING SUIT.

[I. L. R. 16 Calc. 323]

—, ss. 53, 66.

*See* ABATEMENT OF SUIT—APPEALS.

[I. L. R. 11 All. 408]

*See* PARTIES—SUBSTITUTION OF PARTIES—RESPONDENTS.

[I. L. R. 11 All. 408]

**CIVIL PROCEDURE CODE, AMENDMENT ACT (VII of 1888)—concluded**

—, s. 55.

See APPEAL—APPEAL NEWLY GIVEN BY LAW.

[I. L. R. 16 Calc. 429]

—, s. 56.

See APPEAL—APPEAL NEWLY GIVEN BY LAW

[I. L. R. 16 Calc. 429]

See APPEAL—ORDERS

[I. L. R. 12 Mad. 472]

**CLAIM TO ATTACHED PROPERTY.**

1.—*Civil Procedure Code, 1882, s. 280—Attachment—Wakf—Trust Property—Jurisdiction of Court under s. 280, Code of Civil Procedure.* The question to be determined under s. 280 of the Civil Procedure Code is the question of possession: the words "possession of the judgment-debtor, or of some person in trust for him" refer to cases in which the possession of a claimant as a trustee is of such a character as to be really the possession of the debtor, and not to cases in which very intricate questions of law may arise as to whether or not valid trusts may result in particular instances. IN THE MATTER OF THE PETITION OF HAMID BAKHUT MOZUMDAR, HAMID BAKHUT MOZUMDAR v. BUKTEAR CHAND MAHTO.

[I. L. R. 14 Calc. 617]

2.—*Civil Procedure Code, 1882, s. 278—Claim to property directed to be sold under a mortgage decree—Attachment.* Proceedings by way of claim under s. 278 of the Civil Procedure Code are applicable only to cases of money decrees where property has been attached, and not to claims preferred to properties directed to be sold under mortgage decrees. IN THE MATTER OF DEEFHOLTS. DEEFHOLTS v. PETERS.

[I. L. R. 14 Calc. 631]

3.—*Order of attachment—Judgment-debtor declared insolvent—Appointment of receiver—Vesting of insolvent's property in receiver—Objection to attachment—Jurisdiction to entertain objection—Civil Procedure Code s. 278.* Where property has been made the subject of attachment under Chap. XIX of the Civil Procedure Code, the right of an objector to assert his claim to be the true owner of the property, under s. 278, and the jurisdiction of the Court to entertain the objection, are not ousted by the mere circumstance that the judgment-debtor has been declared an insolvent, and his property vested in a Receiver under Chap. XX. It is the judgment-debtor's property only, not that of the objector, that is thus vested. PARAS RAM v. KARAM SINGH.

[I. L. R. 9 All. 232]

**CLAIM TO ATTACHED PROPERTY—concluded.**

4.—*Code of Civil Procedure, ss. 278, 280, 283—Investigation of claim to attached property* The extent to which the "investigation" required by s. 280 should be carried depends upon the circumstances of the case, SARDHARI LAL v. AMBICA PERSHAD.

[I. L. R. 15 Calc. 521]

[L. R. 15 I. A. 123]

**COLLECTOR.**

See BOMBAY ABKARI ACT, 1878, ss. 29, 67

[I. L. R. 11 Bom. 519]

See JURISDICTION OF CIVIL COURT—REVENUE COURT—ORDERS OF REVENUE COURTS.

[I. L. R. 11 All. 94]

See MADRAS BOUNDARY ACT, ss. 21, 25, 28.

[I. L. R. 12 Mad. 1]

See PARTIES—PARTIES TO SUITS—GOVERNMENT.

[I. L. R. 11 Bom. 519]

—, Certificate of—

See HEREDITARY OFFICES ACT, BOMBAY, s. 10.

[I. L. R. 12 Bom. 550]

1.—*Position and duties in executing decree of Civil Court—Civil Procedure Code, 1882, ss. 320—325—Execution of decree—Decree transferred to the Collector for execution—Collector's duties and powers in execution—Civil Court's jurisdiction to revise Collector's proceedings in execution.* A decree was transferred to the Collector for execution. The Mamlatdar, under the orders of the Collector, put up for sale certain immoveable property belonging to the judgment-debtors. The sale was confirmed by the Mamlatdar with the sanction of the Collector. Some time afterwards the auction-purchaser applied to the Collector for a certificate of sale, but the Collector refused the certificate, and set aside the sale, on the ground that the purchaser was a relative of the decree-holder, and had really purchased the property on his behalf without the permission of the Court. Against this proceeding of the Collector the purchaser made an application, first to the Subordinate Judge who had transferred the decree to the Collector for execution, and then to the District Court. But both Courts declined to entertain his application, on the ground of want of jurisdiction. *Held*, on an application to the High Court, that the Subordinate Judge had jurisdiction to deal with the application, and to revise the Collector's proceedings in execution. *Held*, also, that the Collector having through his subordinate put up for sale the judgment-debtor's property, and confirmed the sale, had in that way

COLLECTOR—*continued.*

completely executed the decree so far as he could, and was so far *functus officio*. His duty was to make a return to the Court of what he had done. After confirmation of the sale he could not set it aside. *Per* WEST, J. :—The Collector, like the Nazir in India, is a ministerial officer when he executes a decree. He, like the Nazir, must carry out the decree of a Civil Court in general subjection to the judicial direction of the Court on whose authority the coercive power exercised by him rests, and which alone can deal judicially with the questions that arise in execution. His proceedings and orders are subject, accordingly, to revision and correction on the application of a party aggrieved, whenever he misconceives the decree or acts illegally in giving effect to it. He is limited strictly to the precise line of activity laid down for him in the Code and the orders under it; and in cases of error or doubt it is the Court that must determine whether he, as its ministerial officer, has or has not transgressed his powers. *Per* BIRDWOOD, J. :—A sale made by a Collector under Chap XIX of the Civil Procedure Code is subject to confirmation by the Civil Court under s. 312. As soon as the Collector has exercised or performed the powers or duties conferred or imposed upon him by ss. 321 to 325 of the Code, he is *functus officio*. If he has sold the property or re-sold it under the power given by cl. (c) of s. 325, he has completed the execution of the decree so far as he can legally complete it, and it is then his duty to retransmit the decree to the Court, under rules prescribed in that behalf by Government under the second para. of s. 320. Where the property has been sold or re-sold, the sale or re-sale cannot be set aside by the Collector. Any application for setting it aside must be made to the Civil Court under s. 311, and dealt with by it under s. 312; and if no application is made to the Court, the sale must be confirmed by it under that section. *LALLU TRIKAM v. BHAVLA MITHA.*

[I. L. R. 11 Bom. 478]

*See KESHABDEO v. RADHA PRASAD.*

[I. L. R. 11 All. 94]

*MADHO PRASAD v. HANSA KUAR.*

[I. L. R. 5 All. 314]

*NATHU MAL v. LACHMI NARAIN.*

[I. L. R. 9 All. 43]

2.—*Civil Procedure Code, 1882, s. 265—Execution—Decree for partition referred to Collector—Collector bound to partition and deliver over possession to several allottees under decree—Practice.* The duty of the Collector, to whom a decree has been referred under s. 265 of the Civil Procedure Code (Act XIV of 1882) for partition, is not confined to mere division of the lands decreed to be divided, but includes the delivery of the shares to their respective allottees. *PARBHUDAS LAKHIMDAS v. SHANKARBHAI.*

[I. L. R. 11 Bom. 662]

COLLECTOR—*continued.*

3.—*Civil Procedure Code, ss. 313, 320—Transfer of execution of decree to Collector—Jurisdiction of Civil Courts to entertain application under s. 313—Rules prescribed by Local Government under s. 320—Notification No. 671 of 1880, dated the 30th August.* Held that an application under s. 313 of the Civil Procedure Code by the purchaser at a sale in execution of a decree, which had been transferred for execution to the Collector, in accordance with the rules prescribed by the Local Government, was entertainable by the Civil Courts, and the Collector had no jurisdiction, under the Code or under Notification No. 671 of 1880, to entertain it. *Madho Prasad v. Hansa Kuar, I. L. R. 5 All. 314, referred to. NATHU MAL v. LACHMI NARAIN.*

[I. L. R. 9 All. 43]

4.—*Civil Procedure Code, 1882, s. 424—Collector as guardian of ward—Notice in suit to recover money from estate of ward.* In a suit to recover money due on a promissory note executed by the deceased zemindar, out of the estate of the deceased and of his son, the defendant, a minor under the Court of Wards, the Collector, being appointed guardian *ad litem* of the defendant, pleaded that under s. 424 of the Code of Civil Procedure he was entitled to notice before suit, and the suit was dismissed on the ground of want of notice: *Held*, on appeal, that s. 424 was not applicable to the case. *ANANTHARAMAN v. RAMASAMI.*

[I. L. R. 11 Mad. 371]

5.—*Civil Procedure Code, 1882, s. 265—Execution of decree—Decree for partition—Land Revenue Code (Bombay Act V of 1879), s. 113—Collector's powers in executing partition decrees—Civil Court's jurisdiction to control Collector's action* Decrees in three separate suits for the partition of a certain estate having been referred to the Collector of Ratnagiri for execution under the Civil Procedure Code (Act XIV of 1882), s. 265, *B* and *R* (brothers of the first appellant), who were parties to the suits, objected to the Collector's mode of partition, and applied to the Court to set aside the Collector's scheme, and to direct a fresh partition. The Subordinate Judge of Vengurla granted the application, and set aside the partition ordered by the Collector. Against this order, *V*, who was plaintiff in one of the suits appealed to the District Court, and in the appeal he made *B* alone the respondent. The District Court reversed the order of the Subordinate Judge, and upheld the order of the Collector. Thereupon *B* preferred a second appeal to the High Court against the decision of the District Court. To this appeal neither *R* nor his brother the present appellant were made parties. The High Court having confirmed the decision of the District Court, proceedings were taken to carry out the partition according to the Collector's original scheme. The appellant objected, on the ground that the Collector's scheme had been set aside by the Subordinate Judge, and that he (the appellant) had not been a party to the proceedings in either

**COLLECTOR—continued.**

of the Appellate Courts. He contended that he was, therefore, not bound by the decisions of the Appellate Courts, and that the order of the Subordinate Judge, setting aside the partition ordered by the Collector, was still in force so far as he was concerned. He, therefore, applied that the property should be divided in accordance with that order. His application was rejected by the Court of First Instance as time-barred, inasmuch as more than a year had elapsed since the date of the order of the Subordinate Judge, and during that time the applicant had taken no steps to enforce the order. On appeal, the Acting District Judge confirmed the order of the lower Court, holding that the order of the Subordinate Judge was no longer in force, having been set aside by the High Court. On second appeal to the High Court: *Held*, that the appellant could not succeed in the present appeal, the object of which was to revive the order of the Subordinate Judge. That order was one which the Subordinate Judge had no power to make. It involved taking the execution of the decree for partition out of the Collector's hands into his own, in direct contradiction of the law. In case of partition of lands, s. 265 of the Civil Procedure Code (XIV of 1882) and s. 113 of the Bombay Revenue Code (Bombay Act V of 1879) place the execution of the decree entirely in the Collector's hands. This does not deprive the Court of judicial control of its decree; as for instance, if it should appear to have been obtained by fraud or surprise; but in the present case nothing of that kind was relied on. Nor was it asserted that the Collector had acted in bad faith, or contravened the command of the Court, or transgressed the law. What was alleged was that he had made an objectionable partition. This was not a ground on which the Subordinate Judge could interfere. **DEV GOPAL SAVANT v. VASUDEV VITHAL SAVANT.**

[I. L. R. 12 Bom. 371]

6.—*Civil Procedure Code, 1882, s. 424—Notice to Collector—Collector joined as party in respect of minor's property administered by him, to protect minor's title.* The plaintiff sued as purchaser at a Court-sale of the interest of defendant No. 1, to redeem and recover possession of the land in dispute, alleging that it had been mortgaged by defendant No. 1 to defendant No. 2. Defendant No. 1 denied the mortgage, and that he had any title to the land, which he said belonged to *R*, and formed a part of *R's* *deshmukhi* *vatan*. *R* having died, leaving a minor widow sued as defendant No. 4 in the suit, the estate was administered by the Collector. On the application of the minor's personal guardians, the Collector was joined as a party. The Collector contended on the minor's behalf that the suit having been brought without notice to him as required by s. 424 of the Civil Procedure Code (Act XIV of 1882), it was not maintainable. The District Judge was of opinion that notice was necessary. He therefore rejected the plaintiff's claim, and ordered the sale to be set aside. On appeal by the

**COLLECTOR—concluded.**

plaintiff to the High Court: *Held*, that notice under s. 424 of the Civil Procedure Code (Act XIV of 1882) was not necessary. The Collector was made a party, not in respect of any alleged illegal act by him, but on the application on the minor's personal guardians, in order to protect the minor's title as set up by the first defendant. **BHAU BALAPA v. NANA**

[I. L. R. 13 Bom. 343]

7.—*Suit to cancel patta of Government waste issued by Collector—Power of Collector to cancel patta granted by him—Standing order—Mistake, patta granted by* The plaintiff having obtained from the Revenue officers of the district a patta of Government waste land, sued for the cancellation a patta for the same land subsequently granted to other persons by the Collector who considered that the issue of the plaintiff's patta was not in accordance with the *darkhast* rule: *Heid*, (1), it was not competent to the Collector even if the first patta was granted by mistake to issue the second patta in supersession of that issued to plaintiff; (2) it was competent to a Civil Court to pass a decree declaring the second patta null and void, and the plaintiff was entitled to such a decree. **Kullappa Naik v. Ramannya Chariyar**, 4 Mad. 429, followed. **COLLECTOR OF SALEM v. RANGAPPA.**

[I. L. R. 12 Mad. 404]

**COLLISION, DAMAGE DONE TO SHIP BY.**

See LIMITATION ACT, 1877, ART. 36.

[I. L. R. 11 Bom. 133]

See LIMITATION ACT, 1877, ART. 49.

[I. L. R. 11 Bom. 133]

**COMMISSION—CRIMINAL CASES.**

*Criminal Procedure Code, 1882, s. 503—"Purda-nashin" woman—Examination by commission—Personal appearance in Court.* A Hindu lady having been summoned as a witness on behalf of an accused applied under s. 503 of the Code of Criminal Procedure to be examined by commission on the ground (*enter alia*) that she was a "purda-nashin," and that her enforced appearance in a Criminal Court would entail a forfeiture of her dignity and position in Hindu society: *Held*, that such application was properly made under the section, and that under the circumstances of the case the order prayed for could be made. **IN THE MATTER OF THE PETITION OF DIN TARINI DEBI.**

[I. L. R. 15 Calc. 775]

**COMMISSION AGENT.**

See CONTRACT—CONSTRUCTION OF CONTRACTS.

[I. L. R. 13 Bom. 470]

**COMMISSIONER FOR TAKING ACCOUNTS.**

*See* PRACTICE—CIVIL CASES—COMMISSIONER FOR TAKING ACCOUNTS.

[I. L. R. 13 Bom. 368]

**COMPANIES ACT (VI OF 1882)**

—, s. 18

*See* COMPANY—FORMATION AND REGISTRATION.

[I. L. R. 11 All. 349]

—, s. 45.

*See* COMPANY—ARTICLES OF ASSOCIATION AND LIABILITY OF SHAREHOLDERS.

[I. L. R. 12 Bom. 311, 647]

[I. L. R. 13 Bom. 1]

*See* COMPANY—WINDING UP—GENERAL CASES

[I. L. R. 9 All. 366]

—, s. 47.

*See* COMPANY—WINDING UP—GENERAL CASES

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—, ss. 60, 61.

*See* COMPANY—WINDING UP—GENERAL CASES.

[I. L. R. 9 All. 366]

—, s. 162.

*See* COMPANY—WINDING UP—COSTS AND CLAIMS ON ASSETS.

[I. L. R. 14 Calc. 219]

*See* COSTS—SPECIAL CASES—COMPANIES ACT, 1882.

[I. L. R. 14 Calc. 219]

—, s. 204.

*See* COMPANY—WINDING UP—GENERAL CASES.

[I. L. R. 12 Bom. 526]

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*See* COMPANY—WINDING UP—GENERAL CASES.

[I. L. R. 9 All. 366]

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**COMPANY—continued.**

—, Winding up—

*See* TRANSFER OF CIVIL CASE—GENERAL CASES.

[I. L. R. 9 All. 180]

**(1) FORMATION AND REGISTRATION.**

1—*Application for registration—Act X of 1866 (Indian Companies Act)—Application received while Act X of 1866 was in force—Delay in office of Registrar—Certificate purporting to be issued under Act X of 1866, but issued after repeal thereof by Act VI of 1882—General Clauses Consolidation Act (I of 1868) s. 6—Proceedings commenced.]* Prior to the 1st May 1882, the Secretary and Manager of a projected Company (which was to be limited by shares) applied to the Registrar of Joint Stock Companies for a certificate of incorporation of the Company, intending that it should be registered under Act X of 1866, the Indian Companies Act then in force, and forwarded the memorandum and articles of association with the necessary stamp-fees, and did everything that was required to be done by or on behalf of the Company to obtain a certificate under that Act. No order was passed by the Registrar upon this application until the 6th May, and owing to delay, for which the applicants were not responsible, registration was not effected and the certificate was not issued until the 3rd July, when a certificate was given purporting to be granted in pursuance of Act X of 1866. Meanwhile, on the 1st May 1882, the Indian Companies Act (VI of 1882) repealing Act X of 1866 came into force, s. 28 of which provided that every share in any Company should be deemed to have been taken and held subject to payment of the whole amount thereof in cash, unless the same had been otherwise determined by a contract in writing filed with the Registrar. No such provision existed in Act X of 1866. The shareholders of the Company paid nothing upon their shares in cash; but had agreed (not in writing filed with the Registrar) that, in consideration of certain property conveyed by them to the Company at the time of its formation, fully paid-up shares were to be allotted to them. Subsequently, the Company having gone into liquidation, the official liquidator sought to make the shareholders contributories to the assets of the Company as the holders of shares upon which nothing had been paid, with reference to s. 28 of the Indian Companies Act VI of 1882: *Held*, that the proceedings for obtaining registration of the Company and a grant of a certificate of such registration commenced, within the meaning of s. 6 of the General Clauses Act, when the memorandum and articles of association were received in the Registrar's office in April 1882, while Act X of 1866 was in force: that, therefore, the repeal of that Act by Act VI of 1882 did not affect those proceedings; that consequently the Company must be taken to have been incorporated under the former Act; and that the provisions of s. 28 of Act I 1882 not

## COMPANY—continued.

(1) FORMATION AND REGISTRATION—  
concluded.

being applicable, the shareholders were not liable to be placed on the list of contributories as not having paid the full amount of their shares IN THE MATTER OF THE WEST HOPE TOWN TEA COMPANY.

[I. L. R. 11 All. 349]

## (2) ARTICLES OF ASSOCIATION AND LIABILITY OF SHAREHOLDERS.

2.—*Memorandum of Association—Effect of signing memorandum—Withdrawal of signature before registration of memorandum—Companies Act VI of 1882, s. 45.* A person who signs a memorandum of association for a number of shares becomes absolutely bound to take those shares. The statutory liability, the creation of the agreement, commences with the signature of the memorandum and is not held in suspense until the memorandum is registered. There is no *locus penitentiae* up to the date of registration, and no person who has signed the memorandum can, acting independently of the others, cancel his signature. IN THE MACHINE EXCHANGE COMPANY. RUSTOMJI FRAMJI WADIA'S CASE. SHAPURJI BYRAMJI KATRUCK'S CASE

[I. L. R. 12 Bom. 311]

3.—*Companies Act VI of 1882, s. 45—Member signing unregistered copy of memorandum of association—Agreement to become a member—Proposal—Acceptance—Repudiation before registration of Company.* On the 13th April 1886, Lamb signed a printed copy of the proposed memorandum of association of a projected Company for ten shares which on the 31st August was registered as the Imperial Flour Mills Company. On that day, *viz.*, the 31st August 1886, Lamb received a notice from the Secretary of the Company, informing him that the Company had been duly registered, and requesting him to pay Rs. 100 as the deposit on the shares subscribed by him. On the 5th August, Lamb replied, stating that he had decided not to take up the shares. On the 6th August the Secretary wrote to Lamb, stating that he had already become a shareholder, and could not withdraw. On the 25th September the Directors held their first meeting, and resolved that the "shares applied for be allotted, and application and allotment monies be called in." On the 1st October the Secretary notified to Lamb the allotment of ten shares, and requested him to pay the overdue deposit call of Rs. 10 per share and the allotment call of Rs. 15 per share. Lamb refused to pay, and repudiated his liability in respect of the shares. He contended that he had never become a member of the Company: *Held*, that the defendant was not a member of the Company, and was not liable to the plaintiff's claim. The fact that he had signed the proposed memorandum of association did not make him a member, inasmuch as the document which he had signed was not the document which was registered

## COMPANY—continued,

## (2) ARTICLES OF ASSOCIATION AND LIABILITY OF SHAREHOLDERS—contd.

nor even a true copy of it. Nor could the defendant be held bound as having agreed to become a member within the meaning of s. 45 of the Indian Companies Act VI of 1882. The agreement which binds a party under this section must be an agreement with the Company itself. The Company not being in existence at the date of the defendant's signing the memorandum of association (*viz.*, the 16th April 1886), that signature could amount, at the most, to an application for shares to the promoters, which by reason of its non-withdrawal before the registration of the Company on the 31st August became on that day an application to the Company. There could be no acceptance of that application until the Company was registered; and the defendant withdrew his application by his letter of the 5th August. The letter written by the Company's agents on the 31st August was not an acceptance. It was only a request for the payment of the deposit on the shares for which the defendant had applied, and which was required as a guarantee for the *bona fides* of the application. Further, the terms of the resolution of the Board of Directors of the 25th September made it clear that up to that date the defendant's application had not been made a binding agreement by acceptance. His repudiation, therefore, of the 5th August was in time, and he could not be held liable as a shareholder of the Company. *Held*, also, that in no case could the defendant have been bound by the letter of the 31st August written by the agents of the Company. The letter was written, not by order of the Directors at a meeting duly convened and composed of the proper quorum of four. It was written by the Secretary after consulting separately three only of the Directors. This was an irregular proceeding, which would not bind the Company or the subscribers with regard to the application for or the acceptance of shares. The Directors did not act as a Board, nor was the consent of a quorum obtained. IMPERIAL FLOUR MILLS COMPANY v. LAMB.

[I. L. R. 12 Bom. 647]

4.—*Agreement to take shares—Companies Act VI of 1882, s. 43—Signing duplicate memorandum of association of the registration of Company—Effect of such signature only equivalent to a proposal to take shares—Acceptance.* A, after the Bombay Electrical Company had been registered, signed a duplicate memorandum of association for five shares. He subsequently acted as Director of the Company, being qualified to act as such by procuring from a member of the Company five fully paid-up shares. The shares for which he subscribed were never allotted to him, nor was he registered as holder of them. The Company went into liquidation: *Held*, that A was not liable in respect of the five shares for which he subscribed. A person signing a duplicate memorandum of association is not bound as one who has signed the original

## COMPANY—continued.

## (2) ARTICLES OF ASSOCIATION AND LIABILITY OF SHAREHOLDERS—contd.

memorandum, although such duplicate is signed after the Company has been registered. Such a signature cannot be binding because it does not amount to a signing of the memorandum itself and does not satisfy the requirements of s. 45 of the Indian Companies Act VI of 1882. It does not create the positive agreement which the law has made the necessary consequence of the signature of the real memorandum before registration. It only amounts to a proposal to take shares. But in the present case there had been no acceptance by the Company of the proposal. There had been no allotment and no placing on the register. Acceptance could not be legally inferred from the circumstances of the case. *P*'s liability was only inchoate and never became complete. The company while it was solvent never accepted *P*'s offer to become a shareholder, and after it went into liquidation it was too late. IN RE THE BOMBAY ELECTRICAL COMPANY, NASSER-WANJI DADABHOY KATRUCK'S CASE.

[I. L. R. 13 Bom. 1]

5.—*Liability of a signatory to the memorandum of association for a fully paid up share given to him as a present—Shares available for allotment, but not allotted.* The Bombay Electrical Company having gone into liquidation, the official liquidator applied to have *E* placed on the list of contributories in respect of one share for which he had subscribed, and signed the memorandum and articles of association on the 26th February 1885. The Company was registered on the 5th March 1885, and went into liquidation in July 1886. In his affidavit *E* stated that he had been induced to sign the memorandum and articles of association by one *P* who was a promoter of the company and who had promised to give him a fully paid-up share as the share he had signed for; that in March 1886, *P* had accordingly handed him the certificate of a fully paid-up share; that the said share was one out of a hundred fully paid-up shares which were given by the company to *P* in part payment of money due to him from the Company, and that the said share was duly entered in the share register of the company as having been fully paid-up on the 18th September 1885. He contended that the Company was estopped from denying that the share was fully paid-up; that no other share had been allotted to him and that all the shares of the company had been allotted: *Held*, that he was liable in respect of the share. The transaction between him and *P* did not bind or affect the company. The present of a paid-up share by a third party does not satisfy the obligation of a subscriber of the memorandum. The issue of the certificate does not estop the Company so long as the certificate has not passed to a *bona fide* transferee for value. If *E* had not, in fact paid money or money's worth for the one share subscribed for, the Company was still entitled

## COMPANY—continued.

## (2) ARTICLES OF ASSOCIATION AND LIABILITY OF SHAREHOLDERS—concluded.

to prove the non-payment, and claim the value of the share. *Held*, also, that as there were left shares available for allotment, the fact that none had been allotted to *E* made no difference, and that the liquidator was entitled to hold him to the contract which he had made with the Company when he signed the memorandum. IN RE THE BOMBAY ELECTRICAL COMPANY, ELMORE'S CASE.

[I. L. R. 13 Bom. 57]

6.—*Companies Act IV of 1882, s. 45—Contract with the company—Signing duplicate of the subsequently registered memorandum—Subsequent allotment and repudiation—Specific Relief Act I of 1877, s. 23, cl. (h), and s. 27, cl. (c)* The defendant, in February 1886, signed duplicates of the documents subsequently registered as the memorandum and articles of association of the plaintiff Company in December of the same year. By the documents which he signed, he 'agreed' to take the number of shares (ten) set opposite his name. He never cancelled that agreement. Ten shares were subsequently allotted to him; but the defendant did nothing amounting to an acceptance of this allotment, and on the 19th April 1888, definitely cancelled his previous agreement to take shares. *Held*, that the defendant had never become a shareholder of the Company. Whatever the signing by the defendant of the documents in February 1886 amounted to—whether to a contract or to a mere proposal—the defendant in signing them addressed, not the Company, which was not then in existence, but the promoters. If a contract, the Company was not then in existence and could not therefore ratify it if a proposal it was not a proposal to the Company, or an agent for the Company, and the Company could not therefore accept it. Section 23, cl. (h), and s. 27, cl. (c), of the Specific Relief Act I of 1877 do not apply to contracts to take shares; and only embody the English law as to cases where a company has taken the benefit of a contract, but refuses to carry it into effect. IMPERIAL ICE MANUFACTURING COMPANY v. MUNCHERSHAW BARJORJI WADIA.

[I. L. R. 13 Bom 415]

## (3) POWERS, DUTIES AND LIABILITIES OF DIRECTORS.

7.—*Trading by a Company under its Memorandum of Association—Memorandum of Association—Ultra vires.* The doctrine that a Company can do nothing which is not expressly or impliedly warranted by its memorandum of association or other instrument of incorporation, must be reasonably understood and applied. A Company, therefore, in carrying on the trade for which it is constituted, and in whatever may be fairly regarded as incidental to, or consequential upon that trade, is free to enter into



COMPANY—*continued.*(3) POWERS, DUTIES, AND LIABILITIES  
OF DIRECTORS—*concluded.*

any transaction not expressly prohibited by its memorandum of Association. *SHAMNUGGER JUTE FACTORY Co. v. RAM NARAIN CHATTERJEE.*

[I. L. R. 14 Calc. 189]

8.—*Director — Qualification — Qualification shares not paid for by Director, but transferred to him by a third person.* Shares taken as a qualification for a Directorship of a Company need not be taken from the Company. It is enough if they are taken in open market or from a friend within a reasonable time after acceptance of the office. They need not be shares for which the qualifying Director has paid. *IN RE THE BOMBAY ELECTRICAL COMPANY NASSERYANJI DADABHOY KATRUCK'S CASE.*

[I. L. R. 13 Bom. 1]

## (4) WINDING UP.

## (a) GENERAL CASES.

9.—*Suit against contributory—Service of notice and orders—Contributory in India to English Company.* The defendant was sued as a contributory on the B list of shareholders liable in the winding up of the London, Bombay and Mediterranean Bank. The Bank was an English Joint-Stock Company registered under the English Companies' Act, 1862, and the winding up order was made by the Court of Chancery in England on the 20th July 1866. By a subsequent order made on the winding up it was ordered by the said Court that service of notices, &c., of the various proceedings might be effected on contributories, being past members, by posting the same either in England or in Bombay duly addressed to the last known address or place of abode of such contributories. The Court of Chancery on the 16th December 1878, made an order for a call of £10 per share upon the contributories, and on the 5th June 1879, the final balance order was made by the Court. This suit was brought to recover the sum of Rs. 754-7-0 alleged to be due by the defendant as a contributory in the B list under the said balance order. The plaintiff was an assignee of the Bank. The defendant, who resided at Sumari, in the Surat District, denied that he was a shareholder in the Bank, and alleged that he had had no notice of the various proceedings in the winding up. At the hearing it was proved that one of the notices, which had been posted in Bombay addressed to the defendant at Sumari, in the Surat District, viz., a notice of the intended application for a call of £10 per share, dated the 27th August 1878, had been returned undelivered to the Dead Letter Office, having been carelessly addressed. No further steps were taken to serve it on the defendant: *Held*, that the defendant, not having received any summons or notice to attend the hearing of the application for a call of £10 per share, was not liable to the call made in his absence. Courts, in British India, when called upon to give

COMPANY—*continued.*(4) WINDING UP—*continued.*(a) GENERAL CASES—*continued.*

effect to a foreign judgment, should insist upon a strict proof of the validity and service of summonses and other processes alleged to have emanated from a foreign Court, and made a foundation for a liability to be enforced here by Courts that have no cognizance of the case on its merits. *Rousillon v. Rousillon*, L. R. 14 Ch. D. 351 and 371, followed. *EDULJI BURJORJI v. MANEKJI SORABJI PATEL.*

[I. L. R. 11 Bom. 241]

10.—*Contributories—Shareholders—Notice of allotment—Secondary evidence of notice—Press-copy letter—Evidence of original letter having been properly addressed and posted—Evidence Act I of 1872, ss. 16, 114—Register of members—Presumption of membership—Companies Act VI of 1882, ss. 45, 47, 60, 61, sch. I, Table A (97).* Upon the settlement of the list of contributories to the assets of a Company in course of liquidation under the Indian Companies' Act, one of the persons named in the list denied that he had agreed to become a member of the Company or was liable as a contributory. The District Court admitted as evidence on behalf of the official liquidator, a press-copy of a letter addressed to the objector for the purpose of proving that a notice of allotment of shares was duly communicated. No notice to the objector to produce the original letter appeared on the record; but, at the hearing of the appeal, it was alleged by the official liquidator and denied by the objector, that such notice had been in fact given. There was no evidence as to the posting of the original letter, or of the address which it bore; but the press-copy was contained in the press-copy letter-book of the Company, and was proved to be in the handwriting of a deceased Secretary of the Company, whose duty it was to despatch letters after they had been copied in the letter-book. The objector denied having received the letter or any notice of allotment. *Held* that the Court should not draw the inference that the original letter was properly addressed or posted; that the press-copy letter was inadmissible in evidence; and that there was no proof of the communication of any notice of allotment. The evidence adduced by the official liquidator to show that the defendant was a member of the Company and so liable as a contributory, consisted of the register of members, a letter written by the objector, a reply thereto written by a Managing Director of the Company, and the oral testimony of the Director himself. The objector adduced no evidence at all: *Held* that the official liquidator might, if he had chosen to do so, have put the register in evidence, and waited, before giving any further evidence, until the objector had given some to displace the *prima facie* evidence afforded by the register, or to impugn the character of the register; but his case must be looked at as a whole, and having taken the line which he did, he must take the consequences of his other evidence contradicting or impugning the *prima facie*



## COMPANY—continued.

## (4) WINDING UP—continued.

## (a) GENERAL CASES—concluded.

evidence of the register, and, notwithstanding that the objector gave no evidence, the register was not conclusive. *RAM DAS CHAKRABARTI v. OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY.*

[I. L. R. 9 All. 366]

11.—*Resolution to wind up—Dissentient shareholders—Notice of dissent—Requirements of such notice—Indian Companies' Act VI of 1882, s. 204.* The shareholders of the Gordon Mills having passed a resolution for the voluntary winding up of the Company, five dissentient shareholders gave notice of their dissent by a letter to the liquidators in the following terms:—"With reference to the resolutions to wind up the above Company voluntarily, and which were passed and confirmed on 14th instant, we hereby give you notice under s. 204 of the Indian Companies' Act VI of 1882, and require you to purchase the interest held by us in the said Company at such price as may be determined either by private arrangement or by arbitration, as we are dissentients from such resolution." *Held*, that the letter was sufficient notice of dissent under the provisions of s. 204 of the Indian Companies' Act VI of 1882. *MOTIRAM BHAGUBHAI v. GORDON MILLS.*

[I. L. R. 12 Bom. 526]

## (b) DUTIES AND POWERS OF LIQUIDATORS.

12.—*Vakil of creditor appointed liquidator.* A person who has been appointed liquidator of a Company ought not, after such appointment, to continue to act as vakil of a creditor, whose right to prove against the Company is in dispute in the liquidation. *IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY.*

[I. L. R. 9 All. 180]

## (c) COSTS AND CLAIMS ON ASSETS.

13.—*Companies' Act (Act VI of 1882), s. 162—Extraordinary power of the Court under the Companies' Act—Examination of witness—Costs* Certain persons connected with a Company then in course of liquidation, who were also some of the defendants in a pending suit brought by the Company (and revived subsequent to the order for winding up by the official liquidator) for an account and for the recovery of certain sums alleged to have been paid to the promoters of the Company, having been examined under an order obtained under s. 162 of the Companies' Act, 1882, applied through their counsel for costs incurred on such examination: *Held*, that no order as to such costs could be made. *IN THE MATTER OF THE INDIAN COMPANIES' ACT, 1882, AND IN THE MATTER OF T. F. BROWN & COMPANY.*

[I. L. R. 14 Calc. 219]

14.—*Unsuccessful application to make shareholders liable—Costs—Practice.* An unsuccessful

## COMPANY—continued.

## (4) WINDING UP—concluded.

## (c) COSTS AND CLAIMS ON ASSETS—concluded.

application by an official liquidator to place certain shareholders upon the list of contributories having been *bonâ fide* made in the liquidation of the Company, the Court ordered that the costs of each side should be paid as a first charge out of the estate. *IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY*

[I. L. R. 11 All. 349]

## COMPENSATION.

*See LAND ACQUISITION ACT, 1870, s. 39.*

[I. L. R. 14 Calc. 749]

*See LANDLORD AND TENANT—COMPENSATION FOR IMPROVEMENTS, &c., ON LAND.*

[I. L. R. 10 Mad. 112]

## COMPENSATION—CRIMINAL CASES.

1. For loss or injury caused by offence ... 170
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## (1) FOR LOSS OR INJURY CAUSED BY OFFENCE.

1.—*Cattle Trespass Act (I of 1871), s. 22—Joint fine—Fine and compensation.* Proceedings under s. 22 of the Cattle Trespass Act are quasi-civil in their nature; a Magistrate being at liberty under that section to assess and enforce, in a summary manner, compensation for an injury for which a civil action might be brought. An order, therefore, for the payment of a sum as fine and compensation, passed against two persons under that section, which does not specify the proportionate amount payable by each, is good. *IN THE MATTER OF NEAZ v. MONSIEUR.*

[I. L. R. 14 Calc. 175]

2.—*Criminal Procedure Code, s. 545—Death caused by rash and negligent act—Compensation to widow of deceased.* An order that the amount of a fine imposed on one convicted of causing death by a rash and negligent act be paid as compensation to the widow of the deceased is illegal. *IN RE LUTCHMAKA.*

[I. L. R. 12 Mad. 352]

## (2) TO ACCUSED ON DISMISSAL OF COMPLAINT.

3.—*Criminal Procedure Code, s. 250—Fetitious complaint.* The provisions of s. 250 of the Code of Criminal Procedure may be applied in summons cases whether tried summarily or not. *QUEEN-EMPRESS v. BASAVA.*

[I. L. R. 11 Mad. 142]

## COMPLAINANT.

*See OATHS ACT, ss. 8, 9, 10, 11.*

[I. L. R. 13 Bom. 389]

**COMPLAINANT—concluded.**

*Witness refusing to answer—Criminal Procedure Code, 1882, s. 485—Penal Code, s. 1798.]* *Seemle*—A complainant is not a witness punishable for refusal to answer under s. 485 of the Code of Criminal Procedure, or under s. 179 of the Penal Code. *IN RE GANESH NARAYAN SATHE.*

[I. L. R. 11 Bom. 600]

**COMPLAINT—**

1. Institution of complaint and necessary preliminaries ... 171
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[I. L. R. 12 Bom. 167]

**(1) INSTITUTION OF COMPLAINT AND NECESSARY PRELIMINARIES.**

1.—*Criminal Procedure Code, Act X of 1882, s. 191—Cognizance of an offence on suspicion—Penal Code, Act XLV of 1860, s. 211—Police report—False charge, Prosecution for, without first enquiring into truth of original complaint* ] A person having laid an information before the police, the police reported the case as false; the informant then appeared before a Magistrate, asking that his case might be investigated and his witnesses summoned. This application was refused, and the Magistrate after perusing the police report passed an order directing him to be prosecuted under s. 211 of the Penal Code. *Held*, that the application to the Magistrate was “a complaint” within the meaning of s. 191 of the Criminal Procedure Code into which the Magistrate was bound to have enquired. A Magistrate may take cognizance under s. 191 of the Criminal Procedure Code of an offence brought to his notice by a police report which affords ground for a suspicion that an offence has been committed; but, as a matter of sound judicial discretion, a Magistrate should not so proceed, and direct that the person suspected be tried until some person aggrieved has complained, or until he has before him a police report on the subject based on an investigation directed to the offence to be tried, and in cases of alleged false charges, until it is clear that the original charge has been either heard and dismissed or abandoned. And before the order to prosecute for the false charge is made, the person who made the original charge should be offered an opportunity of supporting it or abandoning it. *QUEEN-EMPRESS v. SHAM SALL.*

[I. L. R. 14 Calc. 707]

2.—*Criminal Procedure Code, ss. 4, 530, and 537—Third class Magistrate taking cognizance of case on receipt of a yadast from a Revenue officer and convicting accused without examining Complainant.* ] A revenue officer sent a yadast to a third class Magistrate, charging a certain person with having disobeyed a summons issued by the revenue officer. The third class Magis-

**COMPLAINT—continued.****(1) INSTITUTION OF COMPLAINT AND NECESSARY PRELIMINARIES—concluded**

trate thereupon tried and convicted the accused under s. 174 of the Penal Code. The District Magistrate referred the case on the ground that the conviction was bad under s. 530 (h) of the Code of Criminal Procedure. *Held*, that as the yadast amounted to a complaint within the meaning of s. 4, although the complainant was not examined on oath as required by s. 200, the conviction was not illegal. *QUEEN-EMPRESS v. MONU.*

[I. L. R. 11 Mad. 443]

3.—*Criminal Procedure Code, ss. 4, 198 and 200—Charge of defamation not made in complaint, but added in subsequent examination* ] A charge of defamation not contained in the complaint presented to the Magistrate, but added subsequently by the Magistrate upon statements made by the complainant in his examination under s. 200 of the Criminal Procedure Code, whether of his own accord or in consequence of suggestions from the Magistrate, is not a legal “complaint” made by an aggrieved person within the meaning of ss. 4 (a) and 198, so as to enable the Magistrate to take cognizance of the offence. *QUEEN-EMPRESS v. KALLU*, I. L. R. 5 All. 233, referred to. *QUEEN-EMPRESS v. DEOKINANDAN.*

[I. L. R. 10 All. 39]

4.—*Criminal Procedure Code, 1882, ss. 203, 248—Who may institute complaint* ] As a general rule any person having knowledge of the commission of an offence may set the law in motion by a complaint, even though he is not personally interested or affected by the offence. The exceptions to this rule, of which ss. 195 and 198 of the Criminal Procedure Code are examples, are exceptions created by statute. There is nothing in the Code showing an intention to confine prosecutions to the persons directly injured. *IN RE GANESH NARAYAN SATHE.*

[I. L. R. 13 Bom. 600]

**(2) POWER TO REFER TO SUBORDINATE OFFICER**

5.—*Reference to police officer—Examination of complainant.* ] It is not a proper course for a Magistrate, when a complaint is made before him of an offence of which he can take cognizance, to refer the complaint to a police officer. He is bound to receive the complaint, and after examining the complainant, to proceed according to law. *IN RE JANKIDAS GURU SITARAM.*

[I. L. R. 12 Bom. 161]

**(3) WITHDRAWAL OF COMPLAINT AND OBLIGATION OF MAGISTRATE TO HEAR IT.**

6.—*Warrant and summons cases—Criminal Procedure Code, 1882, s. 248.* ] Where the offence charged is a “warrant” and not a “summons” case, a Magistrate ought to proceed with the

**COMPLAINT—continued.****(3) WITHDRAWAL OF COMPLAINT AND OBLIGATION OF MAGISTRATE TO HEAR IT—concluded.**

inquiry or trial in spite of the withdrawal of the complainant, if he finds the elements of an offence on the facts set forth in the complaint. Section 248 of the Code of Criminal Procedure applies only to a "summons" case. *IN RE GANESH NARAYAN SATHE*.

[I. L. R. 13 Bom. 600]

**(4) DISMISSAL OF COMPLAINT.****(a) POWER OF, AND PRELIMINARIES TO, DISMISSAL.**

7.—*Report of Police-officer who is an accused person—Criminal Procedure Code (Act X of 1882) ss. 200—203, 437* ] Sections 200 to 203 of the Criminal Procedure Code must be read together, and a Magistrate dismissing a complaint under the provisions of s. 203 on any one of the three grounds, *viz.*, (1), if he, upon the statement of the complainant, reduced to writing under s. 200, finds no offence has been committed; (2), if he distrusts the statement made by the complainant; and (3), if he distrusts that statement, but his distrust is not sufficiently strong to warrant him in acting upon it except upon a further enquiry as provided for in s. 202—must record his reasons for so doing, for, if such reasons were not recorded, it would be impossible for the High Court, exercising its revisional powers under s. 437 of the Criminal Procedure Code, to consider whether the discretion of such Magistrate has been properly exercised. It was never contemplated that a Magistrate should call for a report from an accused person under s. 202 for the purpose of ascertaining the truth of the complaint if such accused happened to be an officer subordinate to the Magistrate. Where, therefore, a complaint was made against a police-officer, and complainant's statement was duly recorded and the Magistrate acting under the provision of s. 202 called for a report from such police-officer, and acting upon that report dismissed the complaint under s. 203: *Held*, that he had acted illegally, and that his order made under the last named section should be set aside, and the case proceeded with according to law from the time at which the complaint was made and the complainant's statement so recorded. *BAIDYA NATH SINGH v. MUSPRATT*.

[I. L. R. 14 Cal. 141]

8.—*Revival of proceedings—Criminal Procedure Code, ss. 203, 437.* ] A complaint was made, before a Magistrate of the first class, of an offence punishable under s. 323 of the Penal Code. The Magistrate recorded a brief statement by the complainant, but did not ask him if he had any witnesses to call. An order was passed directing that "a copy of the petition of complaint should be sent to the police-station, calling for a report on the matter, and on receipt of the report the Magistrate dismissed the complaint under s. 203 of the Criminal Procedure Code. There was

**COMPLAINT—continued.****(4) DISMISSAL OF COMPLAINT—concluded.****(a) POWER OF, AND PRELIMINARIES TO, DISMISSAL—concluded.**

nothing in the Magistrate's original order to show that he saw reason to distrust the truth of the complaint nor did he direct any local investigation to be made by a police officer for the purpose of ascertaining the truth or falsehood of the complaint. Subsequently to the dismissal of the complaint, the same complainant brought a fresh charge upon the same facts against the same persons in the same Court, and upon this charge the accused were tried, convicted, and sentenced: *Held*, that the Magistrate had not complied with the provisions of s. 202 of the Criminal Procedure Code, and ought not, merely on the report he had received, to have dismissed the first complaint under s. 203. *QUEEN-EMPRESS v. PURAN*.

[I. L. R. 9 All. 85]

9.—*Criminal Procedure Code, s. 203—“Examining”—Written complaint attested by complainant on oath—Irregularity—Criminal Procedure Code, s. 537.* ] Where a deposition in the shape of a complaint is made orally or in writing and is sworn to, the requirements of s. 203 of the Criminal Procedure Code in regard to the examination of the complainant are sufficiently satisfied. *Held*, therefore, where a Magistrate dismissed a complaint of criminal breach of trust without examining the complainant on oath, but after the complainant had sworn to the truth of the matters alleged in the complaint, that the provisions of s. 203 had been sufficiently complied with, and, if not, that the irregularity was covered by the terms of s. 537. *QUEEN-EMPRESS v. MURPHY*.

[I. L. R. 9 All. 666]

10.—*Criminal Procedure Code, 4882, s. 203. Magistrate's discretion—Nature and extent of such discretion—“Sufficient ground,” meaning of—Complainant's motive* ] A Magistrate cannot dismiss a complaint under s. 203 of the Code of Criminal Procedure (Act X of 1882), until he has examined the complainant to see whether there is *prima facie* evidence of a criminal offence. In exercising his discretion under s. 203, the Magistrate ought not to allow himself to be influenced by a consideration of the motive by which the complainant may have been actuated in moving in the matter, nor by any other consideration outside the facts which are adduced by the complainant in support of his complaint. *IN THE MATTER OF THE PETITION OF GANESH NARAYAN SATHE*.

[I. L. R. 13 Bom. 590]

**COMPOUNDING CRIMINAL OFFENCE.**

*See* CASES UNDER CONTRACT ACT, s. 23—**ILLEGAL CONTRACT—COMPOUNDING CRIMINAL OFFENCES.**

*See* GUARANTEE.

[I. L. R. 11 Bom. 566]

**COMPROMISE.****1. Compromise of Suits under Civil Procedure Code,**

*See* CIVIL PROCEDURE CODE, 1882, s 244  
—QUESTIONS IN EXECUTION OF DECREE.

[I. L. R. 9 All. 229]

*See* DECREE—FORM OF DECREE—GENERAL CASES.

[I. L. R. 9 All. 229]

*See* DIVORCE ACT, ss 16, 17.

[I. L. R. 10 All. 559]

*See* EXECUTION OF DECREE—APPLICATION, FOR EXECUTION AND POWERS OF COURT.

[I. L. R. 9 All. 229]

*See* GUARDIAN—DUTIES AND POWERS OF GUARDIANS.

[I. L. R. 12 Bom. 689]

**(1) COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE**

**1.—Suit on behalf of minor—Compromise without sanction of Court—Right of minor on attaining majority to impeach decree—Waiver—Practice—Procedure.]** One *R* as father and guardian of the present plaintiffs (three minors) filed this suit in 1870 to recover from the defendants, as executors of *H*, the arrears of a monthly allowance which they claimed under his will. By a decretal order, dated 6th November 1871, the suit was referred to the Commissioner to take accounts of the administration of the estate by the defendants. Accounts were duly brought in by the defendants, and objection and surcharges to these accounts were filed on behalf of the plaintiffs in June 1874. In November 1875, *R* died, and in April 1876, his mother *K* (grandmother of the infants), was appointed guardian *ad litem* of his infant children (the plaintiffs). The Commissioner made his report in March 1884, which was confirmed by the Court in 1885. The two elder children attained their majority and made no objection to the report, but the third plaintiff and the youngest of the three brothers, on attaining his majority in December 1887, at once instituted proceedings, and obtained a rule calling on the defendants to show cause why the proceedings in the suit subsequent to August 1876, should not be set aside, and why he should not be at liberty to proceed with the accounts filed in the office of the Commissioner. He alleged that the inquiry before the Commissioner had not been conducted in the interest of the infants, but had been improperly compromised by withdrawing objections which had been lodged to the accounts brought in by the defendants, and that this compromise had not been sanctioned by the Court: *Held*, that there had been, in effect, a waiver of the infants' claim under an

**COMPROMISE—continued.****(1) COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE—continued.**

agreement of withdrawal between the parties; and that for such waiver and withdrawal the Court's sanction on behalf of the infants was necessary; and that as such sanction had not been obtained, the plaintiff would be entitled to impeach the decree and re-open the accounts if he had proceeded in the proper manner by an application for review or by an original suit, but that the present procedure was wrong, and that the rule must be discharged. *KARMALI RAHIMBOY v. RAHIMBOY HABIBBOY.*

[I. L. R. 13 Bom. 137]

**2.—Civil Procedure Code, 1882, ss. 375, 647.—Execution of decree—Compromise in Execution of decree—Estoppel—Civil Procedure Code, s. 257 A]** Although a Court executing a decree is bound by the terms thereof, and cannot add to or vary or go behind them, the effect of s. 375 read with s. 647 of the Civil Procedure Code, is that, when a decree is put into execution, the proceedings taken therefor amount to a separate litigation in which the parties can enter into a compromise much in the same manner as in a regular suit. Such a compromise does not extinguish the decree; and the Court executing the decree is bound, subject to the conditions indicated by s. 375, to give effect to the compromise. In execution proceedings the word "suit" in s. 375 must, with reference to s. 647, be read as meaning "execution of decree." By reason of the words in s. 375, "lawful agreement or compromise," the provisions of s. 257 A become applicable to such a case; and, so long as the requirements of that section are satisfied, the compromise becomes a part of the decree itself, and—at least as between the decree-holder and the judgment-debtor—can be given effect to in execution of the decree. When such a compromise has been duly made and sanctioned by the Court executing the decree, neither the decree-holder nor the judgment-debtor can resile from the position assumed by them in the matter of the compromise. Even if such a compromise has been irregularly sanctioned by the Court executing the decree—the irregularity not amounting to want of jurisdiction—the compromise must take effect until the order sanctioning it is set aside, and, until that happens, the parties are bound by it in all proceedings relating to the execution of the decree, and, where they have acted upon it, they are estopped thereafter from questioning its validity. *Sita Ram v. Dasrath Das*, I. L. R. 5 All. 492, followed. *Debi Rai v. Gohra, Prasad*, I. L. R. 3 All. 585; *Ram Lakhun Rai v. Bakhtaur Rai*, I. L. R. 6 All. 623; *Fateh Muhammad v. Gopal Das*, I. L. R. 7 All. 424; *Ganga v. Murlidhar*, I. L. R. 4 All. 240; *Sheo Golam Lal v. Beni Prasad*, I. L. R. 5 Calc. 27; *Lakshmana v. Sukiya Bai*, I. L. R. 7 Mad. 400; *Yella Shetti v. Munisami Reddi*, I. L. R. 6 Mad. 101; *Pisani v. Attorney-General of Gibraltar*, L. R. 5 C. P. 516; and

**COMPROMISE—concluded.****(1) COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE—concluded.**

*Sadasiva Pillai v. Ramalinga Pillai*, L R 2, I.A. 219, referred to. *MUHAMMAD SULAIMAN v. JHUKKI LAL*.

[I L R 11 All. 228.]

3.—*Oaths Act (X of 1873), s. 9—Civil Procedure Code, s. 462—Consent by guardian of a minor defendant to accept the oath of the plaintiff*]. It was agreed by the defendants who were majors and by the father and guardian of a minor defendant on his behalf, that one of the issues in a suit should be determined under the Oaths Act, s. 9, by the oath of the plaintiff. The oath was taken and a decree was passed accordingly. *Held*, that the minor defendant was bound by the consent of his guardian since there was no evidence of fraud or gross negligence on the part of the latter, although the Court had not sanctioned the agreement under s. 462, Civil Procedure Code. *CHENGALREDDI v. VENKATAREDDI*.

[I. L. R. 12 Mad. 483]

**CONCILIATOR—**

*See* DEKKAN AGRICULTURISTS RELIEF ACT, s. 39

[I. L. R. 13 Bom. 424]

**CONCUBINE.—**

*See* HINDU LAW — MAINTENANCE — RIGHT TO MAINTENANCE—CONCUBINE

[I. L. R. 12 Bom. 26]

**CONDITION.—Implied.**

*See* CONTRACT—CONSTRUCTION OF CONTRACTS

[I. L. R. 13 Bom. 630]

**CONDITION PRECEDENT.—**

*See* DECREE—CONSTRUCTION OF DECREES — GENERAL CASES.

[I L R 12 Bom 23]

**CONFESSION.**

*Col.*

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**CONFESSIONS TO MAGISTRATE.**

1.—*Evidence, Admissibility of confession in—Question and answer—Memorandum in English by Magistrate—Criminal Procedure Code (Act X of 1882), ss. 164, 364 and 533.* It is not necessary that the English memorandum referred to in para 3 of s. 364 of the Criminal Procedure Code should be made in respect of confessions recorded under s. 164, as the manner in which such a confession is to be recorded under the provisions of that section is fully set out in the first two paras. of s. 364. A confession of an accused person was

**CONFESSION—continued.****(1) CONFESSIONS TO MAGISTRATE—contd.**

recorded before a Deputy Magistrate by one of his clerks, under the provisions of s. 164 of the Criminal Procedure Code, while the case was under investigation by the police. No English memorandum of the nature referred to in s. 364 was made by the Deputy Magistrate. A further confession was recorded by the Magistrate under the provisions of s. 364 while the case was being heard before him. Both confessions were recorded in narrative form and the questions and answers were not taken down. At the trial before the Sessions Judge both confessions were put in evidence, and no evidence was given under the provisions of s. 533 of the Criminal Procedure Code that the accused duly made the statements recorded. The accused was convicted mainly on the strength of the confessions. *Held* upon the authority of the decision in *Titu Mays v. The Queen*, I. L. R. 8 Calc 618 (note), that as the accused was not prejudiced by the questions, and answers not being recorded, it was unnecessary for the Judge to take evidence under s. 533, and that the conviction based on the confessions must be upheld. *FEKOO MAHTO v. QUEEN-EMPRESS*.

[I. L. R. 14 Calc. 539]

2.—*Criminal Procedure Code, ss. 342, 364—Withdrawal of uncorroborated evidence by the witness Examination of the accused.* A and B were charged with the murder of C, the husband of B. There was some evidence that B had said her husband was dead a few days after his disappearance; and some bones, a skull, and some cloths were found in a neighbouring burying ground which were identified as those of C. B made a statement, recorded on June 4th by the village Munsif, to the effect that she had lured C into a garden, and that A, who was her paramour, had murdered him in her arms, which statement she repeated frequently with greater detail in answer to questions from the committing Magistrate, and subsequently before the Sessions Court. On her appeal to the High Court after she had been sentenced to death she retracted her former statements and made the usual charges of ill-treatment against the police. A made a statement to the Committing Magistrate which he subsequently repudiated before the Sessions Court, to the effect that he had assisted in disposing of the corpse of C at the request of his brother-in-law, who corroborated the statement in two depositions before the Magistrate which were likewise repudiated by the deponent before the Sessions Court. *Held*, that the conviction of A was wrong; and further (PARKER, J., dissenting) that the conviction of B was wrong. *Per* KEENAN, J.—“As the second prisoner has withdrawn all the confessional statements made by her, it is necessary according to the rulings of this Court to examine the evidence and see if there is reliable independent evidence to corroborate to a material extent and in material particulars the statements contained in the withdrawn confessional statements. If no such corroborative evi-

**CONFESSION—continued.****(1) CONFESSIONS TO MAGISTRATE—  
continued.**

dence exists, then the contradictory statements of the second prisoner remain, and doubt exists as to which statement is true, and the confessional statements cannot be safely relied on against the prisoner." *Sembla*.—The same rule should be followed when a witness withdraws his deposition before the Sessions Court. *Per* KERNAN, J.—The examination of an accused person under Criminal Procedure Code, s. 364, is subject to the purpose referred to in s. 342, *viz*, "to enable him to explain any circumstances appearing against him," and not to supplement the case for the prosecution against him to show that he is guilty. *QUEEN-EMPRESS v. RANGI*.

[I. L. R. 10 Mad 295]

3.—*Criminal Procedure Code, 1882, s. 164—Statement recorded by a Magistrate—Evidence—Judicial proceeding—Giving false evidence—Penal Code (Act XLV of 1860), ss. 191 and 192.* A statement taken by a third class Magistrate under s. 164 of the Code of Criminal Procedure (Act X of 1882), such Magistrate not having authority to carry on the preliminary inquiry in the case, is not evidence in a stage of a judicial proceeding within the meaning of ss. 191 and 193 of the Penal Code such that, when the statement is contradicted afterwards before the Magistrate having jurisdiction and exercising it in the preliminary inquiry, it will form a sufficient basis for an alternative charge of giving false evidence in a judicial proceeding. *QUEEN-EMPRESS v. BHARMA*.

[I. L. R. 11 Bom. 702]

4.—*Criminal Procedure Code (Act X of 1882) ss. 1, 164, 364 533—Defect in confession—Evidence Act (I of 1872), ss. 21, 26, 80—Presidency Towns. Investigations in.* An accused, in custody at the time, made to a Magistrate in Calcutta, in the course of a police investigation held in Calcutta, a statement confessing that he had murdered his father. The accused spoke and understood English, and the Magistrate questioned him in English, and was answered sometimes in English and sometimes in Bengali. Whenever the answers were given in English, they were so taken down, when in Bengali, they were written down in English and read over to the accused in that language, who accepted the English as being the meaning of that which he had stated, and signed the document in the presence of the Magistrate, who affixed the usual certificate thereto. In taking this confession the Magistrate purported to have acted under ss. 164 and 364 of the Criminal Procedure Code. At the trial, subsequently to the admission of the confession in evidence under s. 80 of the Evidence Act, The Magistrate was called as a witness and deposed to the above facts with reference to the language in which the confession was taken and the mode in which it was recorded: *Held*, on a reference to a Full Bench, as to whether the confession was inadmissible in evidence

**CONFESSION—concluded.****(1) CONFESSIONS TO MAGISTRATE—  
concluded.**

by reason of some of the answers having been given in Bengali, but recorded in English, that the provisions of s. 164 of the Code had no application to statements taken in the course of a police investigation made in the town of Calcutta, and that consequently ss. 364 and 533 had no application: *Held*, nevertheless, that the document was properly admitted upon the evidence of the Magistrate under the provisions of s. 26 of the Evidence Act. *Sembla*: The provisions of s. 164, as read with s. 364, would not be complied with, where answers made by an accused to a Magistrate in one language are taken down in another, unless it could be shown that it was impracticable to have taken down the answers in the language in which they were given, and further that there would be grave doubt if such a defect could be cured by s. 533. *QUEEN-EMPRESS v. NILMADHUB MITTER*.

[I. L. R. 15 Cal. 595]

5.—*Criminal Procedure Code, 1882, s. 288—Evidence—Confession retracted—Corroboration, deposition of witnesses before Magistrates read under s. 288 insufficient.* Where a prisoner was convicted of murder on a confession, to a Magistrate, retracted at the trial, corroborated by depositions, read under s. 288 of the Code of Criminal Procedure, and also retracted at the trial: *Held*, that the prisoner should not have been convicted on such evidence. *QUEEN-EMPRESS v. BHARMAPPA*.

[I. L. R. 12 Mad. 123]

**(2) CONFESSIONS TO POLICE-OFFICERS.**

6.—*Evidence Act, ss. 26, 27—Confessional statements made in the custody of police—Test of admissibility.* The test of the admissibility under s. 27 of the Evidence Act [of information received from an accused person in the custody of a police-officer, whether amounting to a confession or not, is —"Was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as much a relevant fact?" *QUEEN-EMPRESS v. COMMER SAHIB*.

[I. L. R. 12 Mad. 153]

**CONSENT.—**

*See* DECREE—FORM OF DECREE—GENERAL CASES,

[I. L. R. 9 All. 229]

*See* CASES UNDER JURISDICTION—QUESTION OF JURISDICTION—CONSENT OF PARTIES AND WAIVER OF JURISDICTION,

*See* PLEADER—AUTHORITY TO BIND CLIENT,

[I. L. R. 11 Bom. 591]

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## CONTEMPT OF COURT.

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## (1) PENAL CODE, s. 174.

1.—*Madras Act III of 1869—Disobedience to lawful order of public officer—Summons by Revenue officer to give evidence in pauperism inquiry—Standing Order of Board of Revenue (Madras), No. 48a.* The accused, who were parties to a petition pending in a District Court, were summoned by a tahsildar to give evidence on an inquiry by him as to whether or not the petitioner was a pauper; they omitted to attend on the summons, and were charged in respect of such non-attendance under s. 174 of the Penal Code and were convicted. *Held*, the conviction was bad, the tahsildar not being authorised to issue the summons under Act III of 1869 (Madras). *QUEEN-EMPRESS V. VARATHAPPA CHETTI.*

[I. L. R. 12 Mad. 297

## (2) PROCEDURE.

2.—*Criminal Procedure Code, s. 480, 537—Act XLII of 1860 (Penal Code), s. 228* The procedure laid down in s. 480 of the Criminal Procedure Code should be strictly followed. The provisions of the section should be applied then and there, at any rate before its rising, by the Court in whose view or presence a contempt has been committed, which it considers should be dealt with under s. 480. Where a Magistrate in whose presence contempt was committed, took cognizance of the offence immediately, but, in order to give the accused an opportunity of showing cause, postponed his final order for some days: *Held*, that such action, though it might be irregular, was not illegal, and as the accused had not been in any way prejudiced, was covered by s. 537 of the Criminal Procedure Code. *Held*, also that, under the circumstances, it was doubtful whether there was any necessity for the Magistrate to postpone the final order until the accused had had an opportunity of showing cause against it, and that he should have directed the detention of the accused and dealt with the matter at once or before his rising. *QUEEN-EMPRESS v. PAIAMBAR BAKSH.*

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## CONTRACT.—

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## (1) CONSTRUCTION OF CONTRACTS.

1.—*Sale of goods—Non-acceptance of goods—Contract for goods to be ordered from Europe—Performance of contract by offer of goods of same description not ordered out for purchasers, but bought by vendors in Bombay* On the 7th August the defendants commissioned the plaintiffs to order out from Europe 500 cwts. copper braziers, September shipment, assorted in the manner set out in the indent signed by the defendants, "free on board, Bombay harbour," at the rate of £33-5 per ton. On the same day the plaintiffs sent a reply to the defendants' order in their usual form, partly lithographed and partly written, as follows:—"We have the pleasure to inform you that we have received a telegram from our Manchester friends, and so far as regards the cyphers therein used, we learn that they advise the following purchases, which will be invoiced to you at your limit, subject to confirmation by letter as usual. Order this day 100 bundles of copper braziers, at £33-5 per ton, free on board, Bombay." As a fact, however, no telegram had been received from the plaintiffs' Manchester friends, and the plaintiffs had not learned that they had advised the purchases referred to in their reply. The acceptance of the plaintiffs' offer was really based on the plaintiffs' view of the probabilities of the copper market. The agents in England were unable to carry out the order, and it remained unexecuted. On the 26th October the plaintiffs having negotiated with one Naga Ducha to take over from him a September shipment of copper by the S. S. *Merton Hall*, answering to the defendants' order, and for the purpose of fulfilling it, wrote to the defendants as follows:—"We beg to inform you of the arrival of the S. S. *Merton Hall* with 100 packages of goods sold to you as per agreement No 213; and have, therefore,



**CONTRACT—continued****(1) CONSTRUCTION OF CONTRACTS—contd.**

to request payment of the cash for those goods, according to the terms of the agreement." The plaintiffs' negotiation, however, with Naga Ducha fell through, and they were unable to supply the defendants with the goods from the *Merton Hall*. The defendants on the 30th October wrote through their solicitors to the plaintiffs, stating that they believed the goods never came to Bombay, and that they considered the contract at an end. The plaintiffs, however, on the 29th October had succeeded in purchasing a September shipment of goods from one Beg Mahomed, corresponding to those ordered by the defendants. They then on the 31st October wrote to the defendants, informing them that it was a mistake of their clerk to advise the arrival of the defendants' goods *per Merton Hall*, and handing the defendants' invoice of 100 bundles arrived *ex Tuban Head*. The defendants discovered that the plaintiffs had not ordered out these goods, but had purchased them in Bombay, and on that ground they refused to accept them. The price of copper had then fallen. The plaintiffs sold the goods by auction, and brought this suit against the defendants, to recover the difference between the price realized by the sale and the price which by their contract the defendants had agreed to pay. It was admitted by the plaintiffs' witnesses that it was intended, at the time the defendants gave their order, that the goods should be ordered out from England by the plaintiffs; and that this was the invariable course of business of the plaintiffs' firm—the present case forming the only instance to the contrary. *Held*, that the defendants were not bound to accept the goods offered by the plaintiffs; and that the plaintiffs were not entitled to recover the amount sued for. An importing firm which accepts a commission to order out goods at a fixed rate, and undertakes that they shall be invoiced to the person giving the order at that rate does not (in the absence of proof of usage to the contrary), fulfil his contract by obtaining goods answering to the terms of the order from another firm in Bombay, and tendering them to the person giving the order. **BOMBAY UNITED MERCHANTS' COMPANY v DOOLUBRAM SAKULCHAND.**

[I. L. R. 12 Bom. 50]

**2.—Contract to deliver goods—Suit for non-delivery—Agreement exempting from liability in case of loss of carrying ship—Necessity for declaring name of carrying ship to purchaser—Loss of ship, what is a—July-August shipment, what amounts to.]** The defendants agreed to sell to the plaintiff 500 tons of coal *per Steamer July-August shipment*. The last clause of the agreement was as follows:—"In the event of the ship being lost, this contract to be null and void." The coal was put on board the *S. S. Rubens* by the defendants at Sunderland on the 30th and 31st August. On the 1st September the *Rubens* was sunk by collision in dock, and remained at the bottom in twenty-three feet of

**CONTRACT—continued****(1) CONSTRUCTION OF CONTRACTS—contd.**

water for sixteen hours, when she was raised and her cargo discharged. The coal was pronounced unfit for a voyage to Bombay. Extensive repairs to the ship were found necessary, and she was useless until the 6th October. The plaintiff sued for damages for non-delivery of the coal. The defendants relied on the last clause of the agreement as exempting them from liability. *Held*, that the defendants were not liable. The *Rubens* was lost for the purpose for which she was required under the contract, *viz.*, for a voyage in fulfilment of a July-August shipment, and the defendants, having proved that the coal had been duly shipped on board the vessel so lost, were exempt under the last clause of the agreement from liability for non-delivery. It was argued that until the name of the carrying ship was declared to the plaintiff as purchaser, neither the ship nor the coal was assigned to the contract, and, therefore, the loss could not be within the contract. *Held*, that if such a condition was intended it should have been expressed. The appropriation of certain goods to the contract by the vendors (the defendants), the placing them on board the *Rubens* and doing all in their power to despatch them to Bombay in fulfilment of the contract were enough to entitle them to the protection of the last clause of the agreement. **NUSSURVANJI JEHANGIR KHAMBATA v. VOLKART BROTHERS.**

[I. L. R. 13 Bom. 15]

**3.—Cash on delivery—Readiness and willingness to take delivery—Delivery, Failure of, in terms of contract—Breach of contract—Custom.]** Where a contract is for delivery "free on board," and cash on delivery is provided for, payment may be required upon delivery of the goods at the time and place mentioned for delivery in the contract. **HEILGERS & Co. v. JADUBALL SHAW.**

[I. L. R. 16 Calc. 417]

**4.—Demurrage—Sale of Cargo by consignee—Several purchasers—Contract incorporating the charter-party—Liability of one purchaser for delay of all—Contract absolute.]** On the 2nd June 1888, the defendant entered into two contracts with the plaintiffs, the consignees of the cargo, each for the purchase of 500 tons of coal *per S. S. Dunedin* then in harbour. The contracts provided (*inter alia*) "delivery to be taken at a rate of not less than 200 tons per day. All conditions in the charter-party to be binding on the purchaser." The charter-party stated, "Cargo to be discharged, weather permitting, at the average rate of not less than 300 tons a working day, or to pay demurrage at the rate of £30 per working day, or *pro rata*." Previously to the 2nd of June the rest of the cargo had been sold by the plaintiffs to three other purchasers, and the lay days had already partially expired; but as regards neither of these facts did the defendant ask nor were they given information. The *Dunedin* discharged at only three of her four hatches and so discharging was able to give delivery of something more than



**CONTRACT—continued.**

(1) CONSTRUCTION OF CONTRACTS—*contd.*  
 300, but less than 400 tons a day. Delivery was given to whichever of the four purchasers was the first to come alongside. At the expiration of the lay days (being the days required to discharge the whole cargo at the average rate of 300 tons a day) the cargo had been completely discharged with the exception of 264 tons, which remained to be delivered to the defendant. The cargo to be discharged subsequently to 2nd of June would have been discharged within the lay days, but for the want of lighters on the part of the purchasers of the cargo generally. It occasionally happened, however, that a lighter was kept idle waiting for its turn at one of the three hatches. The plaintiffs paid one day's demurrage in respect of the delay in discharging the 264 tons, and now brought an action to recover the same from the defendant. *Held*, that the defendant was liable. The contract of the defendant (by incorporation of the charter-party) to take delivery within the lay days, or to pay demurrage, being absolute, he could only excuse non-performance of his contract by showing it was due either to default of the captain of the ship, or of the plaintiffs themselves, neither of which had been shown. The plaintiffs were not to blame for any difficulties occurring by reason of there being other purchasers. That was the well-known nature of the trade, and it was for the defendant, if he desired protection in this respect, to provide for it in his contract. Neither were the plaintiffs bound to be able to deliver to the defendant at the rate of 400 tons a day under his two contracts. The stipulation in each of the two contracts, that delivery should be taken at a rate of not less than 200 tons *per diem*, was not one of which the defendant could insist, but was an independent stipulation in favour of the cargo. **VOLKART BROTHERS v. NUSSERANJI JHANGIR KHAMBATTA**

[I. L. R. 13 Bom. 392]

5.—*Goods ordered through commission agent.—Contract of agency—Contract of sale—Form of action.* The defendants traded in Bombay as merchants and commission agents, under the style of S. D. & Co., being a branch of a French firm trading in Paris under the same name, of which firm also the defendants were members. The Paris firm were agents for certain manufacturers of zinc. The plaintiff, a Bombay merchant, ordered out 48 casks of zinc sheets through the defendants' firm in Bombay by an indent in the following form:—"I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terms stated below." Such terms, *inter alia*, limited the price of the goods and the time within which the shipments were to be made. Later, the plaintiff consented to increase his limit of price. The defendants having communicated with their Paris firm wrote to the plaintiff as follows:—"We have the pleasure to inform you that our home firm has reported by wire concerning your esteemed

**CONTRACT—continued.**

(1) CONSTRUCTION OF CONTRACTS—*contd.*  
 order as follows:—Placed at your increased limit.' Subsequently the plaintiff was informed by the defendants that the manufacturers being full with orders, the zinc sheets would not be ready for shipment as soon as had been expected; and he was asked whether he agreed to give an extension of time or desired to cancel the indent. Simultaneously the plaintiff wrote that the contract time had been exceeded, and that he would buy similar goods in Bombay on the defendants' account. This the plaintiff did, and brought this action to recover the difference in price as damages on account of the defendants having failed to perform their contract for the delivery of 48 casks of zinc sheets: *Held*, that neither the defendants nor their Paris firm had entered into any contract of sale on which they were liable to the plaintiff. They had only constituted themselves his agents to 'place' his order, *i.e.* to effect a contract of purchase on his account with the manufacturers of zinc—and consequently the action as brought would not lie. *Ireland v. Livingston*, L. R. 5 E. & I. Ap. 395 and *Cassabgon v. Gibb*, L. R. 11 Q. B. D. 797, discussed and considered, **MAHOMED ALLY EBRAHIM PIRKHAN v. SCHILLER DOSOGNE & Co.**

[I. L. R. 13 Bom. 470]

6.—*Agreement for permission to quarry—License, Non-renewal of—Implied condition.* By an agreement (in renewal of similar agreements for the two previous years) dated the 31st September 1888, the defendant agreed to pay the plaintiff rent for a piece of hilly ground at the rate of Rs. 329 *per* month for one year, during which time the defendant was to be allowed to blast stones and carry on the work of quarrying to the extent of seven crow-bais, such quarrying to be done at such places as the plaintiff had pointed out, or should choose to point out from time to time. The rent to be paid was arrived at on a calculation of Rs. 47 *per* crow-bar, and was to be payable whether defendant employed the seven crow-bais or less. The defendant by the sixth clause of the agreement further undertook as follows:—"As regards the police arrangement and other expenses at the time of blasting stones and obtaining an order or license, &c., and as to any other kind of expenses, risk, and responsibility, all these are upon me. I will duly pay you at the rate of Rs. 329 *per* month clear until the fixed time." The defendant was a stone contractor, and had been employed in this work of quarrying all his life, and for the previous two years on this very spot, and was well aware that blasting could not be carried on without a license from the authorities, which was revocable at any time, and required renewal annually. At the time of the agreement the defendant was in possession of a license, which expired on the 31st December 1888. After that date the authorities refused to renew the license, on the ground that the quarry, where operations were being carried on, was surrounded by houses

**CONTRACT—continued.****(1) CONSTRUCTION OF CONTRACTS—concluded.**

on all sides, and the defendant thereupon refused to continue the payment of the monthly rent of Rs. 329. The plaintiff accordingly brought this suit in the Small Cause Court for three months' rent at the above rate. *Held*, looking at the nature of the contract, that it must be taken to have been the intention of the parties to it that the monthly sum of Rs. 329 should only be payable so long as quarrying was permitted by the authorities, and that there was no unconditional contract to pay Rs. 329 in all events in clause 6 of the agreement or elsewhere. *Taylor v. Caldwell*, 3 B. & S. 826, 32 L. J. Q. B. 164, followed; *Marquis of Bute v. Thompson*, 13 M. & W. 487; and *Ridgway v. Sneyd Kay* 627, commented on and distinguished. *GOCULDAS MADHAYJI v. NARSU YENKUJI*.

[I. L. R. 13 Bom. 630]

**(2) ALTERATION OF CONTRACTS.****(a) ALTERATION BY PARTY.**

7.—*Alteration in bond sued on—Materiality of alteration—Fraud—Admissibility on evidence.* Suit on a bond, the date of which had been altered from 11th September to 25th September, while it was in the possession of the plaintiff. Fraud was not proved, and the period of limitation reckoned from the 11th September had not expired. *Held*, that the bond was void as such, and was not receivable in evidence to prove the debt. *Christachariu v. Karibasayya* (I. L. R. 9 Mad. 399), followed. *GOVINDASAMI v. KUPUSAMI*.

[I. L. R. 12 Mad. 239]

**(b) ALTERATION BY COURT (INEQUITABLE CONTRACTS).**

8.—*Interest—“Dharta”—Illiterate agriculturist—Unconscionable bargain.* The High Court as a Court of Equity possesses the power exercised by the Court of Chancery of granting relief in cases of such unconscionable or grossly unequal and oppressive bargains as no man of ordinary prudence would enter into, and which, from their nature and the relative positions of the parties, raise a presumption of fraud or undue influence. The principles upon which such relief is granted apply to contracts in which exceedingly onerous conditions are imposed by money-lenders upon poor and ignorant persons in rural districts. The exercise of such power has not been affected by the repeal of the usury laws. *Chesterfield v. Janssen* 2 Ves 155; *O'Rourke v. Rolingbroke*, L. R. 2 App. Cas. 814; *Earl of Aylesford v. Morris*, L. R. 8 Ch. Ap. 484; *Nevill v. Snelling*, L. R. 15 Ch. D 679, and *Beynon v. Cook*, L. R. 10 Ch. Ap. 389, referred to. An illiterate *Kurmi* in the position of a peasant proprietor executed a mortgage-deed in favour of a professional money-lender to whom he owed Rs. 97, by which he agreed to pay interest on that sum at the rate of 24 *per cent. per annum*

**CONTRACT—continued.****(2) ALTERATION OF CONTRACTS—continued****(b) ALTERATION BY COURT (INEQUITABLE CONTRACTS)—continued.**

at compound interest. He further agreed that “*dharta*” or a yearly fine, at the rate of one *anna per rupee*, should be allowed to the mortgagee, to be calculated by yearly rests. It was also provided that the interest should be paid from the profits of certain *malikana* land of the mortgagor, and that if the interest were not paid for two years, the mortgagee should be put in possession of this land. As security for the debt a six *pies* *zemin* share was mortgaged for a term of eleven years. The effect of the stipulation as to “*dharta*” was that one *anna per rupee* would be added at the end of every year, not only to the principal mortgage-money but also to the interest due, and the total would be again regarded as the principal sum for the ensuing year. Ten years after the date of the mortgage, the mortgagor brought a suit for redemption on payment of only Rs. 97 or such sum as the Court might determine as due to the mortgagee. At that time the accounts made up by the mortgagee showed that the debt of Rs. 97 with compound interest, had swollen to Rs. 873, of which the “*dharta*” alone amounted to Rs. 211. *Held*, that the stipulation in the deed as to “*dharta*” was not of the kind referred to in s. 74 of the Contract Act (IX of 1872), and that there was no question of penalty, but that, looking to the relative positions of the parties, and the unconscionable and oppressive nature of the stipulation, the benefit thereof should be disallowed to the mortgagee, and the mortgagor permitted to redeem on payment of the mortgage money and interest, no appeal having been preferred by him from the decree of the first Court making redemption subject to the payment of interest. *LALLI v. RAM PRASAD*.

[I. L. R. 9 All. 74]

9.—*Unconscionable bargain—Bond—Compound interest.* In a suit for the recovery of a principal sum of Rs. 99 due upon a bond, with compound interest at 2 *per cent per mensem*, it was found that advantage was taken by the plaintiff of the fact that the defendant was being pressed in the *tahsil* for immediate payment of revenue due, to induce him to execute the bond, charging compound interest at the above-mentioned rate, notwithstanding that ample security was given by mortgage of landed property. It was also found that although, under the terms of the bond, the plaintiff had power to enforce the same at any time by bringing to sale the mortgaged property, he had wilfully allowed the debt to remain unsatisfied, in order that compound interest at a high rate might accumulate. *Held*, that the bargain was a hard and unconscionable one, which the Court had undoubted power to refuse to enforce, and which, under all the circumstances it would be unreasonable and inequitable for a Court of justice to give full effect to; and that, under the circumstances, compound

**CONTRACT—continued.****(2) ALTERATION OF CONTRACTS—continued.**  
**(b) ALTERATION BY COURT (INEQUITABLE CONTRACTS)—continued.**

interest should not be allowed. *Kamini Sundari Chaudhrani v. Kali Prasanna Ghose*, I. L. R. 12 Calc. 225; *Beynon v. Cook*, L. R. 10 Ch. Ap. 389; and *Lallu v. Ram Prasad*, I. L. R. 9 All. 74, referred to. The Court decreed the principal sum of Rs. 99, with simple interest at 24 per cent per annum, up to the date of institution of the suit *MADHO SING v. KASHI RAM*.

[I. L. R. 9 All. 228]

10 — *Voluntary transfer—Undue influence—Act IX of 1872 (Contract Act), s. 16*] In a transaction between two persons where one is so situated as to be under the control and influence of the other, the Courts in this country have to see that such other does not unduly and unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognise. Where a fiduciary or quasi-fiduciary relation had existed, courts of equity have invariably placed the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The exercise of this beneficial jurisdiction is not confined to cases only between guardian and ward, attorney and client, father and son, but the relief thus granted stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another. The plaintiff, who on the death of the widow of his brother became entitled to the estate of the deceased, found himself resisted in his claim by wealthy relatives. He was a man without means. The defendant took him to his house, kept him there, found him all the money for the purpose of carrying on his litigation with his relatives, in which the plaintiff succeeded. While the litigation for mutation of names in respect of the property was pending in the Revenue Court, and while plaintiff was residing with the defendant, he executed a sale deed in favor of defendant's brother for the nominal consideration of Rs. 9,500, or half the property he claimed; and again, shortly after the mutation case had terminated in his favor, he executed a deed of endowment of the remaining half in favor of a temple founded by the ancestor of the defendant, and in which the defendant was interested, and the result was that plaintiff was left as poor as he was when he first came into the defendant's hands. Plaintiff sued for cancellation of the deed of endowment, on the ground that the same had been obtained from him by the exercise of undue influence and by means of fraud, and obtained a decree. On appeal by the defendant it was held that, looking at all the facts, such a relation between plaintiff and defend-

**CONTRACT—continued.****(2) ALTERATION OF CONTRACTS—continued.**  
**(b) ALTERATION BY COURT (INEQUITABLE CONTRACTS)—continued.**

dant in the course of the year 1885 had been established as to cast upon the latter the obligation of satisfying the Court that the transaction, which was given effect to by the deed of endowment, was an honest *bona fide* transaction and one that ought to be upheld. *SITAL PRASAD v. PAREU LAL*.

[I. L. R. 10 All. 535]

11 — *Unconscionable bargain—Contract to pay expenses of litigation.*] The result of the English cases regarding "hard" or "unconscionable bargains" is that in dealings with expectant heirs, reversioners or remaindermen, the fact that the bargain was declined by others as not being sufficiently advantageous does not raise a presumption that it was fair and reasonable; and that until the contrary is satisfactorily proved by the party trying to maintain the bargain, the Court may presume that a bargain which apparently provides, in the opinion of the Court, for an unusually high return or for an exceptionally high rate of interest, is a hard and unconscionable bargain against which relief should be granted. The doctrine of equity on the subject of such bargains is applicable in England only to dealings with expectant heirs, reversioners or remaindermen. The judgment of the Privy Council in *Kamini Sundari Chaudhrani v. Kali Prasanna Ghose*, I. L. R. 12 Calc. 225, L. R. 12 I. A. 215, does not imply that the doctrine is to be applied in India to cases except where it would have been applied in England, or except where the case is in some way analogous to a case of snatching a bargain with an expectant heir, reversioner or remainderman, or except there is some fiduciary relationship between the lender and the borrower, although there may be no fraud or undue influence, or except there is some incapacity, such as ignorance, on the part of the borrower to appreciate the true effect of his bargain. For the purposes of meeting the expenses of appeal to the High Court, the appellant, on the advice of his legal advisers, executed a bond for Rs. 25,000 in consideration of the obligee agreeing to defray such expenses. The obligor agreed to pay the Rs. 25,000 within one year from his recovering possession of the property in suit; and, at the request of the obligor's pleader, the obligee advanced Rs. 3,700, which was applied to the expenses of the appeal. The High Court dismissed the appeal; and in a deed executed by the obligor in favour of the obligee and others for the purpose of defraying the expenses of a further appeal to the Privy Council, he admitted his liability under the former bond. The Privy Council decreed his appeal, and he obtained possession of the property in suit, but declined to pay the Rs. 25,000 upon which the obligee sued upon the bond. It was found that, apart from the moneys borrowed by the obligor from time to time, he was without even the means of subsistence; that he executed

**CONTRACT—continued.****(2) ALTERATION OF CONTRACTS—continued.****(b) ALTERATION BY COURT (INEQUITABLE CONTRACTS)—continued.**

the bond with his eyes open and perfectly understood his position and the effect of both the instruments executed by him; that no fraud or improper pressure appeared to have been allowed to him; that his legal advisers had acted honestly and to the best of their ability in his interests, that there was nothing to show that, having regard to the risks of the litigation, he could have obtained the assistance necessary for the prosecution of his appeal on better terms than those contained in the bond; that without such assistance he could not have appealed to the High Court, and that the obligee gave him such assistance upon his application. *Held*, that although there was nothing to show that the obligor could have obtained an advance on terms more advantageous to himself, it was for the obligee to establish to the Court's satisfaction, without reasonable doubt, that he could not have done so; and that, this not having been established, and the reasonableness and fairness of the bargain not being proved by showing that there had been difficulties in negotiating it, or that others had refused it as not sufficiently advantageous to them, the Court should hold the bargain to be a hard and unconscionable one, which should not be enforced. The Court gave the plaintiff a decree for the Rs. 3,700 actually advanced, with simple interest at 20 per cent. per annum from the date of the bond to the date of the decree, with costs, in proportion, and interest at 6 per cent. per annum on the Rs. 3,700, interest and costs, from the date of the decree until payment **CHUNNI KUAR v. RUP SINGH.**

[I L. R. 11 All 57]

**12.—Unconscionable bargain—Gambling in litigation—Agreement opposed to public policy—Act IX of 1872 (Contract Act), s. 23** ] For the purpose of meeting the expenses of an appeal to the Privy Council from concurrent decrees of the Subordinate Judge and the High Court, the plaintiff-appellant executed a deed of sale of certain property worth over Rs. 50,000 in consideration of the vendees providing the necessary security and moneys. The plaintiff experienced considerable difficulty in procuring the means of appeal. The vendees were not professional money-lenders, they did not put pressure on the plaintiff, but, on the contrary, he and his agent put pressure on them to agree to the terms of the deed. It appeared that apart from the moneys borrowed by him from time to time, he was without even the means of subsistence; that he fully understood the nature of the deed; that his agents negotiated the transaction *bonâ fide*, and to the best of their powers, in his interest; that there was no fraud or deception on the part of the vendees; and that they performed all that they undertook as regards meeting the expenses of the appeal. Under the deed the plaintiffs were

**CONTRACT—continued.****(2) ALTERATION OF CONTRACTS—continued.****(b) ALTERATION BY COURT (INEQUITABLE CONTRACTS)—continued.**

liable to furnish security to the extent of Rs. 4,000 and to advance Rs. 8,500 for other necessary expenses, and they did in fact furnish such security, and advanced sums aggregating Rs. 7,542. The appeal was successful. The appellant having failed to put the vendees in possession of the property conveyed by the deed, and recovered by him under the Privy Council's decree, the vendees sued him for possession of the property and mesne profits, afterwards agreeing that the Court should, in lieu thereof, award them compensation in money equivalent thereto: *Held* that, although the case was very different from cases in which persons interfered for their own benefit in litigation not their own, or in which mukhtars, vakils or persons of that class of professional money-lenders, taking advantage of the borrower's position, sued to enforce a contract obtained by them from him, and although the defendant was not entitled to sympathy, yet, judging by the disposition between the liability incurred by the plaintiffs under the contract and the reward which they were to obtain in the event of defendant's success, it must be concluded either that they did not believe his claim to be well founded, and consequently entered, though unwillingly, into a gambling transaction, or, if they believed the claim to be well founded, that the reward contracted for was excessive and unconscionable; and in either case the contract could not be enforced in its terms. *Held* also that, if the doctrine of equity applicable to such cases were applied in favour of the borrower, it should also be applied in favour of the lender; that as there was no reason to suspect the plaintiffs' motives, it would be inequitable to relieve the defendant from all liability; that it was only fair that he should compensate the plaintiffs for the use of their security bonds from the date when they were deposited in the High Court to the earliest date after the judgment of the Privy Council when the plaintiffs could have obtained them back; that simple interest at 12 per cent. per annum on the amounts of the bonds for the period would be reasonable compensation for such use; that the defendant should also repay the amounts advanced by the plaintiffs for the expenses of the litigation with interest on each advance at 20 per cent. from the date on which it was made to the date of the decree in the present case, and that he should pay interest on the whole amount thus decreed at 6 per cent. from the date of the decree till payment. *Chunni Kuar v. Rup Singh*, I. L. R. 11 All. 57; *Prahlad Sen v. Budhu Singh* (12 Moore's I. A. 275) and *Bowes v. Heaps*, 3 V. and B. 117, referred to. **LOKE INDAR SINGH v. RUP SINGH**

[I. L. R. 11 All 118]

*See* **HUSAIN BAKSH v. RAHMAT HUSAIN.**

[I. L. R. 11 All. 128]

**CONTRACT—continued.****(2) ALTERATION OF CONTRACTS—concluded.****(b) ALTERATION BY COURT (INEQUITABLE CONTRACTS)—concluded.**

13.—*Contract obtained by misrepresentation—Kabuliat—Landlord and Tenant—Right to enforce contract.*] Where tenants executed a *kabuliat* containing conditions that *khas* possession might be resumed at will or if the rents were not paid at the end of the year, on a representation that such conditions would not be enforced. *Held* that the *kabuliat*s had been obtained by misrepresentation, that it did not express the real agreement between the parties, and was an inequitable contract which could not be sued upon. **PERTAB CHUNDER GHOSE v. MOHENDRA PURKAIT.**

[L. R. 16 I A. 233, I. L. R. 17 Calc. 291]

**(3) BREACH OF CONTRACT.**

14.—*Betrothal—Marriage—Breach of promise of marriage—Reciprocal contingent contract—Damages—Uparyāman—Haidr Bhātiā caste.*] The plaintiffs alleged that by a written agreement, dated the 18th March 1882, the first defendant and her deceased son *L* agreed that the second defendant *K*, who was the daughter of the first defendant, should be given in marriage to the second plaintiff, who was the son of plaintiff No. 1; and that the betrothal of these two persons took place accordingly. The agreement was executed by the said *L*, as eldest male member of his family, in the name of his deceased father. In pursuance of this agreement, the plaintiffs paid to the first defendant Rs. 700 as "*uparyāman*," and they presented *K* with ornaments and clothes of considerable value. The plaintiffs complained that the first defendant subsequently refused to carry out the contract of marriage and had married her daughter, *K*, (defendant No. 2), to another person. They claimed in this suit to recover the ornaments and clothes, together with the Rs. 700 paid to the first defendant as "*uparyāman*," and Rs. 10,000 as damages. The first defendant was sued both in her personal capacity and as heir and legal representative of her son *L*. The first defendant pleaded that neither she nor the second defendant were bound by the betrothal agreement, as they were not parties to it; that the contract had been a contingent contract, inasmuch as her son, *L*, had agreed to give *K*, (defendant No. 2), in marriage to the second plaintiff only on condition that he (*L*) should obtain in marriage *U*, the daughter of the third plaintiff, and that *L* and *U* were accordingly betrothed; that *L* had died in 1884, and that the contract had been thereby determined; that she had been willing to renew it, and had proposed that a younger son of hers, (*J*), should be accepted as the husband of *U*, but that the plaintiffs had declined this offer. In proof of her allegation that the contract was a reciprocal contingent contract, the first defendant relied upon the following clause in the agreement:—"At the time when the marriages are to take place, the marriages of the two girls are to be

W., D.

**CONTRACT—concluded.****(3) BREACH OF CONTRACT—concluded.**

performed together. When you shall give your daughter in marriage. I also am at the same time to give my daughter in marriage." *Held* that the agreement of betrothal was not a reciprocal contingent contract; and that the first defendant had committed a breach of the agreement by not giving her daughter, *K*, (defendant No. 2), in marriage to the second plaintiff, and that the plaintiffs were entitled to recover from the first defendant the value of the ornaments and the Rs. 700 paid by the plaintiffs as "*uparyāman*," together with Rs. 600 damages for the breach of contract. The second defendant being a minor was held not liable, and the suit as against her was dismissed. **MULJI THAKERSEY v. GOMTI.**

[I. L. R. 11 Bom. 412]

**CONTRACT ACT (IX OF 1872), s. 4.**

See PROMISSORY NOTE.

[I. L. R. 13 Bom. 669]

See STAMP ACT, s. 34.

[I. L. R. 13 Bom. 669]

s. 4.—*Letter of acceptance incorrectly addressed.*] A letter of acceptance to a proposer, not correctly addressed could not, although posted, be said to have been 'put in a course of transmission' to him within the meaning of s. 4 of the Contract Act (IX of 1872). *Townsend's Case* L. R. 13 Eq. 148, referred to. **RAM DAS CHACKARBATY v. OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY.**

[I. L. R. 9 All. 366]

—, ss. 10, 11.

See MINOR—RIGHT TO ENFORCE CONTRACTS.

[I. L. R. 13 Bom. 50]

See RIGHT OF SUIT—CONTRACTS OR AGREEMENTS.

[I. L. R. 13 Bom. 50]

—, s. 15.

See s. 72.

[I. L. R. 15 Calc. 656]

—, s. 16.

See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY COURT (INEQUITABLE CONTRACTS).

[I. L. R. 10 All. 535]

See DEBTOR AND CREDITOR.

[I. L. R. 11 Bom. 666]

See DEED—CANCELLATION.

[I. L. R. 10 All. 535]

**CONTRACT ACT (IX OF 1872)—continued.**  
**—, s. 17.**

See DEBTOR AND CREDITOR.

[I. L. R. 11 Bom. 666

See VENDOR AND PURCHASER—FRAUD.

[I. L. R. 11 Mad 419

**—, s. 19.**

See VENDOR AND PURCHASER—FRAUD.

[I. L. R. 11 Mad. 419

**—, s. 21.**

*Mortgage with proviso that in case of non-redemption in a prescribed time it should become a sale—Razinama by mortgagor declaring sale to mortgagee—Transfer of possession to mortgagee—Extinction of equity of redemption—Subsequent sale by mortgagor of equity of redemption—Mistake of law.] Under the Indian Contract Act (IX of 1872), s. 21, error of law does not vitiate a contract; much less will it annul a conveyance after the lapse of many years, unless there has been some fraud or misrepresentation and an absence of negligence. In 1848, B and R mortgaged a piece of land to V. It was to be redeemed in eight years, or else to become the absolute property of the mortgagee. It was not redeemed; and in 1859, B, in whose name the land was entered in the Government records executed a *razinama* in favour of V, and V passed a *kabuliat* accepting the land. B and R then became V's tenants, and were, as such successfully sued by him for rent in 1863. In 1872, V sold the land to N, who again sold it to the defendant. The plaintiff, as purchaser from the original mortgagors (B and R) of their alleged equity of redemption, filed the present suit to redeem the property: *Held*, that as the *razinama* given by B contained no reservation, and as it was accompanied by a transfer of possession it had the effect of a conveyance of all the mortgagor's rights to the mortgagee. It operated to extinguish the equity of redemption notwithstanding any misconception of ignorance on B's part of his rights as mortgagor. *VISHNU SAKHARAM PHATAK v. KASHINATH BAPU SHANKAR.**

[I. L. R. 11 Bom. 174

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1. Illegal Contracts ...	Col.	196
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**CONTRACT ACT (IX OF 1872), s. 23—continued.**

See INJUNCTION—UNDER CIVIL PROCEDURE CODE.

[I. L. R. 9 All. 497

**(1) ILLEGAL CONTRACTS**

**(a) GENERALLY.**

1.—*Contract entered into in violation of the law—Partnership—Illegal partnership—Right of partner to sue for a share—Abkari Act (Bombay Act V of 1878), s. 45—Breach of license—Penalty.]* A contract entered into for the purpose, or with the necessary effect, of defeating a statute will not be enforced or recognized by the Courts, at any rate where both parties stand *in pari delicto*. A and B took a liquor contract from the Government. By the terms of their license they were forbidden to take a partner, and under s. 45 of the Bombay Abkari Act (V of 1878) they were liable to a penalty of Rs. 100 for a breach of their license. C entered into partnership with A and B with full knowledge of the conditions of the license, and afterwards filed a suit for an account of the partnership transaction. *Held*, that C was not entitled to any relief, having entered into the partnership in direct violation of the law. *HORMASJI MOTABHAI v. PESTANJI DHANJIBHAI.*

[I. L. R. 12 Bom. 422

2.—*Excise Act XXII of 1881, s. 42—License—Sub-lease—Breach of conditions—Consideration forbidden by law—Immoral consideration—Consideration opposed to public policy.]* The plaintiff obtained from the excise authorities a license to manufacture and sell country liquor, such license containing a condition against sub-letting the benefits of the license. By s. 42 of the Excise Act (XXII of 1881) the violation of any condition of a licensed granted under the Act is made a punishable offence. The plaintiff sublet the license to defendants, who on the 5th of September 1884, executed an agreement to pay to the plaintiff a certain sum of money, in which was included the sum of Rs. 1,500, which the defendants had undertaken to pay to plaintiff as rent reserved on the sub-lease. The plaintiff instituted the suit for recovery of the amount due to him on the agreement, and it was decreed by the Court of First Instance but dismissed by the lower Appellate Court. On second appeal the plaintiff contended on the authority of *Gauri Shankar v. Mumtaz Ali Khan*, I. L. R. 2 All 411, that his suit had been wrongly dismissed: *Held*, that the sub-letting of a license to manufacture and sell country liquor having been made punishable as an offence is to be deemed as an act contrary to law within the meaning of s. 23 of the Contract Act (IX of 1872), and the claim to recover money due on such sub-lease was therefore not enforceable in a Court of Justice. *Gauri Shankar v. Mumtaz Ali*, I. L. R. 2 All. 411, distinguished. *DEBY PRASAD v. RUP RAM.*

[I. L. R. 10 All. 577



CONTRACT ACT (IX OF 1872), s. 23—  
*continued.*

(1) ILLEGAL CONTRACTS—*continued.*

(a) GENERALLY—*concluded.*

3.—*Suit on Bond—Money borrowed for immoral purposes—Nautiks or dancing girls of Nasik.* The father of *nautiks* (dancing girls), in Nasik by two bonds mortgaged certain property as security for money lent to him by the plaintiff. The bonds stated that the object of the loan was to enable the mortgagor to get his daughters taught singing and for household expenses. In a suit brought by the plaintiff upon the bonds it was contended that they were void, on the ground that the loan was for an immoral purpose. The District Judge was of opinion that the object of teaching the girls to sing was to make them more attractive as prostitutes, and therefore to further an immoral purpose, which could not be separated from the legal part of the purpose for which the loan was contracted. He accordingly held that the bonds were void, and could not be enforced. On appeal. *Held*, that the bonds were not void, inasmuch as amongst the community of *nautiks*, singing was not necessarily acquired by the women with a view of practising prostitution. It was a distinct mode of obtaining a livelihood not necessarily connected with prostitution, although it might be true, as a fact, that most of those who sing lead a loose life. The District Judge therefore went too far in concluding that the singing was necessarily intended, to the knowledge of the plaintiff, to increase the attractiveness of the mortgagor's daughters as prostitutes. *KHUBCHAND v. BERAM.*

[I. L. R. 13 Bom. 150]

4.—*Civil Procedure Code, 1882, s. 257 A—Agreement for, or to give, time for satisfaction of judgment debt—Agreement without sanction of Court—Illegal contract—Contract Act (IX of 1872) s. 23—Consideration.* The plaintiff obtained a decree against the defendant under which the judgment-debtor was liable to pay the amount by instalments with interest at 4 per cent. Eventually, the defendant failing to pay, the plaintiff accepted a bond executed jointly by the defendant and T his father, by which they both became liable for the amount of the decree with interest at 18½ per cent. In a suit on the bond, it was contended that it was void within the meaning of s. 23 of the Contract Act as being forbidden by, or of a nature to defeat the provisions of, s. 257A of the Civil Procedure Code; and that, consequently, the suit on it was not maintainable: *Held*, the bond was not void under s. 23 of the Contract Act. *Seemle*—The words "any law" in that section refer to some *substantive* law, and not to an adjective law, such as the Procedure Code is. *HUKUM CHAND OSWAL v. TAHARUNNESSA BIBI.*

[I. L. R. 16 Cal. 504]

(b) AGAINST PUBLIC POLICY.

5.—*Assignment of chose in action, Validity of—Void contract—Transfer of mortgage-bond for valuable consideration.* An assignment of a

CONTRACT ACT (IX OF 1872), s. 23—  
*continued.*

(1) ILLEGAL CONTRACTS—*continued.*

(b) AGAINST PUBLIC POLICY—*continued.*

mortgage-bond for a valuable consideration is not void under s. 23 of the Indian Contract Act (IX of 1872) as being opposed to public policy. *KEVAL VANMALI v. FAKIRA JIVAN.*

[I. L. R. 13 Bom. 42]

6.—*Illegal agreement—Agreement against public policy—Guardian and ward—Agreement for marriage by a guardian to give a ward in marriage on payment of a sum of money.* The plaintiff stated as her cause of action that a young girl had been left in her charge and had been maintained by her for a number of years; that in January 1888, arrangements had been made with a Bhatia to get this girl married, and that she (the plaintiff) was to receive Rs. 2,500 on the marriage; that the defendant had also agreed to pay her (the plaintiff) Rs. 2,000 if she would give the girl to him in marriage, and that before the marriage ceremony could be performed the defendant had induced the girl to quit the plaintiff's house for immoral purposes. She claimed Rs. 3,500 as damages. *Held*, that the alleged agreement on which the suit was brought, was immoral and against public policy, and that the action was not maintainable. *DULARI v. VALLABDAS PRAGJI.*

[I. L. R. 13 Bom. 126]

7.—*Agreement to procure marriage in consideration of a money payment—Marriage brokerage—Illegal agreement—Public policy.* The defendant was the eldest of three brothers whose mother on her marriage had been put out of the Lovana caste for having married a man belonging to a different caste. The defendant was anxious that he and his brothers should be re-admitted to the caste; and in 1864 he entered into an agreement with the plaintiff, who was at that time one of the *setias* of the caste, whereby the latter agreed to procure the admission of the plaintiff and his brothers, and get them married to girls belonging to the caste. In consideration for these services, the defendant was to pay the plaintiff the sum of Rs. 5,000, which sum was to become due on the marriage of the defendant's youngest brother to a girl of the caste, and to be expended in purchasing caste utensils, which were to be kept for the use of the caste. The plaintiff alleged that part of this money had been already paid to him, and that on the marriage of the defendant's youngest brother in 1880 he had demanded payment of the balance (*viz.* Rs. 3,149), which the defendant had not paid. He now sued to recover this balance. *Held*, that the contract sued on, in so far as it promised a money payment for the negotiations of a marriage by a third party, was immoral and contrary to public policy. *PITAMBER RATANSI v. JAGIVAN HANSRAI.*

[I. L. R. 13 Bom. 131]

8.—*Agreement opposed to public policy.* For the purpose of meeting the expenses of a suit for possession of immoveable property, the plaintiff

CONTRACT ACT (IX OF 1872), s. 23—  
*continued.*

- (1) ILLEGAL CONTRACTS—*continued.*  
(b) AGAINST PUBLIC POLICY—*concluded.*

who was in straitened circumstances, agreed with the defendant that the latter, in consideration of paying such expenses from the Court of First Instance up to the High Court, should have half the property and half the mesne profits, with all his costs, in the event of success. The suit was brought and was conducted by the plaintiff and the defendant jointly, and was decreed by the High Court on appeal, and the defendant obtained possession of half the property. The plaintiff sued to recover possession of the half, on the ground that the agreement was illegal and void. It appeared that the amount actually spent by the defendant in the former litigation was Rs. 368, and that if that suit had failed, he would have lost about Rs. 600. It was found that the value of the half share of the property was about Rs. 1,000: *Held*, that the agreement was unfair, unreasonable, extortionate, and contrary to public policy, within the meaning of s. 23 of the Contract Act (IX of 1872), and that the plaintiff was entitled to recover possession of the land in suit on payment of compensation for the advances made by the defendant in the former litigation, with interest at 12 per cent. per annum *Chunni Kuar v. Rup Singh*, I L. R. 11 All. 57, and *Loke Indar Singh v. Rup Singh*, I L. R. 11 All. 118, referred to. *HUSAIN BAKHSH v. RAHMAT HUSAIN.*

[I. L. R. 11 All. 128]

9.—(Bengal Act VII of 1878)—*Revenue, Protection of—Contract Act (IX of 1872) s. 23—Public policy*] The Bengal Excise Act of 1878 is not an Act framed solely for the protection of the revenue, but is one embracing other important objects of public policy as well. An agreement, therefore, for the sale of fermented liquors, entered into by a person who has not obtained a license under that Act, is void and cannot be recovered on. *BOISTUB CHURN NAUN v. WOOMA CHURN SEN.*

[I. L. R. 16 Calc. 436]

(c) COMPOUNDING CRIMINAL OFFENCES.

10.—*Criminal breach of trust—Consideration—Guarantee on condition of not taking criminal proceedings—Compounding felony.*] S gave to the creditors of H a guarantee for the payment of the debts due to them by H. As a consideration for this guarantee the creditors were to abstain from taking criminal proceedings against H for criminal breach of trust for fifteen days, and by implication were to abstain from taking such proceedings altogether if the said debts were paid within that time: *Held*, that such a guarantee could not be enforced by the creditors. A man, to whom a civil debt is due, may take securities for that debt from his debtor, even though the debt arises out of a criminal offence, and he threatens to prosecute for that offence provided he does not, in consideration of such securities, agree not to prosecute. He must not, however, by stifling a prosecution obtain a

CONTRACT ACT (IX OF 1872), s. 23—  
*concluded.*

- (1) ILLEGAL CONTRACTS—*concluded.*  
(c) COMPOUNDING CRIMINAL OFFENCES—*concluded.*  
guarantee from third parties. *KESROWJI TULSI-DAS v. HURJIVAN MULJI.*

[I. L. R. 11 Bom. 566]

—, s. 25.  
*See* LIMITATION ACT, 1877, s. 19—*ACKNOWLEDGMENT OF DEBTS.*

[I. L. R. 11 Bom. 580]

—, s. 29.

*Agreement void for uncertainty.*] In a suit for maintenance the defendant alleged that, after the plaintiff had left his house, an agreement had been made between them to refer their dispute to arbitration, and that the agreement of reference had been actually signed, but that, on the day fixed by the arbitrators for making their award, the plaintiff had given notice to them not to make an award, and accordingly they had not done so. The alleged agreement to refer was in the following terms:—"To Bhai Dosa Morarji and Dwarakadass Damodar. We, the undersigned two persons, give in writing to you as follows:—We used to reside and act in the house together in peace and harmony. Lately, a few days ago, in consequence of a disagreement amongst the women, V resided separately. Upon persuasion having been used towards her, V again resides in the house together with the rest. so now all are residing in the house in peace and harmony. If any occasion should arise, and if any disagreement should take place amongst the women, in order to find a remedy for that, we, the undersigned two persons, give in writing to you as follows—As to whatever award or settlement you two persons together will make, in accordance therewith, we agree to receive or pay. As to that, we are truly to act on our true religious faith; and we have written and delivered this writing of our free will and pleasure. The same is agreed to and approved of by our heirs and representatives, all; the 11th *Jyesth Vadya*, *Samvat* 1939, the day of the event, Friday, the 1st June 1883. And as to this, you are truly to make and deliver a settlement within fifteen days' time." *Quere*, whether the above agreement was not void by reason of uncertainty. *Quere*, whether the actual submission of a subject in dispute to named arbitrators, followed by the attempt of one of the parties to such submission to withdraw from or to prevent an award being made upon the submission, falls within the concluding paragraph of s. 21 of the Specific Relief Act 1 of 1877. *ADHIBAI v. CURSANDAS NATHU*

[I. L. R. 11 Bom. 199]

—, s. 45.

*See* PARTIES—PARTIES TO SUITS—PARTNERSHIPS, SUITS CONCERNING.

[I. L. R. 9 All. 486]

*See* PARTNERSHIP—SUITS CONCERNING PARTNERSHIP.

[I. L. R. 9 All. 486]





CONTRACT ACT (IX OF 1872), ss. 69, 70  
—continued.

the defendants, so as to have an equitable lien upon the property they had saved from sale; that it was not a case of a payment which the defendants were bound to make in which the plaintiffs were "interested" within the meaning of s. 69 of the Contract Act; and that therefore the fiction of an implied request by the defendants to the plaintiff to make the payment could not be imported into the case and the plaintiffs were not entitled to contribution. *Held* also that there was no such relationship between the parties as would create or justify the inference of any right in the plaintiffs to look to the defendants for compensation, so as to make s. 70 of the Contract Act applicable; and that if the plaintiffs, as mere volunteers, chose to pay the money, not for the defendants, but for themselves, they could not claim the benefits of that section. The principle of the decision in *Pancham Singh v. Ali Ahmad*, I. L. R. 4 All. 58, has been recognized and provided for in the Transfer of Property Act. By the use of the word "lawfully" in s. 70 of the Contract Act, the Legislature had in contemplation cases in which a person held such a relation to another as either directly to create or reasonably to justify the inference that by some act done for another person, the person doing the act was entitled to look for compensation to the person for whom it was done. *Ram Tulul Singh v. Bissessar Lal Suhoo*, L. R. 2 I. A. 131, referred to. *CHEDI LAL v. BHAGWAN DAS*

[I. L. R. 11 All. 234]

—, s. 72 and s. 15.

—Voluntary Payment—Money paid, but not due, and paid under compulsion.] In execution of a decree the plaintiff purchased certain property. Subsequently the defendant, in execution of another decree against the former owner of the property, proceeded to execute his decree against the same property. The plaintiff thereupon preferred a claim, which was disallowed, as he had not then obtained, and consequently could not produce, the sale certificate. In order to prevent the sale, he then paid the amount of the defendant's decree into Court, and subsequently instituted a suit against the defendant to recover the amount so paid into Court to prevent the sale. The defendant contended that the amount was paid voluntarily and could not be recovered back: *Held*, following *Dooli Chand v. Ram Kishen Singh*, L. R. 8 I. A. 93; I. L. R. 7 Calc. 648, that it was not a voluntary payment, and that the plaintiff was entitled to a decree. *Fatima Khatoon Chowdrain v. Mahomed Jan Chowdhry*, 12 Moore's I. A., 65; 10 W. R. P. O. 29, referred to; *Asibun v. Ram Proshad Das*, 1 Shome 25, doubted. *JUGDEO NARAIN SINGH v. RAJA SINGH*.

[I. L. R. 15 Calc. 656]

—, s. 73.

See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—BREACH OF CONTRACT.

[I. L. R. 12 Bom. 242]

CONTRACT ACT (IX OF 1872)—continued.

—, s. 74.

See ADMINISTRATION BOND.

[I. L. R. 10 All. 29]

See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—BREACH OF CONTRACT.

[I. L. R. 12 Bom. 242]

See INTEREST—STIPULATIONS AMOUNTING TO PENALTY OR OTHERWISE.

[I. L. R. 14 Calc. 248]

[I. L. R. 10 Mad. 203]

[I. L. R. 9 All. 74, 228, 690]

[I. L. R. 11 Mad. 294]

—, s. 78 and s. 92.

—Sale of goods by description—Purchaser's right to reject—Whether goods according to contract or not, how relevant—Delivery of part of the goods—Suit for price of goods rejected.] *B K* agreed to buy from *M R* five bales of chrome orange twist "or any part thereof that may be in a merchantable condition, ex *City of Cambridge*, or other vessel or vessels," with specific marks and numbers, each bale containing 500 lbs. at so much per lb., to be paid for on or before delivery. *B K* took delivery of, and paid for, only one bale, but rejected the others. *M R* brought a suit for the price of the four bales rejected: *Held*, that the property in the goods did not pass to the defendant by the terms of the contract, nor was the delivery that was taken by him of the one bale a delivery of "part of the goods" within the meaning of ss. 78 and 92 of the Contract Act; the suit, therefore, did not lie: *Held* also, that the question whether the defendant was entitled to refuse the goods, in other words whether the goods were, according to the contract or not, was one that was unnecessary for the purposes of the present suit; but it would have been otherwise if the suit were one for damages on the ground of the defendant's refusal to accept the goods. A purchaser's right to reject goods by reason of their not answering the description in the contract may be independent of the question whether the property in the goods has passed to him or not. *MITCHELL REID & Co. v. BULDEO DOSS KHETTRY*.

[I. L. R. 15 Calc. 1]

—, s. 92.

See s. 78.

[I. L. R. 15 Calc. 1]

—, s. 108, Except. 1.

Possession with consent of owner—Bailment—Bailee—Sale by bailee of goods bailed—Title of vendee.] The general rule laid down by s. 108 of the Contract Act, that no seller can give to a buyer a better title than he has himself, is qualified by Exception 1 to that section. But the possession contemplated by that exception does

CONTRACT ACT (IX OF 1872), s. 108—  
concluded

not extend to every case of detention of chattels with the owner's consent. The exception has particular relation to the cases of persons allowed by owners to have the *indivisa* of property, or possession under such circumstances as may naturally induce others to regard them as owners and constituting some degree of negligence or defect of precaution imputable to the true owners. Where, however, the detention of a chattel is allowed for a particular limited purpose, there is not a possession such as is required by the exception. In the case of a gratuitous bailment of a chattel, the possession remains constructively with the owner. *S* left with *C* a buffalo and a calf, to be taken care of during his absence from home. *C* sold the animals to *M*. *S* sued to recover them. *Held*, that the bailment by *S* to *C* was a gratuitous one, or else a mere custody by *C* for *S*; that *S* was, therefore, at the time of sale in constructive possession of the animals, and *C* could not transfer to *M* an ownership that he had not himself. *SHANKAR MURLIDHAR v. MOHANLAL JADURAM*.

[I. L. R. 11 Bom. 704]

—, s. 131.

See GUARANTEE.

[I. L. R. 10 All. 531]

See HINDU LAW—DEBTS.

[I. L. R. 11 Mad. 373]

—, s. 134.

See PRINCIPAL AND SURETY—DISCHARGE OF SURETY.

[I. L. R. 11 All. 310]

—, s. 137.

See PRINCIPAL AND SURETY—DISCHARGE OF SURETY.

[I. L. R. 11 All. 310]

—, ss. 150, 151, 152.

See ONUS PROBANDI—BAILMENTS.

[I. L. R. 9 All. 393]

—, s. 171.

See LIEN.

[I. L. R. 13 Bom. 314]

—, s. 217

See LIEN.

[I. L. R. 13 Bom. 302]

—, s. 221

See LIEN.

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CONTRIBUTION, SUIT FOR. Col.

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See CONTRACT ACT, ss. 69, 70.

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CONTRIBUTION, SUIT FOR—continued.

See SALE FOR ARREARS OF REVENUE—  
DEPOSIT TO STAY SALE.

[I. L. R. 11 Mad. 452]

(1) PAYMENT OF JOINT-DEBT BY ONE DEBTOR.

1.—*Small Cause suit to recover money paid by the plaintiff in discharge of a decree-debt against him and the defendants—Jurisdiction of Court to go into facts of former suit.* *A* sued four persons against whom, together with *A*, a money-decree, had been passed in a previous suit, to recover a proportionate part of a sum paid by *A* in discharge of the decree-debt. Two of the defendants pleaded that they had not appeared in the former suit, and had been unnecessarily brought into the record by *A*. *Held*, that the Court had jurisdiction to inquire into to circumstances of the previous suit. *Suptut Singh v. Imrit Tewari*, I. L. R. 5 Calc. 720, followed. *THANGAMMAL v. THYIAMMUTHU*.

[I. L. R. 10 Mad. 518]

(2) JOINT WRONG-DOERS.

2.—*Unintentional wrong-doer—Ignorance of illegal Act* [An objection to the attachment and sale of certain immoveable property, raised by one who claimed to have purchased the same at a sale in execution of a prior decree, was disallowed on the ground that, under the prior decree, the rights of one only of the present judgment-debtors had been sold and purchased by the objector. In accordance with this order, two-thirds of the property under attachment were sold, and the objector thereupon brought a regular suit for a declaration of his right as a purchaser of the whole property in execution of the prior decree. To this suit he impleaded as defendants the decree-holder and the judgment-debtors. The suit was decreed, and in the result the decree-holder alone was compelled to pay the whole of the costs. Subsequently he brought a suit for contribution in respect of these costs, making defendants to the suit (i) *R* one of his co-defendants in the previous suit, personally and as heir of *A* who was another of those co-defendants (ii) *N*, and (iii) *S*, these two being sued in the character of heirs of *A*: *Held* that inasmuch as the rule preventing one wrong-doer from claiming contribution against another was confined to cases where the person seeking relief must be presumed to have known that he was acting illegally, and in this case there was no evidence to show that the plaintiff in attaching and advertising the property for sale in execution of his decree knew he was doing an illegal act, but the inferences were all the other way, he was fully entitled in law to maintain the suit, and to recover from the defendants the proportionate amount of the costs which he had to pay for them. *Merryweather v. Nixon*, 2 Sm. L. C. 5th Ed. 456; *Adamson v. Jarvis*, 4 Bing. 66; *Dixon v. Fawcus*, 30 L. J. Q. B. 137, and *Suptut Singh v. Imrit Tewari*, I. L. R. 5 Calc. 720, referred to. *KISHNA RAM v. RAKMINI SEWAK SINGH*.

[I. L. R. 9 All. 221]

## CONTRIBUTORY.

See COMPANY—WINDING-UP—GENERAL  
CASES.

[I. L. R. 11 Bom. 241]

## CONVERT.

See BIGAMY.

[I. L. R. 10 Mad. 218]

*Survivorship—Succession Act, 1865—Effect of Act on estates of Native Christians previously following Hindu law* *J* and *J*, brothers, Native Christians, descendants of Brahmins, were living in coparcenary and owned certain land on the date when the Indian Succession Act, 1865, came into force. In 1872, no partition having been made, *J* died. *Held*, that *J* did not take the whole estate on the death of *J* by survivorship. *TELLIS v. SALDANHA*.

[I. L. R. 10 Mad. 69]

## CONVEYANCE

See REGISTRAR OF HIGH COURT,  
AUTHORITY OF.

[I. L. R. 16 Calc 330]

## COPIES OF ORIGINAL DOCUMENTS.

See COURT FEES ACT 1870, SCH. I, ART. 8.

[I. L. R. 11 Bom 526]

## COPYRIGHT.

—Annotated edition of an ancient religious work  
—Originality—Colourable imitation—Injunction  
—Damages—Account—Act XX of 1847, s. 12.]  
The plaintiff, a bookseller, in 1884 brought out a new and annotated edition of a certain well-known Sanskrit work on religious observances, entitled "Vtraj," having for that purpose obtained the assistance of Pundits who re-cast and re-arranged the work, introduced various passages from other old Sanskrit books on the same subject and added foot-notes. In 1885 the plaintiff registered the copyright of this work. In 1886 the defendants printed and published an edition of the same work, the text of which was identical with that of the plaintiff's work, which moreover contained the same additional passages, and the same foot-notes, at the same places, with many slight differences. *Held*, that the plaintiff's work was such a new arrangement of old matter as to be an original work and entitled to protection, and that as the defendants had not gone to independent sources for their material, but had pirated the plaintiff's work, they must be restrained by injunction: *Held*, also, that an account of the net profits made by the defendants by the sale of the plaintiff's book could be ordered, notwithstanding the provisions of s. 12 of Act XX of 1847, as the result of the account would be to give to the plaintiff what he could have claimed as damages under that section. *GANAVISHNU SHRIKISON-DAS v. MORESHVA BAPUJI HEGISHTA*.

[I. L. R. 13 Bom. 358]

## CO-SHARERS.

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RENT AND REVENUE SUITS,  
N.-W. P.

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See LIMITATION ACT 1877, ART. 144—AD-  
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[I. L. R. 11 Bom. 422]

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See POSSESSION—ADVERSE POSSESSION.

[I. L. R. 11 Bom 422]

See PRE-EMPTION—RIGHT OF PRE-EMP-  
TION

[I. L. R. 9 All 234, 480]

—, Payment by—

See LIMITATION ACT, 1877.

[I. L. R. 11 Bom 313]

[I. L. R. 15 Calc. 542]

## (1) GENERAL RIGHTS IN JOINT PROPERTY.

1.—*Payment of arrears of revenue by one co-sharer, Effect of—Charge—Act XI of 1859, s. 9, Construction of—Lien.* *Held* (MITTER and NORRIS, JJ., dissenting) there is no general rule of equity to the effect that whoever, having an interest in an estate, makes a payment in order to save the estate obtains a charge on the estate, and therefore, in the absence of a statutory enactment, a co-sharer who has paid the whole revenue and thus saved the estate does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer. *Enayet Hossein v. Muddunmonee Shahoon*, 14 B. L. R. 155, overruled; *Nogendro Chunder Ghose v. Kamini Das*, 11 Moore's I. A. 258, explained and distinguished; *Kristo Mohini Das v. Kaliprosomo Ghose*, I. L. R. 8 Calc. 402, approved; *In re Leslie*, L. R. 23 Ch. D. 552, relied on. *KINU RAM DAS v. MOZAFFER HOSAIN SHAHA. KINU RAM DAS v. HAJJATULLA SHAHA. KINU RAM DAS v. KAMAR-UDDIN SHAHA*.

[I. L. R. 14 Calc. 809]

See KHUB LALL SAHU v. PUDMANUND  
SINGH.

[I. L. R. 15 Calc. 542]

## CO-SHARERS—continued.

(1) GENERAL RIGHTS IN JOINT PROPERTY  
—continued.

2.—*Limitation Act 1877, Arts. 99 and 132—Suit to recover assessment paid by a co-owner of property from other co-owners.* In 1868, the uncle of the plaintiff brought a suit (No. 176 of 1868) against five members of the undivided family, to which the defendants in the present suit belonged, and obtained a money-decree. In execution of that decree, he attached and sold certain land, in which all the members of the defendants' family were interested. At the sale he purchased the land himself, and was put into possession. In 1873 he began to pay the assessment upon the whole property. Subsequent litigation took place between him and the defendants' family, pending which the plaintiff separated from his uncle, and obtained the property in question as his share. The result of that litigation was a decree by the High Court, on the 23rd September 1879, declaring that the plaintiff's uncle was only entitled to the interest of the five members of the family who had been defendants in his suit (No. 186 of 1868) in execution of the decree in which the property had been sold. The plaintiff brought the present suit in 1883, against the other members of the family to recover their proportionate share of the assessment for the years 1875-1878, during which period he had paid the whole assessment. He prayed for a sale of their interest in the land. Both the lower Courts held that the payment of assessment did not create a charge on the property, and that the plaintiff having omitted to sue within three years from the date of the payment made by him, the present suit was barred. On appeal by the plaintiff to the High Court. *Held*, confirming the lower Court's decree that the suit was barred. The plaintiff paid the assessment as full owner of the property, and it was entirely by his own action that the defendants had been excluded from the property, and did not pay their quotas of the assessment. Under those circumstances, the payments could be regarded as salvage payments so as to make them a charge, according to equity, justice, and good conscience upon the shares of the other co-owners. *ACHUT RAMCHANDRA PAL v. HARI KAMPTI.*

[I. L. R. 11 Bom. 313]

3.—*Right to joint possession—Evidence—Costs* ] One of two co-sharers by ancestral title in the under-proprietary right in certain villages obtained, in 1870, decrees against the talukdar for sub-division, and getting possession had his name entered in the *khewat*. The other co-sharer remained entitled to claim that this possession was held partly for him. The present suit was brought upon two agreements, purporting to have been made in 1870, between the two co-sharers, while proceedings to obtain the above decrees were pending, to the effect that, whereas both had claims against the talukdar, one only was to sue him, the other paying half of the costs and

## CO-SHARERS—continued.

(1) GENERAL RIGHTS IN JOINT PROPERTY  
—continued.

being entitled to receive half of what might be decreed. The Judicial Committee, upon the evidence, concluded that the Appellate Court, attributing too much to certain omissions and acts on the plaintiff's part, which were more or less explained, had erred in reversing the decree of the first Court, which maintained the agreements depriving the plaintiff of his costs in that Court only. *MUHAMMAD YUSUF v. MUHAMMAD HUSAIN.*

[I. L. R. 16 Calc. 62]

4.—*Fractional shareholders in joint undivided estate—Lien on tenure for share of rent—Sale of tenure in satisfaction of decree.* The owner of a fractional share in a joint undivided estate has no lien on the tenure itself for his share of the rent, although such share is collected separately, and therefore, cannot cause the tenure to be sold in satisfaction of a decree for his share of the rent. *BHABA NATH ROY CHOWDHRY v. DURGA PRASUNNO GHOSE.*

[I. L. R. 16 Calc. 326]

## (2) CULTIVATION OF JOINT PROPERTY.

5.—*Cultivation of indigo by one co-sharer without consent of others—Injunction as between co-sharers—Practice of the English Courts in granting injunction, Applicability of.* W, while in possession of an entire mouzah as *ijaradar*, had under an arrangement with the proprietors built factories and cultivated indigo by reclaiming a quantity of waste land. On the expiration of his lease W, who still held a portion of the mouzah in *ijara* from a 2-anna co-sharer, continued to cultivate indigo on the khas lands as before, and, disregarding the opposition of the 14-anna co-sharers, claimed an exclusive title to do so. The 14-anna co-sharers thereupon brought a suit against W for *ijmali* possession of the khas lands, and prayed, among other things, for an injunction prohibiting the defendant from sowing indigo upon the *ijmali* lands without the plaintiffs' consent, and also for a general injunction to prohibit the defendant from throwing any obstacles in the way of plaintiffs holding *ijmali* possession of the lands. The Court below granted an injunction prohibiting the defendant from growing indigo on the khas lands without the consent of the plaintiffs: *Held*, that the plaintiffs were entitled to an injunction; but having regard to the circumstances under which the defendant cultivated the lands, it was necessary to vary the injunction granted by the Court below by making it an injunction restraining the defendant from excluding by any means the plaintiffs from their enjoyment of the *ijmali* possession of the lands. *RAM CHAND DUTT v. WATSON & Co.*

[I. L. R. 15 Calc. 214]

## CO-SHARERS—continued.

## (3) ERECTION OF BUILDINGS ON JOINT PROPERTY.

6.—*Right to injunction to restrain building.*] There is no such broad proposition as that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights, absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction. *SHAMNUGGER JUTE FACTORY Co. v. RAM NARAIN CHATTERJEE.*

[I L R. 14 Calc. 189]

7.—*Right to deal with joint property—Excavation of tank on joint property—Discretion of Court in granting injunction—Specific Relief Act (I of 1877), s. 55*] Before a Court will in the case of co-sharers make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-sharers without the consent of the other should be restored to its former condition (as, for instance, where a tank has been excavated), a plaintiff must show that he has sustained, by the act he complains of, some injury which materially affects his position. *Lala Biswambhar v. Rajaram Lal*, 3 B. L. R. Ap. 67, applied in principle; *Shamnugger Jute Factory Co. v. Ramnarain Chatterjee*, I L. R. 14 Calc. 189, approved. The fact that a portion of the land on which a tank had been excavated by the defendant was fit for cultivation, does not constitute an injury of a substantial nature such as would justify an order of that nature. *Joy Chunder Rukhit v. Bipro Churn Rukhit*

[I. L. R. 14 Calc. 236]

8.—*Right to deal with joint property—Building by one co-sharer against the wish of others—Suit for demolition of building—Discretion of Court.*] The mere fact of a building being erected by a joint owner of land without the permission of his co-owners, and even in spite of their protest is not sufficient to entitle such co-owners to obtain the demolition of such building, unless they can show that the building has caused such material and substantial injury as could not be remedied in a suit for partition of the joint land. *Lala Biswambhar Lal v. Raja Ram*, 3 B. L. R. Ap. 67; *Nocury Lal Chuckerbutty v. Bindabun Chunder Chuckerbutty*, I L. R. 8 Calc. 708; *Girdhari Lal v. Vilayat Ali*, Weekly Notes, All. 1885, p. 277; *Wahid Ali Khan v. Ghansham Narain*, Weekly Notes All. 1887, p. 116; and *Joy Chunder Rukhit v. Bipro Churn Rukhit*, I L. R. 14 Calc. 236, referred to *PARAS RAM v. SHERJIT*.

[I. L. R. 9 All. 661]

9.—*Land dedicated to family idol—Land excluded from partition of family property and declared inalienable—Subsequent purchase from Escheat Department of Government—Sale in execution.*] By a partition deed by the six members of a Hindu family it was provided that part of the land of the family should be set apart for the

## CO-SHARERS—continued.

## (3) ERECTION OF BUILDINGS ON JOINT PROPERTY—concluded.

maintenance of the family idol and should be inalienable, and the rest of the land was divided equally. Subsequently the Government claimed the dedicated land as an escheat, and sold it to the members of the family jointly, of whom one built a house on part of it—less than one-sixth—with the consent of the others. The house and its site were sold in execution of a decree against the builder. *Held*, that the other members of the family were not entitled to have the house removed or the sale cancelled. *MALLAN v. PURUSHOTHAMA.*

[I. L. R. 12 Mad. 287]

## (4) SUITS BY CO SHARERS WITH RESPECT TO THE JOINT PROPERTY.

## (a) MISCELLANEOUS SUITS.

10.—*Suit for rents collected by one co-sharer in respect of another's share—Intermeddler—Suit for recovery of rent—Intermeddler, Liability of.*] The lessee of two-thirds of a five biswas zemindari share asserted and exercised a right of collecting rents in respect not only of the two-thirds but also of the remaining one-third. It appeared that he made these collections not as a matter of contract, but as an intermeddler and in defiance of the wishes of the holder of the one-third share. Subsequently a suit was brought against him by a purchaser of the five biswas for recovery of rents so collected, the claims extending to rents which the defendant might have collected, but neglected to collect, and which were consequently lost to the plaintiff. *Held*, that the defendant, not having been under any obligation to collect the rents of the one-third share, could not be made liable for any of such rents which he had not actually collected, and that as the collection expenses had exceeded the amount collected, the suit must be dismissed. *BALWANT SINGH v. GOKARAN PRASAD*

[I. L. R. 9 All. 519]

## (b) EJECTMENT.

11.—*Act XL of 1858.—Certificated guardian, Power of, to grant lease—Unauthorised transfer, Effect of.*] A lease for a term of 12 years, but renewable at the pergunnah rate and transferable in its character, granted by a certificated guardian without the authority of the Court is void *ab initio*, and will therefore not avail the lessee, even for the period of five years for which such guardian is at liberty to grant the lease: *Held*, accordingly, that in the case of ijmali property, whether such a lease was executed by the guardian conjointly with the co-sharers of the minor, or separately, the minor was entitled to eject the lessee as a trespasser in respect of his own share without making his co-sharers parties to the suit. *Quare*, whether such a lease granted by a certificated guardian conjointly with the co-sharers of a minor, and thus creating one and the same

CO-SHARERS—*concluded.*(4) SUITS BY CO-SHARERS WITH RESPECT TO THE JOINT PROPERTY—*concluded.*(b) EJECTMENT—*concluded.*

tenancy, is not also void as against the co-sharers  
HARENDRA NARAIN SINGH CHOWDHRY v. MORAN  
[I. L. R. 15 Calc. 40]

## (c) RENT.

12.—*Parties*] One of several joint landlords is competent to sue for the entire rent due from a tenant making his co-sharers parties to the suit.  
PREM CHAND NUSKUR v. MOKSHODA DEBI.

[I. L. R. 14 Calc. 201]

13.—*Madras Rent Revenue Act (Madras Act VIII of 1865) s. 9—Joint shrotriyamdars—Distinct contract by tenant in respect of a share.*] The plaintiff was one of two joint shrotriyamdars. In 1288 the defendant accepted a patta from and executed a muchalka to him in respect of the half share of the plaintiff. The plaintiff sued to enforce acceptance of a patta and execution of a muchalka for 1290 and for arrears of rent. *Held* that the suit lay without joinder of the other joint shrotriyamdar. *PURUSHOTTAMA v. RAJU.*

[I. L. R. 11 Mad. 11]

## COSTS.

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[I. L. R. 12 Mad. 121]

See COMPANY—WINDING-UP—COSTS AND CLAIMS ON ASSETS.

[I. L. R. 11 All. 349]

See DECREE—CONSTRUCTION OF DECREE—COSTS.

[I. L. R. 14 Calc. 189]

See DEPUTY COMMISSIONER, JURISDICTION OF.

[I. L. R. 16 Calc. 12]

See INSOLVENCY—INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE.

[I. L. R. 16 Calc. 13]

COSTS—*continued.*

See CASES UNDER PLEADER—REMUNERATION.

See PRIVY COUNCIL, PRACTICE OF—COSTS.

See RIGHT OF SUIT—COSTS.

[I. L. R. 9 All. 474]

## (1) SPECIAL CASES.

1.—*Account. Suit for—Suit for account by principal against agent.*] Where in a suit for an account by a principal against his agent, the defendant falsely denied his fiduciary position, he was ordered to pay the whole costs of the suit up to and including the costs of an appeal to the Privy Council without regard to the result of the account. *HURRINATH RAI v. KRISHNA KUMAR BAKSHI.*

[I. L. R. 14 Calc. 147]

[I. L. R. 13 I. A. 123]

2.—*Companies' Act (Act VI of 1882). s. 162—Extraordinary power of the Court under the Companies' Act—Examination of witness—Costs.*] Certain persons connected with a company then in course of liquidation, who were also some of the defendants in a pending suit brought by the company (and revived subsequent to the order for winding up by the official liquidator) for an account and for the recovery of certain sums alleged to have been paid to the promoters of the company, having been examined under an order obtained under s. 162 of the Companies' Act, 1882, applied through their counsel for costs incurred on such examination. *Held*, that no order as to such costs could be made. *IN THE MATTER OF THE INDIAN COMPANIES' ACT, 1882, AND IN THE MATTER OF T. F. BROWN & COMPANY.*

[I. L. R. 14 Calc. 219]

3.—*Defendants—Separate defence where defences are identical.*] Where the obligees of a bond brought a suit against their joint obligors the heirs of their surety, a purchaser from those heirs of the property mortgaged in the money-bond, and one D, in which suit they claimed to recover the money due on the bond by the sale of the property mortgaged therein, a 6½ biswas share in certain property, and also by the sale of the property mortgaged in the security bond: *Held*, that one set of costs was enough for the heirs of S and the purchaser from them of the property mortgaged in the security bond, as their defences were identical, and that D's costs should be calculated on the value of the 6½ biswas, the decree of the Court of the First Instance being modified to this extent. *BHUP SINGH v. ZAIN-UL-ABDIN.*

[I. L. R. 9 All. 205]

4.—*Delay—Civil Procedure Code, s. 315—Limitation—Sale in execution set aside—Application by purchaser for refund of purchase-money—Accrual of right to apply.*] A suit by a judgment-debtor



## COSTS—continued.

## (1) SPECIAL CASES—continued.

whose *sir* land had been sold in execution of a decree, to have the sale declared void and illegal, on the ground that the *sir* was incapable of sale. was decided on appeal by the High Court on the 13th June 1884. On the 11th June 1887, the purchaser at the sale applied, under s. 315 of the Civil Procedure Code, for a refund of the purchase-money: *Held* that the right to apply accrued on the passing of the High Court's decree, and the application was therefore not barred by limitation; but that looking to the great delay there had been on the part of the applicant, he should not be allowed any costs. *GIRDHARI v. SITAL PRASAD*.

[I. L. R. 11 All. 372]

5.—*Error or mistake—Proceedings initiated through error of Courts* ] On the 14th February 1884, the High Court dismissed an application of the 22nd March 1883, by a *purdah-nashin* lady, for leave to appeal *in formâ pauperis* from a decree, dated the 16th September 1882, the application, after giving credit for 86 days spent in obtaining the necessary papers, being out of time by 73 days. On the 16th August 1884, an order was passed allowing an application which had been made for review of the previous order to stand over, pending the decision of a connected case. On the 24th April 1885, the connected case having then been decided, the application for review was heard and dismissed. Nothing more was done by the appellant until the 18th June 1885, when, on her application, an order was passed by a single Judge allowing her, under s. 5 of the Limitation Act (XV of 1877) to file an appeal on full stamp paper, and she thereupon, having borrowed money on onerous conditions to defray the necessary institution-fees, presented her appeal, which was admitted provisionally by a single Judge: *Held* by MAHMOOD, J., that the *ex-parte* order of the 18th June, 1885, was one which the Civil Procedure Code nowhere allowed and was *ultra vires*, and that the Bench before which the appeal came for hearing was competent to determine whether the order admitting the appeal should stand or be set aside. *Dubey Sahai v. Ganesh Lal*, I. L. R. 1 All. 34, referred to: *Held*, further, by MAHMOOD, J., that although but for the erroneous order of the 18th June 1885, the appellant would neither have borrowed the money required to defray the institution-fees, nor preferred the appeal, and this was a circumstance to be considered in the exercise of the discretionary power conferred by s. 220 of the Code, it could not be said that the error of a Court of Justice which leads a party to initiate proceedings against another is sufficient to exonerate the losing party from paying the costs incurred by the opposite party, and that the appeal should therefore, be dismissed with costs. *HUSAINI BEGAM v. COLLECTOR OF MUZAFFARNAGAR*.

[I. L. R. 9 All. 11]

The judges having differed on the question as to whether sufficient cause had or had not been

## COSTS—continued.

## (1) SPECIAL CASES—continued.

shown for the admission of the appeal after time, *TYRRELL, J.*, holding that there was sufficient cause and *MAHMOOD, J.*, that there was not, an appeal was heard under the Letters Patent and the decision of *MAHMOOD, J.*, on that point was affirmed, and the appeal was eventually dismissed with costs. *HUSAINI BEGAM v. COLLECTOR OF MUZAFFARNAGAR*.

[I. L. R. 9 All. 655]

6.—*Government—Application to sue in formâ pauperis—Omission to make inquiry into pauperism—Civil Procedure Code, ss. 409, 412.* ] *A* applied for leave to file a suit *in formâ pauperis* against *B*. *B* resisted the application, on the ground that *A* was a minor. The Government pleader also resisted, on the ground that *A* was not a pauper. The Court without inquiring into *A*'s pauperism rejected the application solely on the ground that *A* was a minor, and that he was not properly represented by a next friend or guardian. The Court ordered all costs to be paid out of the minor's estate. The minor died soon afterwards. The Collector then applied to the Court to attach certain property in *B*'s hands which was alleged to form a part of the minor's estate. *B* objected, but the attachment was allowed: *Held*, on an application for revision of the order on which the order for costs against the minor's estate was held to be illegal and *ultra vires*, that no inquiry having been made into *A*'s pauperism, and no order passed such as is contemplated in ss. 409 or 412 of the Code, the Collector was not entitled to costs. *AMICHAND TALAKHAND v. COLLECTOR OF SHOLAPUR*.

[I. L. R. 13 Bom. 234]

7.—*Reference to High Court—Practice—Costs of reference to High Court—Small Cause Court (Presidency Towns) Act (Act XV of 1882), s. 69—Civil Procedure Code (Act XIV of 1882), ss. 220, 617, 620* ] Under s. 620 of the Civil Procedure Code the costs of a reference to the High Court cannot be dealt with separately, but must be dealt with when awarding the costs of the suit. They are, however, in the discretion of the Court, and need not necessarily follow the event of the suit. *NICOL v. MATHOORA DASS DUMANT*.

[I. L. R. 15 Calc. 507]

8.—*Respondents—Successful preliminary objection to appeal—Practice.* ] Where a preliminary objection was successfully taken to the hearing of an appeal, the High Court refused to follow the practice adopted in bankruptcy appeals in England by depriving the respondent of costs on the dismissal of the appeal, on the ground that the appellant had no previous notice of the preliminary objection. *Ex parte Brooks*, I. L. R. 13 Q. B. D. 42, and *Ex parte Blease*, I. L. R. 14 Q. B. D. 123, referred to. *IMTIAZ BANO v. LATAFATUN-NISSA*.

[I. L. R. 11 All. 328]



**COSTS—concluded.****(1) SPECIAL CASES—concluded.**

9.—*Vendor and Purchaser—Suit for damages for breach of contract and refund of earnest-money—Omission to tender.*] In a suit for damages for breach of a contract to sell immoveable property and for refund of the earnest-money paid to the plaintiff by the defendant in which the plaintiff obtained a decree for the earnest-money: *Held*, that as the defendant had not paid the earnest-money into Court, nor formally tendered it, she must pay the costs of the suit. *PITAMBER SUN-DARJI v. CASSIBAI.*

[I. L. R. 11 Bom. 272]

**(2) COSTS OUT OF ESTATE.**

10.—*Will, Construction of—Difficulty of construction caused by testator.*] In a suit for the construction of a will: *Held*, that the difficulty of construction having been caused by the testator himself, and in regard to the circumstances and position of the parties, costs should come out of the estate. *INDAR KUNWAR v. JAIPAL KUNWAR.*

[I. L. R. 15 Calc. 725]

[L. R. 15 I. A. 127]

**COUNSEL**

1.—*Advocate—Privilege.*] An advocate in India cannot be proceeded against civilly or criminally for words uttered in his office as advocate. *SULIVAN v. NORTON.*

[I. L. R. 10 Mad. 28]

2.—*Hearing of argument on preliminary issue.*] Two counsel for the same party may be heard on argument of a preliminary issue. *FATMABAI v. AISHABAI.*

[I. L. R. 12 Bom. 454]

**"COURT."**

See EVIDENCE ACT, 1872, s. 57.

[I. L. R. 14 Calc. 176]

1.—*Criminal Procedure Code, s. 195—Registration Act, s. 41—Sanction of Sub-Registrar—Condition precedent to trial for forgery of will registered.*] A Sub-Registrar acting under s. 41 of the Registration Act, 1877, is a "Court" within the meaning of s. 195 of the Code of Criminal Procedure. *IN RE VENKATACHALA.*

[I. L. R. 10 Mad. 154]

2.—*Criminal Procedure Code, s. 195—Sanction to prosecute—Registration Act (III of 1877), s. 34—Forged document registered by Sub-Registrar.*] A Sub-Registrar acting under s. 34 of the Registration Act, 1877, is not a "Court" within the meaning of s. 195 of the Code of Criminal Procedure. *QUEEN-EMPRESS v. SUBBA.*

[I. L. R. 11 Mad. 3]

**"COURT"—concluded.**

3.—*Criminal Procedure Code, s. 195—Sub-Registrar—Sanction to prosecute.*] A Sub-Registrar under the Registration Act 1877 is not a Judge, and therefore not a "Court" within the meaning of s. 195 of the Criminal Procedure Code. The ruling in *In re Venkatachala*, I L. R. 10 Mad. 154, dissented from. *QUEEN-EMPRESS v. TULJA.*

[I. L. R. 12 Bom. 36]

**COURT FEES' ACT (VII OF 1870),**

See CIVIL PROCEDURE CODE, 1882, s. 316.

[I. L. R. 13 Bom. 670]

See SALE IN EXECUTION OF DECREE—PURCHASERS, TITLE OF—CERTIFICATES OF SALE.

[I. L. R. 13 Bom. 670]

See VALUATION OF SUIT—SUITS.

[I. L. R. 11 Bom. 591]

—, s. 6.

See CIVIL PROCEDURE CODE, 1882, s. 316.

[I. L. R. 13 Bom. 670]

See SALE IN EXECUTION OF DECREE—PURCHASERS, TITLE OF—CERTIFICATES OF SALE.

[I. L. R. 13 Bom. 670]

See VALUATION OF SUIT—APPEALS.

[I. L. R. 10 Mad. 187]

—*Written statement—Set-off—Civil Procedure Code (Act XIV of 1882), ss. 111 and 216.*] A written statement containing a claim of set-off is chargeable with the court-fee which would be payable on a plaint of that nature. *BAI SHRI MAJIRAJBAI v. NAROTAM HARGOVAN.*

[I. L. R. 13 Bom. 672]

1.—s. 7, cl. 5—*Stamp Construction and applicability of the proviso—Valuation of suits for land in a talukdari village—Talukdar's jama—Remission.*] *Per WEST and NANABHAI, JJ.*—The proviso to art. 5 of s. 7 of the Court Fees' Act (VII of 1870) was clearly intended to provide a standard of valuation in the Bombay Presidency not only for the comparatively rare case of land forming part, but not a definite share, of an estate paying revenue to Government, but for all cases of suits for land. The theory being that all land is primarily liable to be rated or taxed for the public revenue, any sum not levied according to the appraisement made in order to show the proper amount of the land-tax may be regarded as a remission. In the case of a talukdari village the proprietor of which had, under a settlement with Government for a period of twenty-two years agreed to pay a fixed annual jama or lump assessment, instead of the full survey assessment for the whole village. *Held*, by a majority of the Full Bench, that the difference in amount

COURT FEES' ACT (VII OF 1870), s. 7,  
cl. 5—*continued*.

between the *jama* and the full survey assessment was a remission, and therefore a suit for possession of lands in this village was to be valued according to cl. 3 of the proviso to art. 5 of s. 7 of the Court Fees' Act (VII of 1870.) *Per* BIRDWOOD, J.:—The remission contemplated by cl. (3) of the proviso is an *express* remission, and not a mere difference in amount between the actual assessment payable by a *talukdar* and the survey assessment." The three clauses of the proviso seem to apply only to lands which have been subjected to a survey settlement as ordinarily understood and legally provided for in the Bombay Presidency the first clause being applicable to lands settled for a period not exceeding thirty years, the second to lands settled for a longer period or permanently, and the third to *nam* lands on which the whole or a part of the survey assessment has been expressly remitted. The *talukdars* are not *namdars*. They are land-holders liable to pay a land-tax, but not under a survey settlement, such as is applicable to lands for which provision seems to have been specially made in the proviso to art. 5 of s. 7 of the Court Fees' Act. No part of the proviso therefore applies to a suit for the possession of lands in a *talukdar* village. Such a suit should be valued according to cl. (d) of art. 5 of s. 7 of the Court Fees' Act. *ALA CHELA v. OGHADBHAI THAKERSI*

[I. L. R. 11 Bom. 541]

BAVAJI MOHANJI v. PUNJABHAI HANUBHAI.

[I. L. R. 11 Bom. 550 note]

2.—s. 7, cl. 5 (c) (e)—*Paramba in Malabar, Valuation of suit for.* On its appearing that a paramba in Malabar is not subject to land tax, but that a tax is levied on trees of certain kinds which may grow on it: *Held*, that a paramba must be regarded for the purposes of the Court Fees' Act as a garden or as land which pays no revenue, according to the circumstances of each case. *AUDATHODAN MOIDIN v. PULLAMBATH MAMALLY.*

[I. L. R. 12 Mad. 301]

s. 11 and s. 17.—*Execution of part of decree—Payment of full amount of Court Fees not necessary for such part execution—Construction of Act.* The plaintiff sued the defendant to recover possession of a house and for mesne profits. In the same suit he also claimed certain account books and documents from the defendant. In paying court-fees he estimated the mesne profits at Rs. 151, and paid in that amount. He obtained a decree, and the amount of mesne profits awarded to him was Rs. 3,349-13-3. The decree further directed that possession of the house should be given to him, and that the books and documents should be handed over to him. He now applied for execution of that part of the decree which directed the delivery of the

COURT FEES' ACT (VII OF 1870), s. 11  
and s. 17—*continued*.

house and of the account books and other documents. The defendant contended that, under s. 11 of the Court Fees' Act VII of 1870, the plaintiff was not entitled to execution of any part of the decree until he paid the proper court-fees on the sum awarded as mesne profits, *viz.*, Rs. 3,349-13-3: *Held*, that the plaintiff might obtain execution of that part of the decree which ordered delivery of the house and books and documents without paying the fees payable on the amount awarded for mesne profits. S. 11 and s. 17 of the Court Fees' Act VII of 1870 ought to be similarly construed; and the language of the latter section, which deals with multifarious suits, shows that for the purposes of the stamp revenue such suits are deemed to be a collection of distinct suits relating to the several causes of action combined in them. In applying s. 11 to such suits, in order to give a harmonious construction to the Act as a whole, the term "suit" in that section should be construed as confined to that part of the suit in question which related to mesne profits. *FULCHAND v. BAI ICHHA.*

[I. L. R. 12 Bom. 98]

—, s. 12.

*See* APPEAL—DECREES.

[I. L. R. 11 All. 91]

*See* VALUATION OF SUIT—SUITS.

[I. L. R. 12 Mad. 223]

—, s. 17.

*See* s. 11.

[I. L. R. 12 Bom. 98]

s. 17.—*Suit on Hunds—Distinct causes of action—"Distinct subjects."* In a suit upon three different *hunds* executed on the same date by one of the defendants in favour of the other three defendants and by them assigned to the plaintiff, and not paid on maturity: *Held* that each *hundi* afforded a separate cause of action, that the suit embraced three separate and distinct subjects, and that the memorandum of appeal by the first defendant was chargeable with the aggregate amount of the court-fees to which the memoranda of appeal in suits embracing separately each of such subjects would be liable under the Court Fees' Act. *PARSHOTAM LAL v. LACHMAN DAS.*

[I. L. R. 9 All. 252]

—, sch. 1, art. 5.—*Fee payable on application to review appellate decree under Letters Patent, s. 10.* For the purpose of ascertaining the court-fee to be paid under sch. i, art. 5 of the Court Fees' Act (VII of 1870) upon an application to review an appellate decree, the fee to be considered is the fee leviable on the memorandum of the appeal in which the decree sought to be reviewed was passed, and not the fee which was

**COURT FEES' ACT (VII OF 1870), s. 17—**  
*continued*

leviable on the plaint, nor—where the decree sought to be reviewed was passed on appeal under s. 10 of the Letters Patent from an appellate judgment of a Division Bench—the fee which was leviable on the memorandum of the appeal before such Bench. *HUSAINI BEGAM v. COLLECTOR OF MUZAFFARNAGAR.*

[I. L. R. 11 All 176]

—, sch. I, art. 8.—*Stamp Act, 1879, sch. I art. 1—Copies of originals returned to the party—Liability of such copies to stamp-duty* ] In the course of a suit the plaintiff put in evidence certain entries from his day-books and ledger. The books had been produced in Court, and had been returned to the plaintiff, as usual, on his furnishing copies of the said entries. The Subordinate Judge feeling doubt as to whether such copies should be furnished on stamped paper, referred the question to the High Court. *Held* that the original entries not having been in the handwriting of the debtor, were not liable to stamp duty under sch. I, art. 1 of the Stamp Act I of 1879, and that, therefore, the copies of them were not chargeable with any court fees under sch. I, art. 8 to the Court Fees' Act VII of 1870. *HARICHAND v. JIVNA SUBHANA*

[I. L. R. 11 Bom 526]

—, sch. II, art. 6.—*Security bond for costs of appeal—Act I of 1879, sch. 2, No. 13* ] *Held* by the Full Bench that where a bond is given under the orders of a Court as security by one party for the costs of another, it is subject to two duties—(a) an *ad valorem* stamp under the Stamp Act, art. 13, sch. i, (b) a court-fee of eight annas under the Court Fees' Act, art. 6, sch. ii. *KULWANTA v. MAHABI PRASAD.*

[I. L. R. 10 All 16]

—, sch. II, art. 17, cls. (i) and (ii).

*See VALUATION OF SUIT—SUITS.*

[I. L. R. 11 All 365]

—, sch. II, art. 17, cls. (i) and (iii).

*See VALUATION OF SUITS—SUITS.*

[I. L. R. 10 Mad. 187]

[I. L. R. 12 Mad. 223]

—, sch. II, art. 17, cl. (vi).

*See VALUATION OF SUIT—SUITS.*

[I. L. R. 11 Mad. 148, 149 note, 266]

**COURT OF WARDS ACT (BENGAL ACT IX OF 1879.)**

s. 55.—*Bengal Act III of 1881, s. 7—Suit on behalf of ward by manager without sanction of the Court of Wards, Effect of—Sanction after appeal, Effect of.* ] In the absence of some order by the Court of Wards authorising the bringing

**COURT OF WARDS ACT (BENGAL ACT IX OF 1879), s. 55—continued.**

of a suit, a suit instituted by a manager on behalf of a ward must be dismissed. A suit was instituted in the Court of the First Subordinate Judge of Dacca on behalf of a ward by his manager without the order or sanction of the Court of Wards, and proceeded to judgment without any such order or sanction. The suit was partially decreed; and the manager appealed to the District Judge for that portion of the claim which had been dismissed by the Court of First Instance. At the hearing of the appeal, an application was filed on behalf of the appellant, accompanied by a letter giving sanction to the institution of the suit, the appeal and other proceedings connected therewith, with retrospective effect from the date of its institution. The Judge dismissed the suit. The plaintiff appealed to the High Court. *Held*, having regard to s. 55 of the Court of Wards Act, 1879, as amended by s. 7 of Bengal Act III of 1881, the lower Appellate Court was right in dismissing the suit—*Held*, also that the sanction given after appeal did not have a retrospective effect. *DINESH CHUNDER ROY v. GOLAM MOSTAPHA DINESH CHUNDER ROY v. FAHAMIDUNNESSA BEGAM. DINESH CHUNDER ROY v. NISHI KANT GUNGOPADHYA.*

[I. L. R. 16 Calc. 89]

**COVENANT.**

*See REGISTRAR OF HIGH COURT, AUTHORITY OF.*

[I. L. R. 16 Calc. 330]

—*Covenant running with the land—Malikana—Heritable charge—Suit for arrears of malikana allowance—Bond fide transferee without notice—Transfer of Property Act (IV of 1882), s. 3.* ] *S* sold a share in immoveable property to *M* by a registered deed of sale which contained the following provisions: "The said vendee is at liberty either to retain possession himself or to sell it to some one else and he is to pay Rs. 25 of the Queen's coin to me annually (as *malikana*), which he has agreed to pay." *M* mortgaged the property to *B*, who obtained possession and, after the mortgage, the annual payments provided for by the deed of sale ceased. The representatives of the vendor sued *M* and *B* to recover arrears of *malikana*. *Held* without expressing any opinion as to whether registration of the deed of sale operated as notice to all the world, or whether notice of the terms of the deed was necessary to bind *B*, and assuming *B* to have had no such notice in fact, that if he had searched the register he would have ascertained those terms, and if he did not search the register he must have wilfully abstained from so doing, or was guilty of gross negligence in not so doing; that in either case he could not be treated as a *bona fide* mortgagee without notice; and that, being in receipt of the profits of the property, he was liable for the annual payment of the Rs. 25 from the date when he took possession as

**COVENANT—concluded.**

mortgagee *Agra Bank v. Barry*, L. R. 7 H. L. 135, and *Pitcher v. Rawlins*, L. R. 7 Ch. App. 259, distinguished, *Abadi Begam v. Asa Ram*, I. L. R. 2 All. 162, referred to. The definition of the word "notice" in s. 3 of the Transfer of Property Act (IV of 1882), correctly codifies the law as to notice which existed prior to the passing of the Act. *CHURAMAN v. BALLI*.

[I. L. R. 9 All. 591]

**CRIMINAL BREACH OF TRUST.**

See JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—CRIMINAL BREACH OF TRUST.

[I. L. R. 13 Bom. 147]

*Criminal Breach of Trust—Penal Code, s. 405.*

Where a complaint only amounted to a statement that the accused had, in consequence of certain arrangements made with the complainant's father, received certain moneys and had refused to render accounts, but contained no allegation that he had in fact realised and dishonestly misappropriated any particular sum, and obviously was made for the purpose of forcing him to render accounts. *Held*, that the Magistrate was right in dismissing it, since the facts alleged did not constitute criminal breach of trust. *QUEEN-EMPRESS v. MURPHY*.

[I. L. R. 9 All. 666]

**CRIMINAL INTIMIDATION.**

1.—*Penal Code (Act XLV of 1860), ss. 503, 507, 511—Attempt to commit offence.* The accused sent a fabricated petition to the Revenue Commissioner, S. D., containing a threat, that if a certain Forest Officer were not removed elsewhere, he would be killed. The accused was charged with the offence of criminal intimidation under s. 507 of the Penal Code (XLV of 1860). The Sessions Judge found that the Commissioner had neither official nor personal interest in the Forest Officer. He therefore acquitted the accused of the offence of criminal intimidation, but convicted him of an attempt to commit the offence punishable under s. 507, and sentenced him to four months' simple imprisonment: *Held*, reversing the conviction and sentence, that as the person to whom the petition was addressed, was not interested in the person threatened, the act intended and done by the accused did not amount to the offence of criminal intimidation within the meaning of s. 503 of the Penal Code. *Per WEST, J.*:—"The offence of criminal intimidation, as defined, seems to require both a person to be threatened and another in whom he is specially interested. Then there must be the intent to cause alarm to the former by a threat to him of injury to the latter. The intent itself might be complete, though it could not be effected. But the existence of the interest seems essential to the offence, as also and equally to the attempt at the offence, since otherwise the attempt would be to do something not constituting an offence."

**CRIMINAL INTIMIDATION—continued.**

*Per BIRDWOOD, J.*:—"No criminal liability can be incurred, under the Penal Code, by an attempt to do an act, which, if done, would not be an offence against the Code. In the present case, therefore, if the accused was not guilty of committing criminal intimidation, because the act intended and done by him lacked an ingredient of that offence, he could not be guilty of an attempt at that offence." *QUEEN-EMPRESS v. MANGESH JIVAJI*.

[I. L. R. 11 Bom. 376]

2.—*Penal Code, Act XLV of 1860, s. 503.* The threat referred to in s. 503 of the Penal Code must be a threat communicated, or uttered with the intention of its being communicated, to the person threatened for the purpose of influencing his mind. *GUNGA CHUNDER SEN v. GOUR CHUNDER BANIKYA*.

[I. L. R. 15 Calc. 671]

**CRIMINAL MISAPPROPRIATION.**

See THEFT.

[I. L. R. 15 Calc. 388]

1.—*Penal Code, ss. 403 429—Bull dedicated to an idol.* A bull dedicated to an idol and allowed to roam at large is not *fera bestia*, and therefore *res nullius*, but *prima facie*, the trustee of the temple where the idol is worshipped, has the rights and liabilities attaching to its ownership. Such an animal can therefore be the subject of theft or criminal misappropriation. *QUEEN-EMPRESS v. NALLA*.

[I. L. R. 11 Mad. 145]

2.—*Penal Code, s. 403—Intention, Proof of* *R* was a Government servant, whose duty it was to receive certain monies and to pay them into the treasury on receipt. He admitted that he had retained two sums of money in his possession for several months, when fearing detection, he paid them into the treasury making a false entry at the time in his books with a view to avert suspicion. His explanation as to his reason for retaining the money was not credited by the Magistrate who convicted him of criminal misappropriation under s. 403 of the Penal Code. *Held* that the conviction was right. *QUEEN-EMPRESS v. RAMAKRISHNA*.

[I. L. R. 12 Mad. 49]

**CRIMINAL PROCEEDINGS.**

1.—*Irregularity in Criminal Trial—Improper Joinder of Charges—Criminal Procedure Code 1882, s. 537.* *Semble (per PETHERAM, C. J.)*—That if a man were tried for four specific offences of the same kind at one trial, such a procedure would not be merely an irregularity which could be cured by s. 537 of the Code, but a defect in the trial which would render the whole trial inoperative, unless possibly it could be cured by some subsequent proceeding by striking out some portion of the charge. *IN THE MATTER OF LUCHMINARAIN*.

[I. L. R. 14 Calc. 128]

**CRIMINAL PROCEEDINGS—continued.**

2.—*Irregularity in Criminal Trial—Rioting, Counter Charges of.—Cross cases taken together—Criminal Procedure Code, Act X of 1882, s. 537—Irregularity prejudicing the accused—“Failure of justice.”*] A Magistrate, there being counter charges of rioting and assault before him, took up and tried one of such cases; and having heard the evidence for the prosecution called on the counter case, and in this latter case examined as witnesses some of the accused in the first case, eventually convicting the accused in the first case: *Held* that such a procedure constituted a grave irregularity, but that, under the circumstances of the particular case, the irregularity was cured by s. 537 of the Criminal Procedure Code. *BACHU MULLAH v. SIA RAM SINGH*

[I. L. R. 14 Calc. 358]

3.—*Criminal Procedure Code (Act X of 1882), ss. 233, 234, 537—Separate charges for distinct offences.*] Five persons were charged with having committed the offence of rioting on the 5th December; four out of those persons, and one *F*, were charged with having committed the offence of criminal trespass on the 9th December. These two cases were taken up and tried together in one trial, and were decided by one judgment. *Held* that the trial was illegal, and the defect was not cured by s. 537 of the Criminal Procedure Code. *IN THE MATTER OF THE PETITION OF CHANDI SINGH. QUEEN-EMPRESS v. CHANDI SINGH.*

[I. L. R. 14 Calc. 395]

4.—*Criminal Procedure Code, ss. 107, 112, 117, 118, 239, 537—Joint inquiry—Opposing factions dealt with in one proceeding.*] Upon general principles, every person is entitled, in the absence of exceptional authority conferred by the law to the contrary effect, when required by the judiciary either to forfeit his liberty or to have his liberty qualified, to insist that his case shall be tried separately from the cases of other persons similarly circumstanced. Where an order has been passed under s. 107 of the Criminal Procedure Code requiring more persons than one to show cause why they should not severally furnish security for keeping the peace, the provisions of s. 239 read with s. 117 are applicable, subject to such modifications as the latter section indicates, and to such procedure as the exigencies of each individual case may render advisable in the interests of justice. A joint inquiry in the case of such persons is therefore not *ipso facto* illegal; and even in cases where one and the same proceeding taken by the Magistrate under ss. 107, 112, 117, and 118 improperly deals with more persons than one, the matter must be considered upon the individual merits of the particular case, and would at most amount to an irregularity which, according to the particular circumstances, might or might not be covered by the provisions of s. 537. *Queen-Empress v. Nathu*, I. L. R. 6 All. 214, and *Empress v. Batuk*, Weekly Notes All. 1884, p. 54, referred to. Where, according to the

W., D.

**CRIMINAL PROCEEDINGS—continued.**

nature of the information received by the Magistrate, there were two opposing parties inclined to commit a breach of the peace: *Held*, applying by analogy the principles relating to the trial of members of opposing factions engaged in a riot, that the Magistrate acted irregularly in taking steps against both parties jointly, and in holding the inquiry in a single proceeding. Such procedure is not *ipso facto* null and void, but only where the accused have been prejudiced by it. *Empress v. Lochan*, Weekly Notes, All., 1881, p. 98, and *Hossain Buksh v. The Empress*, I. L. R. 6 Calc. 96, referred to. *QUEEN-EMPRESS v. ABDUL KADIR.*

[I. L. R. 9 All. 452]

5.—*Irregularity—Evidence given at previous trial treated as examination-in-chief—Criminal Procedure Code, ss. 353, 537—Evidence Act I of 1872, s. 167.*] At the trial of a party of Hindus for rioting, the Magistrate, instead of examining the witnesses for the prosecution, caused to be produced copies of the examination-in-chief of the same witnesses which had been recorded at a previous trial of a party of Muhammadans, who were opposed to the Hindus in the same riot. These copies were read out to the witnesses, who were then cross-examined by the prisoners, and no objection to this procedure was taken on the prisoners' behalf. The accused were convicted: *Held* that although the procedure adopted by the Magistrate was irregular, the irregularity was cured by the provisions of s. 537 of the Criminal Procedure Code, and of s. 167 of the Evidence Act (I of 1872), as it was not shown that there had been any failure of justice or that the accused had been substantially prejudiced, and as the matters elicited in cross-examination were sufficient to sustain the conviction. *QUEEN-EMPRESS v. NAND RAM.*

[I. L. R. 9 All. 609]

6.—*Criminal Procedure Code, s. 203—“Examination”—Written complaint attested by complainant on oath—Irregularity—Criminal Procedure Code, s. 537.*] Where a deposition in the shape of a complaint is made orally or in writing and is sworn to, the requirements of s. 203 of the Criminal Procedure Code in regard to the examination of the complainant, are sufficiently satisfied: *Held*, therefore, where a Magistrate dismissed a complaint of criminal breach of trust without examining the complainant on oath, but after the complainant had sworn to the truth of the matters alleged in the complaint, that the provisions of s. 203 had been sufficiently complied with, and, if not, that the irregularity was covered by the terms of s. 537. *QUEEN-EMPRESS v. MURPHY.*

[I. L. R. 9 All. 666]

7.—*Criminal Procedure Code, ss. 535 and 537—Joint trial for separate offences—Irregular procedure.*] A Magistrate tried *A* for theft and *B* and *C* for rescuing *A* from lawful custody, and convicted *A*, *B*, and *C* in one trial. *A* appealed, and *B* and *C* appealed separately. No objection was

**CRIMINAL PROCEEDINGS—continued.**

taken in the petitions of appeal to the procedure of the Magistrate: *Held*, on revision, that the convictions might stand. *QUEEN-EMPRESS v. KUTTI*.

[I. L. R. 11 Mad. 441]

8.—*Criminal Procedure Code*, ss. 4, 530, and 537—*Third-class Magistrate taking cognizance of case on receipt of a yadast from a Revenue Officer and convicting accused without examining complainant* ] A Revenue Officer sent a yadast to a third-class Magistrate, charging a certain person with having disobeyed a summons issued by the Revenue Officer. The third-class Magistrate thereupon tried and convicted the accused under s. 174 of the Penal Code. The district Magistrate referred the case on the ground that the conviction was bad under s. 530 (h) of the Code of Criminal Procedure: *Held*, that as the yadast amounted to a complaint within the meaning of s. 4, although the complainant was not examined on oath as required by s. 200, the conviction was not illegal. *QUEEN-EMPRESS v. MONU*.

[I. L. R. 11 Mad. 443]

9.—*Criminal Procedure Code*, ss. 289, 537—"No evidence"—*Acquittal of accused without taking opinions of assessors.*] The words "there is no evidence" in s. 289 of the Code of Criminal Procedure, 1882, cannot be extended to mean no satisfactory, trustworthy or conclusive evidence; but the third paragraph of the section means that if at a certain stage of a sessions trial the Court is satisfied that there is not on the record any evidence which, even if it were perfectly true, would amount to legal proof of the offence charged, then the Court has power, without consulting the assessors, to record a finding of not guilty. But if a Court acts only because it considers the evidence for the prosecution unsatisfactory, untrustworthy, or inconclusive, it acts without jurisdiction, and its order discharging the accused is illegal. Even if not illegal for want of jurisdiction, such action is a serious irregularity, which may, or perhaps must, have caused a failure of justice within the meaning of s. 537 of the Code of Criminal Procedure. *In the matter of the Petition of Narain Das*, I. L. R. 1 All. 610, referred to. *QUEEN-EMPRESS v. MUNNA LALL*.

[I. L. R. 10 All. 414]

10.—*Code of Criminal Procedure*, ss. 234 and 537—*Obtaining a minor for prostitution—Penal Code*, ss. 372, 373—*Misjoinder of charges—Immaterial irregularity.*] A woman, being a member of the dancing girl caste, obtained possession of a minor girl and employed her for the purpose of prostitution; she subsequently obtained in adoption another minor girl from her parents, who belonged to the same caste. She and the parents of the second girl were charged together under ss. 372, 373 of the Penal Code. The charges related to both girls: *Held*, (1) that the two charges should not have been tried together, but

**CRIMINAL PROCEEDINGS—continued.**

the irregularity committed in so trying them had caused no failure of justice; (2) that ss. 372, 373 of the Penal Code may be applicable in a case where the minor concerned is a member of the dancing girl caste. Per *MUTTUSAMI AYYAR, J.*—It would be no offence if the intention was that the girl should be brought up as a daughter, and that when she attains her age she should be allowed to select either to marry or follow the profession of her prostitute mother. *QUEEN-EMPRESS v. RAMANNA*.

[I. L. R. 12 Mad. 273]

11.—*Contempt of Court—Postponement of final order—Irregular Procedure.*] Where a Magistrate in whose presence contempt was committed, took cognizance of the offence immediately, but, in order to give the accused an opportunity of showing cause, postponed his final order for some days: *Held* that such action, though it might be irregular, was not illegal, and as the accused had not been in any way prejudiced, was covered by s. 537 of the Criminal Procedure Code. *QUEEN-EMPRESS v. PAIAMBAR BAKSH*.

[I. L. R. 11 All. 361]

11.—*Criminal Procedure Code*, 1882, s. 530, cl. (p)—*Offence originally cognizable by a second class Magistrate subsequently non-cognizable by reason of an aggravating circumstance—Duty of inferior Court.*] The accused were charged before a Magistrate of the second class with causing grievous hurt as members of an unlawful assembly under ss. 149 and 325 of the Indian Penal Code. The evidence showed that one of the accused had used an axe in causing the hurt. The Magistrate apparently ignored this fact, and he convicted the accused under s. 325 of the Code. The accused appealed. The District Magistrate who heard one appeal, and the first class Magistrate who heard the rest of the appeals, were both of opinion that the offence committed by the accused was one of causing grievous hurt with a dangerous weapon within the meaning of s. 326 of the Penal Code, and as such beyond the jurisdiction of the second class Magistrate. But they did not think it proper under the circumstances of the case to quash the convictions. The Sessions Judge on examining the record of the case was of opinion that as the offence committed by the accused was not cognizable by the trying Magistrate, his proceedings were void *ab initio* under s. 530 of the Criminal Procedure Code. He therefore referred the case to the High Court, and recommended that the convictions under s. 325 should be set aside: *Held*, that the proceedings before the second class Magistrate were not void *ab initio*, as he had jurisdiction to try the accused for offences punishable under ss. 149 and 325 of the Indian Penal Code with which they were originally charged: *Held*, also, that though it was the duty of the trying Magistrate, when the evidence disclosed a circumstance of aggravation, such as the use of a dangerous weapon, which made the



**CRIMINAL PROCEEDINGS—concluded.**

offence cognizable by a higher Court to adopt the proper procedure to send the case to the higher Court, still it was not necessary to quash the proceedings, as the accused were not in any way prejudiced, and the sentences were not inadequate. *QUEEN-EMPRESS v. GUNDYA.*

[I. L. R. 13 Bom. 502]

**CRIMINAL PROCEDURE CODE (Act X of 1882.)**

—, s. 4.

*See* COMPLAINT—INSTITUTION OF COMPLAINT AND NECESSARY PRELIMINARIES.

[I. L. R. 11 Mad. 443]

*See* JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS.

[I. L. R. 12 Bom. 561]

—, s. 33.

*See* SENTENCE—IMPRISONMENT—IMPRISONMENT IN DEFAULT OF FINE.

[I. L. R. 10 Mad. 165, 166 note]

—, s. 35.

*See* SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 10 All. 146]

[I. L. R. 16 Calc. 442]

[I. L. R. 11 All. 393]

*See* SENTENCE—IMPRISONMENT—IMPRISONMENT GENERALLY.

[I. L. R. 10 All. 58]

—, s. 45.

*See* INFORMATION OF COMMISSION OF OFFENCE.

[I. L. R. 12 Mad. 92]

—*Duty to report sudden death—Owner of house distinguished from owner of land.* Under s. 45 of the Code of Criminal Procedure, every owner or occupier of land is bound to report the occurrence thereon of any sudden death. The head of a Nayar family was convicted and fined under s. 176 of the Penal Code for not reporting a sudden death in the family house: *Held*, following former decisions of the Court, that the conviction was illegal, because s. 45 of the Code of Criminal Procedure does not apply to the owner of a house. *QUEEN-EMPRESS v. ACHUTHA.*

12 Mad. 92

[I. L. R.]

—, s. 54.

*See* WRONGFUL RESTRAINT.

[I. L. R. 12 Bom. 377]

**CRIMINAL PROCEDURE CODE—contd.**

—, s. 59.

*See* ESCAPE FROM CUSTODY.

[I. L. R. 11 Mad. 441, 480]

—, ss. 94—99.

*See* INSPECTION OF DOCUMENTS—CRIMINAL CASES.

[I. L. R. 15 Calc. 109]

—, s. 106.

*See* RECOGNIZANCE TO KEEP PEACE—MAGISTRATE WITH POWERS OF APPELLATE COURT.

[I. L. R. 16 Calc. 779]

—, s. 107.

*See* CRIMINAL PROCEEDINGS.

[I. L. R. 9 All. 452]

*See* CASES UNDER RECOGNIZANCE TO KEEP THE PEACE.

*See* SECURITY FOR GOOD BEHAVIOUR.

[I. L. R. 9 All. 452]

—, s. 112.

*See* CRIMINAL PROCEEDINGS.

[I. L. R. 9 All. 452]

*See* SECURITY FOR GOOD BEHAVIOUR.

[I. L. R. 9 All. 542]

—, ss. 117, 118.

*See* CRIMINAL PROCEEDINGS.

[I. L. R. 9 All. 452]

*See* RECOGNIZANCE TO KEEP PEACE—LIKELIHOOD OF BREACH OF PEACE AND EVIDENCE.

[I. L. R. 9 All. 452]

*See* SECURITY FOR GOOD BEHAVIOUR.

[I. L. R. 9 All. 452]

—, s. 133.

*See* JURISDICTION OF CIVIL COURT—MAGISTRATE'S ORDERS, INTERFERENCE WITH.

[I. L. R. 14 Calc. 60]

*See* CASES UNDER NUISANCE—UNDER CRIMINAL PROCEDURE CODE.

—, s. 137.

*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE.

[I. L. R. 15 Calc. 460]

*See* JURISDICTION OF CIVIL COURT—MAGISTRATE'S ORDERS, INTERFERENCE WITH.

[I. L. R. 15 Calc. 460]

**CRIMINAL PROCEDURE CODE, s. 137—  
concluded.**

*See* NUISANCE—UNDER CRIMINAL PROCEDURE CODE

[I. L. R. 11 Bom. 375]

—, s. 144

*See* CASES UNDER NUISANCE—UNDER CRIMINAL PROCEDURE CODE.

*See* SUPERINTENDENCE OF HIGH COURT—  
—CHARTER ACT, s. 15—CRIMINAL CASES.

[I. L. R. 16 Calc. 80]

—, s. 145.

*See* CASES UNDER POSSESSION, ORDER OF CRIMINAL COURT AS TO.

—, s. 147

*See* CASES UNDER POSSESSION, ORDER OF CRIMINAL COURT AS TO—DISPUTES AS TO RIGHT OF WAY, &c

—, s. 155.

*See* MAGISTRATE, JURISDICTION OF—  
POWERS OF MAGISTRATE.

[I. L. R. 12 Bom. 161]

—, s. 161.

*See* EVIDENCE—CRIMINAL CASES—STATEMENTS TO POLICE-OFFICERS.

[I. L. R. 11 Bom. 659]

[I. L. R. 16 Calc. 610, 612 note]

*See* FALSE EVIDENCE—CONTRADICTORY STATEMENTS.

[I. L. R. 16 Calc. 349]

*See* SANCTION TO PROSECUTION—WHERE SANCTION IS NECESSARY.

[I. L. R. 11 Bom. 659]

—, s. 162.

*See* EVIDENCE—CRIMINAL CASES—STATEMENTS TO POLICE-OFFICERS

[I. L. R. 11 Bom. 659]

—, s. 164.

*See* CONFESSION—CONFESSIONS TO MAGISTRATE.

[I. L. R. 14 Calc. 539]

[I. L. R. 11 Bom. 702]

[I. L. R. 15 Calc. 595]

—, s. 167

*See* DETENTION OF ACCUSED BY POLICE.

[I. L. R. 11 Mad. 98]

—, s. 172.

*See* EVIDENCE—CRIMINAL CASES—STATEMENTS TO POLICE-OFFICERS.

[I. L. R. 16 Calc. 610, 612 note]

**CRIMINAL PROCEDURE CODE—contd.**

—, s. 180.

*See* JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—DACOITY.

[I. L. R. 9 All. 523]

—, s. 182, and s. 531.

“*Local Area*” *Meaning of*] The words “local area” used in s. 182 only apply to a “local area” over which the Criminal Procedure Code applies, and not to a local area in a foreign country, or in other portions of the British Empire to which the Code has no application, and similarly s. 531 only refers to districts, divisions, sub-divisions, and local areas governed by the Code of Criminal Procedure. IN THE MATTER OF BICHITRANUND DASS *v.* BHUGGUT PERAI. IN THE MATTER OF BICHITRANUND DASS *v.* DUKHIA JANA.

[I. L. R. 16 Calc. 667]

—, s. 188.

*See* JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—CRIMINAL BREACH OF TRUST

[I. L. R. 11 Bom. 147]

—, s. 191

*See* COMPLAINT—INSTITUTION OF COMPLAINT, &c.

[I. L. R. 14 Calc. 707]

*See* FALSE CHARGE.

[I. L. R. 14 Calc. 707]

—, s. 195.

*See* COURT.

[I. L. R. 10 Mad. 154]

[I. L. R. 11 Mad. 3]

[I. L. R. 12 Bom. 36]

*See* LIMITATION ACT, 1877, ART. 178.

[I. L. R. 10 All. 350]

*See* MALICIOUS PROSECUTION.

[I. L. R. 9. All. 59]

*See* CASES UNDER SANCTION TO PROSECUTION.

*See* SESSIONS JUDGE, JURISDICTION OF.

[I. L. R. 16 Calc. 766]

—, s. 198.

*See* COMPLAINT—INSTITUTION OF COMPLAINT, &c.

[I. L. R. 10 All. 39]



**CRIMINAL PROCEDURE CODE—contd.**

—, s. 200.

*See* COMPLAINT—DISMISSAL OF COMPLAINT—POWER OF, AND PRELIMINARIES TO, DISMISSAL.

[I. L. R. 14 Calc. 141]

*See* COMPLAINT—INSTITUTION OF COMPLAINT, &c.

[I. L. R. 13 All. 39]

—, s. 202.

*See* COMPLAINT—DISMISSAL OF COMPLAINT—POWER OF, AND PRELIMINARIES TO, DISMISSAL.

[I. L. R. 14 Calc. 141]

*See* POLICE INQUIRY.

[I. L. R. 12 Bom. 161]

—, s. 203 .

*See* COMPLAINT—DISMISSAL OF COMPLAINT—POWER OF, AND PRELIMINARIES TO, DISMISSAL.

[I. L. R. 9 All. 85, 666]

[I. L. R. 14 Calc. 141]

[I. L. R. 13 Bom. 590]

*See* COMPLAINT—INSTITUTION OF COMPLAINT AND NECESSARY PRELIMINARIES.

[I. L. R. 13 Bom. 600]

*See* DEFAMATION.

[I. L. R. 12 Bom. 167]

—, ss. 209, 210.

*See* MAGISTRATE, JURISDICTION OF—COMMITMENT TO SESSIONS COURT.

[I. L. R. 11 Bom. 372]

—, s. 227 .

*See* CHARGE—ALTERATION OR AMENDMENT OF CHARGE.

[I. L. R. 9 All. 525]

—, s. 233.

*See* JOINDER OF CHARGES.

[I. L. R. 14 Calc. 395]

—, s. 234.

*See* JOINDER OF CHARGES

[I. L. R. 14 Calc. 128, 395]

—, s. 235.

*See* SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 10 All. 58, 146]

**CRIMINAL PROCEDURE CODE—contd.**

—, s. 248.

*See* COMPLAINT—WITHDRAWAL OF COMPLAINT AND OBLIGATION OF MAGISTRATE TO HEAR IT

[I. L. R. 13 Bom. 600]

—, s. 250.

*See* CASES UNDER COMPENSATION—CRIMINAL CASES—TO ACCUSED ON DISMISSAL OF COMPLAINT.

—, s. 260

*See* CASES UNDER SUMMARY TRIALS.

—, s. 288.

*See* CONFESSION—CONFESSIONS TO MAGISTRATE.

[I. L. R. 12 Mad. 123]

*See* EVIDENCE—CRIMINAL CASES—DEPOSITIONS.

[I. L. R. 12 Mad. 123]

—, s. 289.

*See* CRIMINAL PROCEEDINGS.

[I. L. R. 10 All. 414]

*See* RIGHT OF REPLY.

[I. L. R. 14 Calc. 245]

[I. L. R. 11 Mad. 339]

*See* SESSIONS JUDGE, POWER OF.

[I. L. R. 10 All. 414]

—, s. 297.

*See* CHARGE TO JURY—MISDIRECTION.

[I. L. R. 12 Mad. 196]

—, s. 298.

*See* CHARGE TO JURY—SUMMING UP IN GENERAL CASES.

[I. L. R. 14 Calc. 164]

—, s. 307.

*See* MAGISTRATE, JURISDICTION OF—POWERS OF MAGISTRATES.

[I. L. R. 9 All. 420]

*See* REFERENCE TO HIGH COURT—CRIMINAL CASES.

[I. L. R. 9 All. 420]

*See* REVISION—CRIMINAL CASES—VERDICT OF JURY AND MISDIRECTION.

[I. L. R. 15 Calc. 269]

*See* VERDICT OF JURY—POWER TO INTERFERE WITH VERDICT.

[I. L. R. 9 All. 420]

[I. L. R. 15 Calc. 269]

CRIMINAL PROCEDURE CODE—*contd.*

—, ss. 337, 339.

*See* APPROVERS.

[I. L. R. 11 All. 79]

*See* PARDON.

[I. L. R. 11 All. 79]

—, s. 342.

*See* CONFESSION—CONFESSIONS TO MAGISTRATE.

[I. L. R. 10 Mad. 295]

*See* EVIDENCE—CRIMINAL CASES—EXAMINATION AND STATEMENTS OF ACCUSED.

[I. L. R. 10 Mad. 295]

*See* PENAL CODE, s. 182.

[I. L. R. 12 Mad. 451]

—, s. 344.

*See* BAIL.

[I. L. R. 15 Calc. 455]

—, s. 349.

*See* MAGISTRATE, JURISDICTION OF—COMMITMENT TO SESSIONS COURT.

[I. L. R. 14 Calc. 355]

—, s. 365.

*See* CONFESSION—CONFESSIONS TO MAGISTRATE.

[I. L. R. 14 Calc. 539]

[I. L. R. 10 Mad. 295]

[I. L. R. 15 Calc. 595]

*See* EVIDENCE—CRIMINAL CASES—EXAMINATION AND STATEMENTS OF ACCUSED.

[I. L. R. 10 Mad. 295]

—, s. 369.

*See* REVIEW—CRIMINAL CASES.

[I. L. R. 14 Calc. 42]

—, s. 370. cl. i.

*See* JUDGMENT—CRIMINAL CASES.

[I. L. R. 14 Calc. 174]

—, s. 395.

*See* SENTENCE—IMPRISONMENT GENERALLY.

[I. L. R. 11 All. 308]

*See* SENTENCE—WHIPPING.

[I. L. R. 11 All. 308]

CRIMINAL PROCEDURE CODE—*contd.*

—, s. 399.

*See* MAGISTRATE, JURISDICTION OF—POWERS OF MAGISTRATES.

[I. L. R. 12 Mad. 94]

—, s. 411.

*See* APPEAL IN CRIMINAL CASES—CRIMINAL PROCEDURE CODE, 1882.

[I. L. R. 16 Calc. 799]

—, s. 417.

*See* APPEAL IN CRIMINAL CASES—ACQUITTAL, APPEALS FROM.

[I. L. R. 9 All. 528]

—, s. 418.

*See* REFERENCE TO HIGH COURT—CRIMINAL CASES.

[I. L. R. 9 All. 420]

*See* VERDICT OF JURY—POWER TO INTERFERE WITH VERDICT.

[I. L. R. 9 All. 420]

—, s. 423.

*See* REFERENCE TO HIGH COURT—CRIMINAL CASES.

[I. L. R. 9 All. 420]

*See* REVISION—CRIMINAL CASES—MISCELLANEOUS CASES.

[I. L. R. 16 Calc. 730]

*See* VERDICT OF JURY—POWER TO INTERFERE WITH VERDICT.

[I. L. R. 9 All. 420]

—, s. 427.

*See* APPEAL IN CRIMINAL CASES—ACQUITTAL, APPEALS FROM.

[I. L. R. 9 All. 528]

—, s. 428.

*See* PENAL CODE, s. 182.

[I. L. R. 12 Mad. 451]

—, s. 435.

*See* REVISION—CRIMINAL CASES—GENERAL RULES FOR EXERCISE OF POWER.

[I. L. R. 12 Bom. 377]

—, s. 437.

1.—“*Further inquiry*”—*Practice*—*Notice to show cause.*] Held by the Full Bench that when a Magistrate has discharged an accused person under s. 253 of the Criminal Procedure Code, the High Court or Court of Session under s. 437 has jurisdiction to direct further inquiry on the same materials, and a District Magistrate may

**CRIMINAL PROCEDURE CODE, s. 437—**  
*continued.*

under like circumstances, himself hold further inquiry or direct further inquiry by a Subordinate Magistrate. *Queen-Empress v. Dorabji Hormasji*, I. L. R. 10 Bom. 131, referred to. *Empress v. Bhole Singh*, Weekly Notes, All 1883, p. 150; *Queen-Empress v. Hasnu*, I. L. R. 6 All. 367; *Chundi Churn Bhattacharjia v. Hem Chunder Banerjee*, I. L. R. 10 Cal. 207. *Jeebun Kristo Roy v. Shub Chunder Dass*, I. L. R. 10 Cal. 1027; *Darsun Lall v. Jamuk Lall*, I. L. R. 12 Cal. 522; and *Queen-Empress v. Amur Khan*, I. L. R. 8 Mad 336, dissented from. In exercising the powers conferred by s. 437, Sessions Judges and Magistrates should, in the first place, always allow the person who has been discharged an opportunity of showing cause why there should not be further inquiry before an order to that effect is made, and, next, they should use them sparingly and with great caution and circumspection, especially in cases where the questions involved are mere matters of fact. As to the mode in which their discretion should be regulated under such circumstances, the remarks of STRAIGHT and TYRRELL, JJ., in *Queen-Empress v. Gayadin*, I. L. R. 4 All. 148, in reference to appeals from acquittals, are applicable. *QUEEN-EMPRESS v. CHOTU*.

[I. L. R. 9 All. 52]

2.—s. 437—*Complaint, Dismissal of—Revival of proceedings—Criminal Procedure Code, s. 437.* A complaint was made before a Magistrate of the first class of an offence punishable under s. 323 of the Penal Code. The Magistrate recorded a brief statement by the complainant, but did not ask him if he had any witnesses to call. An order was passed directing that "a copy of the petition of complaint should be sent to the police-station calling for a report on the matter," and on receipt of the report the Magistrate dismissed the complaint under s. 203 of the Criminal Procedure Code. There was nothing in the Magistrate's original order to show that he saw reason to distrust the truth of the complaint, nor did he direct any local investigation to be made by a police-officer for the purpose of ascertaining the truth or falsehood of the complaint. Subsequently to the dismissal of the complaint, the same complainant brought a fresh charge upon the same facts against the same persons in the same Court, and upon this charge the accused were tried, convicted, and sentenced: *Held* that the Magistrate in ordering a further inquiry on receiving the complainant's second petition did not act contrary to any provision of the law, and that, considering the circumstances under which the first complaint had been dismissed, a further inquiry was necessary. *QUEEN-EMPRESS v. PURAN*.

[I. L. R. 9 All. 85]

3.—s. 437—*Notice to accused—Discharge by Magistrate—Criminal Procedure Code, Act X of 1882, s. 437.* No notice to an accused person is

**CRIMINAL PROCEDURE CODE, s. 437—**  
*continued.*

necessary in point of law before an order under s. 437 can be passed; but as a matter of discretion it is proper that such notice should be given. *Held* by the majority of the Full Bench (PRINSEP, WILSON, TOTTENHAM, NORRIS, PIGOT, and O'KINEALY, JJ.)—After an inquiry by a Subordinate Magistrate and the discharge of an accused person a Sessions Judge or Magistrate has jurisdiction, under s. 437 of the Criminal Procedure Code, to order a "further inquiry" or a re-hearing upon the same materials which were before the Subordinate Magistrate, *v.e.*, when no further evidence is forthcoming. But (PRINSEP, J., dissenting) the words "further enquiry" in that section mean the inquiry preliminary to trial which regularly results in a charge or discharge and do not include the trial. And if on the evidence taken the accused ought to be committed, then, in a case triable only at the Sessions, the proper course is to commit under s. 436; in other cases to refer to the High Court. *Per* PRINSEP, J.—The words "inquiry" includes a trial, and the "further inquiry" would therefore allow of the framing of a charge and the cross-examination of witnesses for the prosecution. *Per* PETHERAM, C. J., and GHOSE, J.—The power given by s. 437 of the Criminal Procedure Code to order a further inquiry is confined to cases in which the revising officer is satisfied, for one of the reasons mentioned in s. 435, that the subordinate officer has proceeded on insufficient materials, and that with a more exhaustive inquiry further material would be forthcoming. It was not intended that such an inquiry should be granted simply for the reconsideration of evidence. *IN THE MATTER OF HABI DASS SANYAL v. SARITULLA*.

[I. L. R. 15 Cal. 608]

4.—*Further inquiry—Wrongful confinement—Wrongful restraint—Malice—Penal Code, ss 340, 342.* The accused as abkari inspector visited a toddy shop, where the complainant and one D were employed as agents for the sale of toddy. Having reason to suspect that an offence under the Abkari Act (Bombay Act V of 1878) had been committed, the accused made an inquiry, in the course of which the complainant made certain statements implicating his fellow-servant. The accused thereupon resolved to prosecute D and make the complainant a witness in the case. In order to prevent him being tutored, the accused ordered his sepoy to bring the complainant to his camp, and there detained him during the night, and on the following morning sent him in charge of a sepoy to a Magistrate's Court, where the complainant repeated the statements made by him before the accused. He was then allowed to go away. The accused prosecuted D, and in the course of his trial admitted in his deposition that he had ordered his sepoy to bring the complainant to his camp, and had detained him there during the night. After the termination of D's trial, the complainant charged the accused

**CRIMINAL PROCEDURE CODE, s. 437—**  
*concluded.*

with wrongful confinement under s. 342 of the Penal Code. The accused pleaded that the complainant had voluntarily come to his tent to have his statements reduced to writing, and that he had of his own accord stopped in his camp during the night. The trying Magistrate held this plea proved, and discharged the accused under s. 253 of the Code of Criminal Procedure (Act X of 1882.) The Sessions Judge held that though the accused had detained the complainant in his camp during the night, still he was not guilty of any offence under the Penal Code, as he had acted without malice and to the best of his judgment. He therefore declined to interfere, or order any further inquiry. *Held*, by the High Court on revision, that the trying Magistrate had wrongly omitted to take into consideration the admissions made by the accused in his deposition in *D's* case. Those admissions had an important bearing on the present case. They were admissible in evidence against the accused, and as they were left out of consideration, the inquiry was necessarily incomplete and imperfect. Further inquiry was, therefore, ordered. *DHANIA v. CLIFFORD.*

[I. L. R. 13 Bom. 376]

—, s. 438.

*See* REFERENCE TO HIGH COURT—CRIMINAL CASES.

[I. L. R. 9 All. 362]

[I. L. R. 10 All. 146]

—, s. 439.

*See* CASES UNDER REVISION—CRIMINAL CASES.

—, ss. 453, 454.

*See* JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS.

[I. L. R. 12 Bom. 561]

—, s. 476.

*See* REVISION—CRIMINAL CASES—MISCELLANEOUS CASES.

[I. L. R. 16 Calc. 730]

—*Power of and procedure of Court in making order under section—Order directing prosecution.* [Before a Court is justified in making an order under s. 476, directing the prosecution of any person, it ought to have before it direct evidence, fixing the offence upon the person whom it is sought to charge, either in the course of the preliminary inquiry referred to in that section, or in the earlier proceedings out of which the inquiry arises. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that the person had been guilty of an offence; but there must be distinct evidence of the commission of an offence by the person who is to be prosecuted.—*Queen v. Baijoo Lal*, I. L. R. 1 Calc.

**CRIMINAL PROCEDURE CODE, s. 476—**  
*concluded.*

450, and *In the matter of the petition of Kali Prosunno Bagchee*, 23 W. R. Cr. 23, followed. *IN THE MATTER OF THE PETITION OF KHEPU NATH SIKDAR v. GRISH CHUNDER MUKERJI.*

[I. L. R. 16 Calc. 730]

—, s. 478

—*Sanction to prosecution, effect of—Criminal Procedure Code (Act X of 1882) s. 195—Civil Court's power to proceed under section 478 after sanction given to a private person—Dismissal of a complaint by a private person, effect of.* [The granting of a sanction to a private person under cl. (c) of s. 195 of the Code of Criminal Procedure (Act X of 1882) does not debar a Civil Court from proceeding under s. 478; nor can the dismissal by a Magistrate of a complaint made by a private person be held to be a bar, till set aside, to a proceeding under that section. *QUEEN-EMPRESS v. SHANKAR.*

[I. L. R. 13 Bom. 384]

—, s. 480.

*See* CONTEMPT OF COURT—PROCEDURE

[I. L. R. 11 All. 361]

*See* PRODUCTION OF DOCUMENTS.

[I. L. R. 12 Bom. 63]

*See* WITNESS—CIVIL CASES—ABSCONDING WITNESSES

[I. L. R. 12 Bom. 63]

—, s. 485

*See* COMPLAINANT.

[I. L. R. 13 Bom. 600]

*See* PENAL CODE, s. 179.

[I. L. R. 13 Bom. 600]

—, s. 487.

*See* SESSIONS JUDGE, JURISDICTION OF.

[I. L. R. 16 Calc. 766]

—*Judicial proceedings—Sanction to prosecute—Criminal Appeal—Hearing of by District Judge who has granted sanction to prosecute—Penal Code, s. 210.* [A complainant applied to a Munsiff for sanction to prosecute a decree-holder for an offence under s. 210 of the Penal Code, and upon the Munsiff's refusing such application preferred an appeal to the District Judge, who granted the sanction asked for. The decree-holder, having been prosecuted and convicted before a Deputy Magistrate, preferred an appeal, which came on for hearing before, and was disposed of by, the same District Judge who had granted the sanction: *Held*, that the words "shall try any person," as used in s. 487 of the Code of Criminal Procedure, include the hearing of an appeal, and that the hearing

**CRIMINAL PROCEDURE CODE, s. 487—**  
*concluded.*

of the appeal from the order of the Munsiff refusing sanction was a judicial proceeding within the meaning of the Code, and consequently that, under the provisions of s. 487, the District Judge had no jurisdiction to entertain the appeal against the judgment and sentence passed by the Deputy Magistrate. **IN THE MATTER OF MADHUB CHUNDER MOZUMDAR v. NOVODEEP CHUNDER PUNDIT.**

[I. L. R. 16 Calc. 121]

Overruled by **QUEEN EMPRESS v SARAT CHANDRA RAKHIT.**

[I. L. R. 16 Calc 766]

—, s. 488.

*See EVIDENCE—CRIMINAL CASES—DEPOSITIONS.*

[I. L. R. 9 All. 720]

*See CASES UNDER MAINTENANCE, ORDER OF CRIMINAL COURT AS TO.*

*See WITNESS—CIVIL CASES—PERSON COMPETENT TO BE WITNESS.*

[I. L. R. 16 Calc. 781]

—, "*Cruelty.*" The word "*cruelty*" in s. 488 of the Criminal Procedure Code is not necessarily limited to personal violence. *Kelly v. Kelly*, L. R. 2 P. D. 59, and *Tomkins v. Tomkins*, 1 S. & T 168, referred to. **RUKMIN v. PEARE LALL.**

[I. L. R. 11 All. 480]

—, s. 494

*See DISCHARGE OF ACCUSED*

[I. L. R. 12 Mad. 35]

—, s. 503.

*See COMMISSION—CRIMINAL CASES.*

[I. L. R. 15 Calc. 775]

—, s. 509.

*See EVIDENCE—CRIMINAL CASES—DEPOSITIONS.*

[I. L. R. 10 All. 174]

—, s. 517.

*See STOLEN PROPERTY—DISPOSAL OF BY THE COURT.*

[I. L. R. 14 Calc 834]

[I. L. R. 10 Mad. 25]

—, s. 526.

*See HIGH COURT, JURISDICTION OF—HIGH COURT, MADRAS—CRIMINAL.*

[I. L. R. 12 Mad. 39]

**CRIMINAL PROCEDURE CODE—contd.**

—, s. 526A

*Application for postponement of case in order to apply for transfer of case—Discretion of Magistrate in granting adjournment.* *M.*, the complainant, on the 19th November 1887, made an application to the Deputy Magistrate, under s. 526A of the Criminal Procedure Code, for the postponement of his case against *G.*, to enable him to apply to the High Court under s. 526 for a transfer of the case from the file of the Deputy Magistrate to that of another officer. On the same date the Deputy Magistrate refused the application, and proceeded with the case, acquitting *G.* *Held*, having regard to the words "the Court shall exercise, etc," in s. 526A, the order of the Deputy Magistrate of the 19th November refusing to grant the application was illegal. **QUEEN-EMPRESS ON THE PROSECUTION OF PALAKDHARI MAHTON v. GAYITRI PRASUNNO GHOSAL.**

[I. L. R. 15 Calc. 455]

—, s. 530.

*See CRIMINAL PROCEEDINGS.*

[I. L. R. 11 Mad. 443]

[I. L. R. 13 Bom. 502]

—, s. 531.

*See* s. 182.

[I. L. R. 16 Calc 667]

*See JURISDICTION OF CRIMINAL COURT—GENERAL JURISDICTION.*

[I. L. R. 16 Calc. 667]

—, s. 533.

*See CONFESSION—CONFESSIONS TO MAGISTRATE.*

[I. L. R. 14 Calc. 539]

[I. L. R. 15 Calc 595]

—, s. 537.

*See CASES UNDER CRIMINAL PROCEEDINGS.*

—, s. 540.

*See PENAL CODE, s. 182.*

[I. L. R. 12 Mad 451]

*See WITNESS—CRIMINAL CASES—EXAMINATION OF WITNESSES—GENERALLY*

[I. L. R. 14 Calc. 245]

—, s. 545.

*See CASES UNDER COMPENSATION—CRIMINAL CASES—FOR LOSS OR INJURY BY OFFENCE.*

**CRIMINAL PROCEDURE CODE—*conold.***

—, s. 551.

*Unlawful detention for an unlawful purpose—Infant, Custody of.*] A Hindu girl, under the age of 14 years, went of her own accord to a Mission House, where she was received and allowed to remain. The mother and husband of the girl thereupon applied to the Magistrate, who took proceedings under s. 551 of the Criminal Procedure Code. The Lady Superintendent of the Mission House denied that the girl was legally married, and alleged that she was practically being brought up with the connivance of the mother to a life of prostitution. The Magistrate, after recording evidence, found that the girl was legally married; that the other allegation was not established; and that, although she went to and remained in the Mission House of her own free will, there was, under the circumstances, an unlawful detention for an unlawful purpose. He further found that there were no facts established which would disentitle the husband or the mother to the custody of the girl, and passed an order under the section directing the girl to be restored to her mother: *Held*, upon the facts as found by the Magistrate, as it was immaterial whether the girl did or did not consent to remain at the Mission House, there was an unlawful detention within the meaning of these words as used in the section, as the girl was kept against the will of those who were lawfully entitled to have charge of her. *Held* also, that s. 551, applying only as it does to women and female children, must not be construed so as to make it include purposes which, although not unlawful in themselves, might only become so when entertained towards a child, in opposition to the wishes of its guardian, but that the purpose, whether entertained towards a woman or a female child, must be in itself unlawful: *Held* consequently, that, in the circumstances of the case, there was no detention for an unlawful purpose, and that the Magistrate had no power to make the order. *Held* further, that although the Magistrate had no power under the section to make the order he did, it did not follow that the Court should direct the girl to be restored to the custody of the Lady Superintendent, even if it had the power to do so, and that having regard to the circumstances of the case, there was nothing to justify such an order being passed. **ABRAHAM v. MAHTABO.**

[I. L. R. 16 Calc. 487]

**CRIMINAL PROCEDURE CODE AMENDMENT ACT (III OF 1884). s. 8, cl. 6.**See **MAGISTRATE, JURISDICTION OF—POWERS OF MAGISTRATES.**

[I. L. R. 9 All. 420]

—, s. 12.

See **CRIMINAL PROCEDURE CODE, 1882, s. 526A.**

[I. L. R. 15 Calc. 455]

**CRIMINAL TRESPASS.**See **THEFT.**

[I. L. R. 15 Calc. 388, 402]

1.—*Penal Code, ss. 441 and 466—House breaking by night—Intent.*] When a stranger, uninvited and without any right to be there, effects an entry in the middle of the night into the sleeping apartment of a woman, a member of a respectable household, and, when an attempt is made to capture him, uses great violence in his efforts to make good his escape, a Court should presume that the entry was made with an intent such as is provided for by s. 441 of the Penal Code. An accused person in the middle of the night effected an entry into a house occupied by two widows, members of a respectable family. On an alarm being given, and an attempt made to capture him, he made use of great violence and effected his escape. Upon these facts he was charged with offences under ss. 456 and 323 of the Penal Code. The defence set up was an *alibi*, which was disbelieved by both the lower Courts. Neither Court found specifically what was the intention with which the accused entered the house, but it was suggested that it was probably for the purpose of prosecuting an intrigue with one of the women. There was no evidence that he had been invited by her to go there. The lower Courts convicted the accused under s. 456. It was contended that, as the prosecution had failed to prove that the entry was made with intent to commit any offence, the conviction was illegal: *Held* that, under the circumstances of the case, the Court ought to presume that the entry was effected with such intent as is provided for by s. 441, and that the conviction should be upheld. **IN THE MATTER OF THE PETITION OF KOILASH CHANDRA CHAKRABARTY. KOILASH CHANDRA CHAKRABARTY v. THE QUEEN-EMPRESS.**

[I. L. R. 16 Calc. 657]

2.—*Penal Code (Act XLV of 1860), s. 447.*] During the pendency of a civil suit, certain persons, on behalf of the plaintiff, went on to the premises belonging to the defendant for the purpose of making a survey and for getting materials for a hostile application against the defendant. They went (some of them armed) without the permission of the defendant, and in his absence, and when the defendant's servants objected to their action, they persisted in their trespass, and endeavoured to prevent opposition by making false statements as to the authority under which they were acting: *Held*, that their actions amounted to criminal trespass. **GOPAL PANDEY v. BODDAM.**

[I. L. R. 16 Calc. 715]

**CROPS.**See **REGISTRATION ACT, 1877, s. 17.**

[I. L. R. 10 All. 20]

See **SMALL CAUSE COURT MOFUISSL—JURISDICTION—MORTGAGE.**

[I. L. R. 10 All. 20]

**CROSS DECREES.**See **SET-OFF—CROSS DECREES.**

**"CRUELTY."**

See CRIMINAL PROCEDURE CODE, 1882.  
s. 488.

[I. L. R. 11 All. 480]

See MAINTENANCE, ORDER OF CRIMINAL  
COURT AS TO.

[I. L. R. 11 All. 480]

**CULPABLE HOMICIDE.**

1.—*Causing death by a rash and negligent act—Kobiraj—Surgical operation—Unskilled medical practitioner—"Good faith"—"Accepting risk"—Penal Code (Act XLV of 1860), ss 304A, 88 and 52*] A kobiraj operated on a man for internal piles by cutting them out with an ordinary knife. The man died from hæmorrhage. The kobiraj was charged under s. 304A of the Penal Code, with causing death by doing a rash and negligent act. It was contended that, inasmuch as the prisoner had performed similar operations on previous occasions, it was not a rash act within the meaning of that section, and that at all events he was entitled to the benefit of s. 88 of the Penal Code, as he did the act in good faith, without any intention to cause death and for the benefit of the patient who had accepted the risk: *Held* that, as the prisoner was admittedly uneducated in matters of surgery, and having regard to the meaning of "good faith" as defined in s. 52 of the Penal Code, he was not entitled to the benefit of s. 88: *Held* further, that s. 88 did not apply to the case, as it was not shown by the accused, on whom the burden of proving that fact lay, that the deceased knew the risk he was running in consenting to the operation, and he could not therefore be said to have accepted the risk: *Held* also, that under the circumstances the conviction under s. 304A was a proper one. *SUKAROO KOBIRAJ v. THE EMPRESS.*

[I. L. R. 14 Calc. 566]

2.—*Penal Code, s. 304A—Causing death by a criminal act.*] Where death is caused by an act being in its nature criminal, s. 304A of the Indian Penal Code has no application. *QUEEN EMPRESS v. DAMODARAM.*

[I. L. R. 12 Mad. 56]

**CURRENCY NOTES.**

See ATTEMPT TO COMMIT OFFENCE.

[I. L. R. 16 Calc. 310]

**CUSTODY OF CHILDREN.**

*Parent and Child—Interference with natural rights for the benefit of the child—Equity and good conscience.*] Plaintiff, a Brahmin widow, sued to recover her illegitimate infant child from defendant, to whom she had entrusted it since its

**CUSTODY OF CHILDREN—concluded.**

birth for nurture: *Held*, that it being proved that the plaintiff was leading an immoral life, the suit was rightly dismissed. *VENKAMMA v. SAVITRAMMA.*

[I. L. R. 12 Mad. 67]

**CUSTOM**

See EVIDENCE—CIVIL CASES—DECREES,  
JUDGMENTS AND PROCEEDINGS IN  
FORMER SUITS—DECREES AND  
PROCEEDINGS NOT INTER PARTES,  
[I. L. R. 15 Calc. 233]

See FISHERY, RIGHT OF.

[I. L. R. 12 Mad. 43]

See PRESCRIPTION—EASEMENTS—PRIVACY.

[I. L. R. 10 All. 358]

See PRIVY COUNCIL, PRACTICE OF—CON-  
CURRENT JUDGMENTS ON FACTS.  
[I. L. R. 14 Calc. 296]

**—, Of Trade.**

See SALE BY AUCTION.

[I. L. R. 16 Calc. 702]

1—*Observations on the use of books of history to prove local custom.*] Observations on the use of books of history to prove local custom, and on the position as heads of their caste by custom of the representatives of the ancient sovereigns of the West Coast. *VALLABHA v. MADUSUDANAN.*

[I. L. R. 12 Mad. 495]

2.—*Customary right of privacy—Right of building and to interfere with erection of building.*] A customary right of privacy, under certain conditions, exists in India and in the North-Western Provinces, and is not unreasonable, but merely an application of the maxims *sic utere tuo ut alienum non laedas* and *aedificare in tuo proprio solo non licet quod alteri noceat*. In the case of a building for *parda* purposes, newly erected without the acquiescence of the owner of an adjacent building site, a custom preventing such owner from so building as to interfere with the privacy of the first new building would be unreasonable and consequently bad in law. But if such adjacent owner, without protest or notice, allowed his neighbour to erect and consequently to incur expenses in connection with a building for the use of *parda nashin* women, a custom preventing him from interfering with the privacy of such new building would not, in India, be unreasonable. *GO-KAL PRASAD v. RADEO.*

[I. L. R. 10 All. 358]

**CUSTOM—concluded.**

3.—*Suit for pre-emption—Evidence—Decrees enforcing right.*] In a suit for pre-emption based on custom, evidence of decrees passed in favour of such a custom, in suits in which it was alleged and denied, is admissible evidence to prove its existence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom. *Gujju Lal v. Fateh Lal*, I. L. R. 6 Calc. 171, distinguished. *Koodottooliah v. Mohinee Mohun Shaha*, 5 Rev. Civ. & Cr. Rep. 290. *Sheo Churn v. Goodar*, 3 Agra 138, and *Luchman Rao v. Akbar Khan*, I L. R. 1 All. 440, referred to. *GURDAYAL MAL v. JHANDU MAL*.

[I. L. R. 10 All. 585]

4.—*Sale—Exchange—Trade usage—Contract Act, ss 49, 77, 92, 151—Delivery of cotton to Cotton press—Transfer of Property Act, s. 118—Ownership of cotton.*] According to merchantile usage in the cotton trade in Tuticorin, where a dealer delivers cotton to the owner of a cotton press, not in pursuance of any special contract, the property in the cotton vests in the owner of the cotton press who is bound to give the merchant in exchange cotton of like quantity and quality. The transaction is not a sale, but an agreement for exchange. Where, therefore, cotton thus delivered was accidentally destroyed by fire: *Held*, that the loss fell on the owner of the press. *VOLKART BROTHERS v. VETTIVELU NADAN*.

[I. L. R. 11 Mad. 459]

**DAMAGES.**

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[I. L. R. 10 All. 29]

See CONTRACT—BREACH OF CONTRACT.

[I. L. R. 11 Bom. 412]

See COPYRIGHT.

[I. L. R. 13 Bom. 358]

See HINDU LAW—MARRIAGE—BETROTHAL.

[I. L. R. 11 Bom. 412]

See INJUNCTION—SPECIAL CASES—OBSTRUCTION TO RIGHTS OF PROPERTY.

[I. L. R. 16 Calc. 252]

[I. L. R. 13 Bom. 252]

See LIMITATION ACT, 1877, ART. 36.

[I. L. R. 11 Bom. 133]

**DAMAGES.—continued.**

See LIMITATION ACT, 1877, ART. 49.

[I. L. R. 11 Bom. 133]

See LIMITATION ACT, 1877, ART. 116.

[I. L. R. 11 All. 416]

**(1) SUITS FOR DAMAGES.****(a) BREACH OF CONTRACT.**

1.—*Contract for sale of immoveable property—Breach of such contract—Damages—Costs of suit—Title to be made by vendor.*] On the 8th October 1884, the defendant, who was executrix of one M, contracted to sell to the plaintiff a house in Bombay for Rs. 5,351; the contract to be completed within two months. The plaintiff paid Rs. 500 as earnest-money at the date of the contract, and the remainder of the purchase-money was to be paid on the execution of the conveyance. In October, November, and December the plaintiff's solicitors applied to the defendant for the title-deeds, in order that the conveyance might be prepared; and on the 6th December the defendant through her solicitor replied that she was ready and willing to execute the conveyance, but could not find the title-deeds. The plaintiff's solicitors then requested to be furnished with an abstract of title, or a statement of the defendant's title to the house, and then they would consider what could be done. No reply to this letter being received, they wrote again on the 10th December 1884, stating that the time for completing the contract had expired; and giving formal notice that if the defendant did not send the abstract or statement of title within two days, proceedings would be taken to compel specific performance, and to recover damages. In reply to this letter, the defendant's solicitors wrote on the 11th December 1884, stating that the defendant had searched for the title-deeds, but had been unable to find them, but that as soon as they were found they would be handed over. In the meantime, they were instructed to state that the property was mortgaged to M (of whose will the defendant was executrix), and one K; that K had agreed to convey the property in question to the defendant; and that the deed of conveyance was being prepared. They further stated that, if the plaintiff wished to accept a conveyance without the old title-deeds, the defendant was willing to indemnify him against all claims to the property; but, if he was not prepared to do so, the defendant was willing to pay back the earnest-money to him and to rescind the contract. On the 13th December 1884, the plaintiff's solicitors wrote that they could not advise the plaintiff to take the mere conveyance offered, but if the defendant would deposit the purchase-money in a Bank in the joint names of the plaintiff and defendant until the title-deeds were found, the plaintiff would complete the purchase at once. They further stated that the plaintiff declined to rescind the contract, and would hold the defendant responsible for loss and costs incurred by the delay. Further correspondence ensued, and suit was filed on the 20th Feb-



**DAMAGES—continued.****(1) SUITS FOR DAMAGES—concluded.****(a) BREACH OF CONTRACT—concluded.**

ruary 1885, praying for specific performance and Rs. 500 damages, or that the defendant should pay to the plaintiff the sum of Rs. 2,500 damages and refund the Rs. 500 earnest-money. It subsequently transpired that the title-deeds were with K, the co-mortgagee, and they were set forth in the defendant's affidavit of documents filed in July 1885. The defendant, after the suit was filed, sold the property to one J; and K, the co-mortgagee, joined in the conveyance to him: *Held*, that the case was governed by *Flureau v Thornhill*, 2 W. Bl. 1070, and *Bain v. Fothergill*, 7 Eng. & Ir. Ap. 268, and that the plaintiff could not recover damages for the loss of his bargain. The defendant had offered to do all that lay in her power to carry out her contract, and the case of *Engell v. Fitch*, L. R. 4 Q. B. 659, did not apply. *PITAMBER SUNDARJI v. CASSIBAI*.

[I. L. R. 11 Bom. 272]

**(b) TORTS.**

2.—Cause of Action—Suit for damages caused by false statement of witness in a suit.] No action will lie against a witness for making a false statement in the course of a judicial proceeding. *CHIDAMBARA v. THIRUMANI*.

[I. L. R. 10 Mad. 87]

3.—Suit for compensation for wrongful seizure of cattle—Cattle Trespass Act (I of 1871)—Jurisdiction of Civil Court.] A suit for compensation for wrongful seizure of cattle will lie in a Civil Court, the provisions of Act I of 1871 being no bar to such a suit. *Nomaz Mollah v. Lall Mohun Tagadger*, 15 W. R. 279, approved of; *Aslem v. Kalla Durzi*, 2 C. L. R. 344, dissented from. *SHUTTRUGHON DAS COOMAR v. HOKNA SHOWTAL*.

[I. L. R. 16 Calc. 159]

**(2) MEASURE AND ASSESSMENT OF DAMAGES.****(a) BREACH OF CONTRACT.**

4.—Contract Act 73 and 74—Interest—Agreement to lend money—Damages recoverable by lender for breach of such agreement.] The plaintiff, a money-lender, by a written agreement agreed to lend the defendant the sum of Rs. 20,000 at  $7\frac{1}{2}$  per cent. per annum for three years on the security of certain lands. From the evidence it appeared that the loan was to have been advanced on the 1st March 1887, and that the plaintiff's attorneys had prepared the necessary deeds, which were ready on that day for execution by the defendant. The plaintiff had on that day withdrawn Rs. 20,000 from his bankers, where it had been lying in deposit, bearing interest at 6 per cent. per annum, and his *mumim* took it to the attorney's office for payment to the defendant. The defendant, however, did not attend, and on the following day the money was paid in again to the plaintiff's bankers at the same rate of interest

**DAMAGES—concluded.****(2) MEASURE AND ASSESSMENT OF DAMAGES—concluded.****(a) BREACH OF CONTRACT—concluded.**

as before. The defendant failed to take the loan, and the plaintiff sued him for breach of the agreement. He claimed, as damages, interest on the Rs. 20,000 at  $1\frac{1}{2}$  per cent. per annum for the three years for which under the agreement the loan was to be made: *Held*, that he was not entitled to interest for three years, but only to interest for such period as might reasonably be required to find another borrower of the Rs. 20,000 at the rate of interest agreed upon between him and the defendant. The Court accordingly awarded him interest at  $1\frac{1}{2}$  per cent. per annum, (i.e., the difference between the banker's rate of interest and the contract rate), on Rs. 20,000 for four months, together with the expense of preparing the deeds required for the purpose of the loan. *DATUBHAI EBRAHIM v. ABUBAKER MOLE-DINA*.

[I. L. R. 12 Bom. 242]

**(b) TORTS.**

5.—Moveable property—Non-existent moveables—Contract to assign after-acquired chattels—Completion of assignment on property coming into existence—Transferee with notice of hypothecation—Suit against transferee for damages for wrongful conversion.] *Held* upon principles of equity, that a hypothecation of certain future indigo produce was a valid contract to assign such produce when it should come into existence; and that the hypothecation became complete when the crop was grown and the produce realized; and was enforceable against a transferee of such produce with notice of the obligee's equitable interest. *Collyer v. Isaacs*, L. R. 19 Ch. D. 342, and *Holroyd v. Marshall*, L. R. 10 H. L. 191, referred to. *Held* also, that such an interest would not avail against a transferee without notice. *Joseph v. Lyons*, L. R. 15 Q. B. D. 280, and *Hallas v. Robinson*, L. R. 15 Q. B. D. 288, referred to. In a suit against such a transferee with notice, who had sold the produce, for damages for wrongful conversion of the security: *Held* that the measure of damages, under ordinary circumstances, and where a fair price had been obtained, would be the amount which the defendant had realized by the sale. *Misri Lal v. Mozhar Hossain*, I L. R. 13 Calc. 262, referred to. *BANSIDHAR v. SANT LAL*.

[I. L. R. 10 All. 133]

**DANCING GIRLS—**

See CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—GENERALLY.

[I. L. R. 13 Bom. 150]

**DEATH, PRESUMPTION OF—**

See EVIDENCE ACT, s. 103.

[I. L. R. 11 Bom. 433]

See CASES UNDER HINDU LAW—PRESUMPTION OF DEATH.

## DEBTOR AND CREDITOR.

1.—*Fraudulent preference*—Stat. 13 Eliz. c. 5 —*Transfer of property by insolvent in consideration of debt barred by limitation*—*Fraud*—*Conveyance in trust for payment of creditors*—*Hindu widow, duty of, to pay husband's creditors equally*—*Purchaser from Hindu widow*—*Contract Act IX of 1872, ss. 16, 17.* The English Statute 13 Eliz. c. 5, has not, as such, any operation in the mofussil of India, but it embodies principles of general application on account of their essential equity. An unequal disposition of property by a person in insolvent circumstances, and known to be so by the disponent, will be set aside if impeached by creditors, except where the transferee has simply pressed a valid claim, or made a purchase in good faith. The plaintiff *G* obtained a decree against *M* on the 30th September 1878. *M* died in April 1879, leaving *A*, a childless widow, him surviving. At his death, *M* was in insolvent circumstances. On the 7th June 1879, *A* conveyed by a deed of sale (exhibit 98) the whole of his property, consisting of a house and a garden, to the defendants, who were his separated brothers, in consideration of two time-barred debts due to them by her deceased husband. At the same time she executed in their favor a rent-note (exhibit 99) by which she agreed to pay them a nominal rent for her occupation of the house; but no rent was ever claimed or paid. On the same day the defendants passed an agreement in writing (exhibit No. 114) to the widow, by which they undertook to settle the claims of the principal creditors of *M*: but they never acted upon this agreement, nor did they communicate it to any of the creditors, and they admitted in their evidence that it did not form any part of the consideration for the sale-deed (exhibit 98). In 1881 the plaintiff *G* in execution of his decree against *M* attached the house conveyed by the sale-deed. The attachment was raised at the instance of the defendants, who claimed the house under the sale-deed (exhibit 98). Thereupon the plaintiff *G* brought the present suit to establish his right to attach and sell the house as the property of his judgment-debtor *M* in execution of his decree. The defendants relied upon the deed of sale executed by the widow (exhibit 98): *Held*, that the alleged sale to the defendants (exhibit 98) was not a real transaction supported by good consideration, and must be set aside in so far as it interfered with the execution of the plaintiff's decree. The transferees were not purchasers for money, or even creditors diligent in pressing an enforceable right. They were members of the vendor's family, and the consideration they gave, consisted of old and barred claims that could not be enforced. Payment of such debts by a transfer of the insolvent's whole estate, to the disappointment of creditors whose claims were not barred, was in itself a fraud. Being made to near relatives acquainted with the facts, it could not be regarded as a real and practical transaction: *Held* also, that the character of the transaction was not altered by the agreement (exhibit 114) of the defendants to settle the claims of *M*'s creditors. The agreement was

DEBTOR AND CREDITOR—*continued.*

not communicated to the creditors, and it could be suppressed at any moment by the concurrence of the parties to it. If that agreement was independent of the conveyance (exhibit 98) of the property to the defendants, the latter had no consideration to support it, except merely the moral consideration to pay a barred debt, which could not prevail against the obligation to satisfy a decree about to be executed. If, on the other hand, the agreement (exhibit 114) was connected with the conveyance (exhibit 98), the exclusion of its terms from that document and the secrecy observed about it stamped the transaction with fraud, whether the transfer was real or only fraudulent. There was no honest trust for distribution which could defeat the plaintiff's execution. *M* might have preferred one creditor to another having an equal right, and the fact that the creditor was his brother did not make such a preference improper. But although *M* might have preferred one creditor to another, his widow could not do so. She took her husband's estate as an aggregate, assets and debts together. She was in some degree a trustee, and at any rate under a legal obligation to pay her deceased husband's debts, and to pay them as far as she could equally. She was not at liberty to deal capriciously with the estate which she could alienate at all only for special purposes indicated by the law. She ought not, in performing the duty cast upon her, to prefer one valid claim to another, as her husband might have done. This advantage a creditor might have obtained from her husband by his diligence, but on her no pressure could be exercised, except through the estate which she was bound, pressure or no pressure, to distribute among the creditors. A purchaser from a Hindu widow must see that she exercised her power of sale strictly, or at least satisfy himself that a sufficient cause for alienation exists. If the defendants told the widow that the claims, in consideration of which she made the conveyance to them, were barred by limitation, then clearly she had joined with them in a scheme for depriving the judgment-creditors of their due. If they did not tell her, they deceived her by their silence when, as near relatives getting an advantage, they were bound, in dealing with an ignorant woman, to put her in possession of all the material facts—Contract Act IX of 1872, ss. 15 and 17. *RANGILBHAI KALYANDAS v. VINAYAK VISENU.*

[I. L. R. 11 Bom. 666]

2.—*Fraudulent conveyance*—*Gift in fraud of creditors*—*Subsequent sale by creditors in execution of subject-matter of gift*—*Purchase at execution-sale for inadequate price by means of fraud.* In June 1875, *A* being in pecuniary difficulties executed a deed of gift of all his property in favour of his wife and minor sons, the plaintiffs, *B*, one of his then existing creditors, subsequently obtained a decree against him, and in execution sold part of the said property. At the sale the first defendant by means of false representation became the purchaser at an

**DEBTOR AND CREDITOR—continued.**

inadequate price. In July 1879, A applied to have the sale set aside, on the ground of the fraud of the first defendant, but his application was rejected. In 1884 the plaintiffs by their next friend sued to set aside the sale, contending that at the date of B's decree the property was theirs by virtue of the deed of gift of June 1875, and further that the sale was void by reason of the defendant's fraud: *Held*, rejecting the plaintiffs' claim, that the plaintiffs could not be allowed to set up their deed of gift as against the proceedings in execution under which the defendant acquired his title as purchaser. That gift was made to them by A when he was in pecuniary difficulties, and included all A's property. It was, therefore, void as against his then existing creditors, of whom B was one. B was, therefore, entitled to sell the property in execution of his decree. **HORMUSJEE v. COWASJI.**

[I. L. R. 13 Bom. 297]

3.—*Sale to creditor for old debt and new advance on debtor's bankruptcy—Intent to delay and defeat creditors—Bonâ fides of purchaser—Fraudulent preference—Statute 13 Eliz. c. 5*] On the 27th February 1886, the firm of Ranchhod Jamna, a family firm, was on the point of failing being heavily indebted. On that day, the managing member of the firm executed four sale-deeds, comprising all the property of the firm, in favour of four different creditors of the firm, of whom the plaintiff was one. The deed executed in favour of the plaintiff was in consideration of a then existing long-standing debt and a fresh advance of Rs. 3,400 made by him to the firm. The next day the firm stopped payment. The defendant was one of the creditors of the firm, and sought to attach and sell the property conveyed to the plaintiff in execution of a decree which the defendant had obtained against the firm. The plaintiff's objection to the attachment by the defendant having been disallowed, he brought the present suit against the defendant, to establish his right to the property attached under his sale-deed. The defendant contended (*inter alia*) that the sale to the plaintiff, having been effected in order to delay and defeat the creditors and to give undue preference to the plaintiff, was void: *Held*, on the evidence, that the sale to the plaintiff was, on the part of the plaintiff at least, a *bonâ fide* sale in consideration of a debt still due, and for payment of which the plaintiff had been pressing, and Rs. 3,400 in cash; and that there were no circumstances in the case which showed that the plaintiff in entering into it was a party to any scheme to delay the general body of the creditors. That being the case, the sale was not impeachable at the instance of the defendant; although, having regard to the fact of its having been negotiated on the eve of the failure of the firm, it might possibly be regarded as a sale by which the plaintiff obtained an unfair preference, and as much perhaps be impeachable at the suit

**DEBTOR AND CREDITOR—concluded.**

of the whole body of creditors. *In re Johnson: Golden v. Gillam*, L. R. 20 Ch. D. 389, referred to and followed. **MOTILAL RAVICHAND v. UTAM JAGIVANDAS.**

[I. L. R. 13 Bom. 434]

4.—*Arrangement between firm and its creditors—Giving time—Mortgage security.*] A firm in difficulties executed a mortgage, securing debts due to creditors named in the deed, it being understood that all the creditors should refrain from suing the firm until the expiration of a certain period. Notwithstanding this, two creditors named in the deed immediately sued for their debts, and obtained decrees. Other creditors named in the deed afterwards bringing the present suit to enforce their rights under the mortgage, it appeared that the intention and agreement was that the deed should not take effect, unless all the creditors came in and were bound by it: *Held*, that the suits above-mentioned having been brought before the expiration of the period agreed upon, the consideration for the mortgage had failed, and the creditors could not sue the firm on the mortgage-deed. **AJUDHIA PRASAD v. SIDH GOPAL.**

[I. L. R. 9 All. 330]

5.—*Time fixed for payment of debt—Intention of parties.*] The term fixed for payment of a debt should be presumed to be a protection only for the debtor till a contrary intention is shown. **BHAGWAT DAS v. PARSHAD SINGH.**

[I. L. R. 10 All. 602]

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See CASES UNDER ATTACHMENT—SUBJECT OF ATTACHMENT—DEBTS.

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# DECLARATORY DECREE, SUIT FOR— *continued.*

*See* PLAINT—AMENDMENT OF PLAINT.

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*See* VALUATION OF SUITS—SUITS.

[I. L. R. 12 Mad. 223]

## (1) REQUISITES FOR EXISTENCE OF RIGHT.

1.—*Specific Relief Act I of 1877, s. 42—Consequential Relief.* *Percour.*—The restrictions imposed under s. 12 of the Specific Relief Act must be held to refer to the consequential relief properly obtainable by the plaintiff as against the defendants in the suit, and not to be extended to the case of all third parties who may possibly support some of the contentions of the defendants. *SUBRAMANYAN v. PARAMASWRAN.*

[I. L. R. 11 Mad. 116]

2.—*Specific Relief Act, s. 42—Amendment of plaint—Suit to declare alienation by Hindu widow invalid—Death of widow pending appeal by plaintiff—Right of appellant to proceed with appeal—Plaint not to be amended by claim for possession.* The proviso to s. 42 of the Specific Relief Act that “no Court shall pass a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so” refers to the position of plaintiff at the date of suit. Where a suit was brought for a declaration that certain alienations of land made by a Hindu widow to the defendants were not binding on plaintiff, her reversionary heir and pending appeal by the plaintiff, the widow died: *Held*, (1) that the plaintiff was entitled to proceed with his appeal; (2), that plaintiff could not be permitted to amend his plaint and claim possession. *GOVINDA v. PERUMDEVI.*

[I. L. R. 12 Mad. 136]

## (2) SUITS CONCERNING DOCUMENTS

3.—*Cause of action—Suit to cancel patta.* Plaintiff sued in a Civil Court to cancel a patta which he alleged was incorrect and fraudulently antedated by the defendant with a view to prevent plaintiff from taking steps to cancel it in a revenue Court. a copy of the patta had been affixed to plaintiff's house: *Held*, that the plaintiff had no cause of action cognizable by a Civil Court. *NURDIN v. ALAVUDIN.*

[I. L. R. 12 Mad. 134]

4.—*Madras Rent Recovery Act (VIII of 1865)—Suit in Civil Court to enforce exchange of patta and muchalka—Civil Procedure Code, s. 53—Amendment of plaint.* A suit in the Court of a District Munsiff to enforce acceptance of a patta and execution of a muchalka by defendant in respect of a holding in a village to which plaintiff claimed title, was dismissed as not being maintainable: *Held*, that the suit should not have been dismissed, but the plaint should have been amended by the addition of a prayer for a declaration of the plaintiff's title: and that the Court then

# DECLARATORY DECREE, SUIT FOR— *continued.*

(2) SUITS CONCERNING DOCUMENTS—  
*concluded.*

would have had jurisdiction to grant, by way of consequential relief, the relief originally sought. *NARASIMMA v. SURYANARAYANA.*

[I. L. R. 12 Mad. 481]

## (3) REMOVAL OF LIEN OR ATTACHMENT.

5.—*Assignment of interest of judgment-debtor in surplus proceeds of sale—Attachment by creditor of judgment-debtor—Suit for declaration of assignee's title—Civil Procedure Code, s. 266 (k)—Contingent interest.* In execution of a decree in a District Munsiff's Court, certain property having been sold, a balance, after satisfying the decree, remained in favor of the judgment-debtor X. After the date of sale, but before the whole of the purchase-money had been paid into Court, X applied to the Court by petition, praying that the amount due to him might be paid to A, to whom, he alleged, he had assigned it. Before any order was made on this petition, B, C, D and E in execution of separate decrees against X attached the sum in Court. The District Munsiff ordered that B, C, D and E should be paid before A. A brought a suit against B, C, D, and E in another District Munsiff's Court for a declaration that he was entitled to the money and to set aside the said order. The Munsiff set aside the order and declared the plaintiff to be entitled to the amount. B, C, D and E appealed against this decree, and the District Court passed a decree dismissing A's suit: *Held*, on second appeal by A that he was entitled to a decree, declaring his title to the amount claimed. *CHATHU v. KUNHAMED.*

[I. L. R. 11 Mad. 280]

## (4) REVERSIONERS.

6.—*Joinder of plaintiffs—Suit by daughter and daughter's son against widow to declare alienations invalid.* The *palayam* of C was granted during the Mahomedan rule to a Hindu on service tenure, the condition being that the grantee should maintain a body of police for the service of the paramount power. This *palayam* was not brought under permanent settlement under the provisions of Reg. XXV of 1802. The last male holder died in 1860 leaving him surviving a widow K and a daughter C. In 1865 the Government discontinued the service and, in lieu thereof and of the reversionary interest of the Crown, imposed a quit-rent, and an inam patta was issued to K by the Inam Commissioner by which her title to the estate was acknowledged by the Government of Madras, and the estate was confirmed to her as her absolute property subject to the quit-rent. In 1882 C and her minor son A sued K and others to whom K had alienated portions of the estate, for a declaration that they were the reversionary heirs of K, and that the alienations made by K were good only during the lifetime of K. The District Judge held that there being no collusion between C and the

DECLARATORY DECREE, SUIT FOR—  
continued.

## (4) REVERSIONERS—continued.

defendants, A was not entitled to join in the suit. *Held* that A was entitled to join O as co-plaintiff. *NARAYANA v. CHENGALAMMA.*

[I. L. R. 10 Mad. 1

7.—*Specific Relief Act, s. 42—Suit by reversioners of Hindu widow* [The plaintiffs, uncle's sons of R, a deceased Hindu, brought a suit as reversioners of R for a declaration that certain alienations made by M, the widow of R, were not binding beyond the lifetime of M. The District Judge held on the strength of *Gresman Singh v. Wadhari Lall Singh*, I. L. R. 8 Calc. 12, that the suit would not lie under s. 42 of the Specific Relief Act. *Held* that the suit would lie. *GANGAYYA v. MAHALAKSHMI.*

[I. L. R. 10 Mad. 90

8.—*Suit by reversioner to establish his title to property sold in execution of decree obtained against a widow as representative of her deceased husband's estate—Fraud—Collusion—Right of reversioner to possession* [The plaintiff, as the nearest heir of one O T who died intestate in 1873, sued to set aside a sale of certain immovable property belonging to the estate of the deceased, which had been sold on the 3rd November 1875, in execution of a money-decree obtained by the defendant J against B V, the widow of O T. B V had married a second time in 1876, and her second husband was the brother of the purchaser at the execution-sale. The plaintiff alleged that the decree had been fraudulently and collusively obtained on a bond in O T's name, which had been forged by J. The suit was brought on the 28th January 1878, and the plaintiff prayed that the sale might be cancelled, having been made in order to defeat his rights; that he might be declared the heir of O T, and that possession of the property, with mesne profits might be awarded to him. *Held*, on the evidence, that the suit against B V was collusive, and that the sale in execution was in fraud of the plaintiff's right. He was therefore entitled to a decree declaring that he was not bound by the sale of the 3rd November 1875, in the suit brought by J against B V as representative of her deceased husband O T. Whether the plaintiff was entitled also to immediate possession of the property in the suit, depended on the question whether B V's life-estate was defeasible on her re-marriage. She belonged to a caste in which re-marriage was permitted. The following issue was accordingly sent to the lower Court for trial: "Whether, by the usage of the country, the rights and interests of B V by inheritance in her deceased husband's property, the subject of this suit ceased and determined on re-marriage in 1876 as if she had then died." *PAREKH RANCHOR v. BAI VAKHAT.*

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DECLARATORY DECREE, SUIT FOR—  
continued—

## (4) REVERSIONERS—concluded.

9.—*Alienation by widow to her married daughter—Act I of 1877 (Specific Relief Act), s. 42.* [The effect of a gift by a Hindu widow of her deceased husband's estate to her daughter is merely to accelerate the latter's succession and put her by anticipation in possession of her life-estate, and therefore affords no cause of action to a reversioner to maintain a declaratory suit impeaching the gift. *Per MAHMOOD, J.*, that in the exercise of the discretion allowed to the Court by s. 42 of the Specific Relief Act, a declaratory decree should be refused to the plaintiff in such a case, where the donee was a married woman and capable of bearing a son, who would be the next reversioner to the full ownership of the estate of the donor's deceased husband. *Indar Kuar v. Lalla Prasad Singh*, I. L. R. 4 All. 532, and *Udhar Singh v. Ranee Koonour*, 1 Agra 234, referred to. *BHUPAL RAM v. LACHMA KUAR.*

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## (5) DECLARATION OF TITLE.

10.—*Specific Relief Act (I of 1877), s. 42—Obstruction to alleged highway—Criminal Procedure Code, Act X of 1882, ss. 133, 137—Parties* [An owner of land has a right to bring a suit under s. 42 of the Specific Relief Act against any one of the public who formally claims to use such lands as a public road, and who thereby has endangered the title of the owner. To such a suit it is unnecessary to make the Secretary of State a party. Such a suit is not barred by an order of a Criminal Court under s. 137 of the Criminal Procedure Code. *Khodabux Mundal v. Monglur Mundal*, I. L. R. 14 Calc. 60, overruled. *CHUNI LALL v. RAM KISHEN SARU.*

[I. L. R. 15 Calc. 460

11.—*Sale in execution of decree of property not belonging to judgment-debtor—Right of owner to bring suit to establish title and not wait for dispossession* [In execution of a decree on a mortgage certain property was sold which the plaintiff in this suit claimed as his own under a sale to himself by the sons of the judgment-debtor. He applied to the Court to have the sale set aside, but failing in his application he sued both the decree-holder and the auction-purchaser for a declaration of his title to the property in question. The Assistant Judge held on appeal that the suit was not maintainable on the grounds that a separate suit could not be brought, as the question of title was one for decision in the execution proceedings, and that even if the point could be raised in a separate suit, the present suit was premature, as the plaintiff should have waited till he was dispossessed by the auction-purchaser. *Held*, that the suit was not premature. A person, whose property is sold in execution of a decree against a third party, is not bound to wait till he is dispossessed by the auction-purchaser. As soon as his title is denied,

**DECLARATORY DECREE, SUIT FOR—**  
*concluded.***(5) DECLARATION OF TITLE—concluded.**

he is entitled to bring his suit. *SHIVRAM CHINTAMAN v. JIVU.*

[I. L. R. 13 Bom. 34]

**(6) RENT AND ENHANCEMENT OF RENT.**

**12—Declaratory Decree—“Further relief”—**  
*Arrears of rent—Specific Relief Act (Act I of 1887), s. 42.* In a suit for a declaratory decree in respect of plaintiff's right to certain land where it appeared that rent was due to the plaintiff in respect of such land, if his case were a true one, and where such rent was not claimed. *Held*, that the “further relief” referred to in the proviso to s. 42 of the Specific Relief Act is further relief in relation to “the legal character or right as to any property which any person is entitled to, and whose title to such character or right any person denies or is interested in denying,” and does not include a claim for arrears of rent. *FAKIR CHAND AUDHIKARI v. ANUNDA CHUNDER BHUTTACHARI.*

[I. L. R. 14 Calc. 586]

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*See CIVIL PROCEDURE CODE, s. 257.*

[I. L. R. 12 Mad. 121]

**—, Amendment of—**

*See LIMITATION ACT, 1877, ART. 178.*

[I. L. R. 9 All 364]

**—, Assignment of—**

*See CASES UNDER CIVIL PROCEDURE CODE, 1882, s. 232.*

**—, Form of—**

*See RELIEF.*

[I. L. R. 10 Mad. 375]

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*See LIMITATION ACT, 1877, ART. 178.*

[I. L. R. 15 Calc. 502]

*See DEKKAN AGRICULTURISTS RELIEF ACT (XVII of 1879), s. 20.*

[I. L. R. 12 Bom. 326]

**—, Satisfaction of—**

*See CASES UNDER CIVIL PROCEDURE CODE, 1882, ss. 257, 258.*

*See PENAL CODE, s. 210.*

[I. L. R. 16 Calc. 126]

[I. L. R. 10 Bom. 288]

**(1) FORM OF DECREE.****(a) GENERAL CASES.**

**1—Decree for larger amount than that claimed—**  
*Consent of parties—Compromise of suit awarding plaintiff more than amount claimed—Execution of decree limited to amount claimed—Suit for larger amount awarded in compromise.* By consent of parties and the leave of the Court a suit may be amended to cover an increased claim, and there is nothing in the law which prevents the parties to a suit enlarging by consent or compromise the original claim, and getting or allowing a decree for a greater amount of money or land than that originally asked for. *MOHIBALLAH v. IMAMI.*

[I. L. R. 9 All. 229]

**(b) BILL OF EXCHANGE.**

**2.—Suit on Bill of Exchange—Civil Procedure Code Act (XIV of 1882), ss. 532, 538—Negotiable Instruments Act (XXVI of 1881), s. 35.** A plaintiff suing on a bill of exchange the drawer, acceptor, and endorser, where the endorsement has been made before maturity and without restriction, is entitled to a decree against all three defendants; a decree containing a condition exempting the endorser from liability until the plaintiff has exhausted his remedies against the drawer and acceptor is therefore illegal. *BANK OF BENGAL v. KARTICK CHUNDER ROY.*

[I. L. R. 16 Calc. 804]

**(c) MORTGAGE.**

**3—First and second mortgages—Second mortgagee not made party to suit by first mortgagee for sale of mortgaged property—Transfer of Property Act (IV of 1882), s. 85—Notice.** Certain immoveable property was mortgaged in 1865 to *H*, in 1871 to *G*, and in 1873 again to *H*. In 1883 the property was purchased by *M*, the representative of *G*, in execution of a decree obtained in 1877 by *G* in a suit for sale brought by him upon the mortgage of 1871. To this suit and decree the mortgagee under the deeds of 1865 and 1873 was not a party. In 1885, *M* sued the representatives of *H* for redemption of the mortgage of 1865.



DECREE—*continued*.(1) FORM OF DECREE—*continued*.(c) MORTGAGE—*continued*.

One of the defendants pleaded that as he was a puisne incumbrancer in the property in suit at the time of the plaintiff's suit against the mortgagors in 1877, he ought to have been made a party to that suit, and thus afforded "an opportunity of protecting his rights by payment of the mortgage-money." He did not in the Court below ask in express terms to be allowed to redeem the plaintiff's mortgage, but he did so in appeal to the High Court: *Held*, with reference to the terms of s. 85 of the Transfer of Property Act, that inasmuch as the defendant was in possession of the mortgaged property at the time of the suit of 1877, and his mortgage was a registered instrument, it must be presumed that the plaintiff had notice of its existence and should therefore have made him a party; and that, under the circumstances he should be placed in the same position as he would have held if the decree of 1877 had never been passed: *Held* also that, although it would have been more regular had the defendant in the Court below asked in express terms to be allowed to redeem the plaintiff's mortgage and brought into Court what he alleged to be due thereunder, or expressed his willingness to pay such amount as might be found to be due on taking accounts, yet, the defendant having pleaded that he ought to have been afforded an opportunity of protecting his rights by payment of the prior mortgage-money, the Court should not be too technical in such a matter, where the defendant had the undoubted right now asserted by him, and where the result of not recognizing such right would be to extinguish his security. The Court therefore passed an order declaring the defendant entitled to retain possession of the property in suit, if within ninety days he paid into Court the amount of the plaintiff's mortgage-debt, with interest, otherwise the lower Court's decree for redemption on payment of the amount due on the mortgage of 1865 would stand. MUHAMMAD SAMI-UD-DIN v. MAN SINGH.

[I. L. R. 9 All. 125]

4.—*Transfer of Property Act (IV of 1882)*. ss. 1, 67, 86—89—*Usufructuary mortgage, dated 20th April 1882 sued on in 1884*. In a suit filed in 1884 on a usufructuary mortgage, dated 20th April 1882, a decree was passed for the payment of the mortgage-money, or in default for the sale of the mortgage property. *Held*, (semble under the Transfer of Property Act) that the decree for sale was the right decree. VENKATASAMI v. SUBRAMANYA.

[I. L. R. 11 Mad. 88]

5.—*Construction of mortgage bond—Liability of property other than that mortgaged*. Under a mortgage-bond, a mortgagor stipulated that, if the money advanced should not be repaid at a fixed date, the mortgaged property might be sold; and that, if the property were sold for arrears of

DECREE—*continued*.(1) FORM OF DECREE—*continued*.(c) MORTGAGE—*concluded*.

Government revenue or for other causes, the mortgagee might, in such cases, recover the money advanced by execution against the person or other property of the mortgagor: *Held*, no sale having taken place under the second stipulation, that the mortgagee could only obtain a decree against the mortgaged properties. *Narotam Dass v. Sheopargush Singh*, I. L. R. 10 Calc. 740, referred to. BUNSEEDHUR v. SUJAT ALI.

[I. L. R. 16 Calc. 540]

## (d) NONSUIT.

6.—*Suit dismissed as brought, with liberty to bring a fresh suit—Civil Procedure Code, s. 373*. Where a suit for enforcement of hypothecation against immoveable property was dismissed "in the form in which it was brought," and "with permission to bring a fresh suit," on the ground that the plaintiff, by purchasing a part, had put it out of his power to sue for relief against the whole of the hypothecated property: *Held* that the decree being in effect one of nonsuit, which no Court in India had power to make, and not being made under s. 373 of the Civil Procedure Code, and the plaint not having been returned or rejected under Chap V of the Code, the decision must be set aside. *Watson v. The Collector of Rajshahye*, 13 B. L. R. P. C. 48; 13 Moore's I. A. 160, and *Kudrat v. Dinu*, I. L. R. 9 All. 155, referred to. BANWARI DAS v. MUHAMMAD MAS-HIAT.

[I. L. R. 9 All. 690]

## (c) PARTITION.

7.—*Talukdari estate—Decree of Privy Council*. In a suit, commenced in 1865 by a member of a joint family for the declaration of his rights in a talukdari estate, partition not being claimed the order of Her Majesty in Council (1879) directed that the talukdar should cause and allow the villages forming the talukdari estate and the proceeds thereof to be managed and applied according to the trust declared in favor of the family. The plaintiff in that suit afterwards obtained entry of his name as a co-sharer in the villages in the register kept under Act XVII of 1876, s. 56; and then brought the first of the present suits for his share upon partition, both in that estate as it stood in 1865, and also with the addition of villages since acquired out of profits, claiming an account against the talukdar. The latter alleged, among other defences, that the talukdari estate was impartible, and brought a cross-suit to establish this, and also that it was held by him according to the rule of primogeniture, the right of other members of the family being only to the profits: *Held* that, in regard to the order of Her Majesty above-mentioned, which was applicable to an estate held subject to the law of the Mitakshara, the talukdari estate could not be declared to be

## DECREE—continued.

## (1) FORM OF DECREE—concluded.

## (c) PARTITION—concluded

impartible; also that a declaration in the Judicial Commissioner's decree that a member of the family entitled to a share upon partition should hold it as an under-proprietor under the talukdar could not be allowed to stand. *PIRTHI PAL v. JOWAHIR SINGH*.

[I. L. R. 14 Calc. 493

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*See SHANKAR BAKSH v. HARDEO BAKSH*

[I. L. R. 16 Calc. 397

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## (f) POSSESSION.

8.—*Decree for possession under mokurrai lease—Condition as to payment of rent.* After the sale of a share in an estate under the provisions of Act XI of 1859, a suit was brought to establish a mokurrai lease, as an incumbrance under s 54, upon the share in the hands of the purchaser. The mokurrai lease having been established as to so much only of the lands as were covered by the title proved, the decree below, although no question of apportionment had been raised, was conditional that the whole rent reserved should be paid. *Held*, that this condition should have been omitted, the amount of rent being determinable by a future proceeding if necessary *IMAMBANDI BEGUM v. KAMLESWARI PERSHAD*.

[I. L. R. 14 Calc 109

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## (2) CONSTRUCTION OF DECREE.

## (a) GENERAL CASES.

9.—*Decree how constructed for purposes of execution.* A decree cannot be extended in execution beyond the real meaning of its terms. *BUDAN v. RAMCHANDRA BHUNJGAYA*.

[I. L. R. 11 Bom. 537

10.—*Statement of Claim in the decree of Appeal Court not a part of decree—Civil Procedure Code (Act XIV of 1882), ss. 579 and 587—Practice.* On a second appeal the High Court decreed the plaintiff's claim with costs throughout; but the claim, as stated in the paper book of appeal, differed from the claim as it had been stated in the plaint: *Held*, that the decree was to be understood as referring to the claim as stated in the plaint, and not as described in the paper book. Sections 579 and 587 of the Civil Procedure Code (Act XIV of 1882) do not require the claim to be stated in the decree, so as to make such statement a part of the decree itself. *SOUDE SHRINIVASAPA v. KRISHNAPA HEGDE*.

[I. L. R. 11 Bom. 177

## DECREE—continued.

## (2) CONSTRUCTION OF DECREE—continued.

## (a) GENERAL CASES—concluded.

11.—*Decree specifying a certain time for execution—Construction—Condition precedent—Limitation.* The plaintiff obtained a decree on the 25th July 1882, which directed that he should give the defendant possession of certain parcels of land at the end of next *Margashirsha* (i.e., 9th January 1883), and that, on his doing so, the defendant should remove certain hedges and sheds, and restore the land in suit to the plaintiff. On the 9th December 1885, the plaintiff applied to execute the decree. The defendant resisted the application as being time-barred. He contended that the plaintiff having failed to deliver up the land in his possession within the time specified in the decree, he had lost his right to execute the decree. *Held*, that the application was not time-barred. The specification of the end of *Margashirsha* had merely the effect of postponing the operation of the decree till that time, and the plaintiff had three years from that date within which he might seek execution. The mention of a term when a particular right is to become enforceable, is not a condition precedent, whether the enforcement be otherwise subject to a condition or not. *NARAIN CHITKO JUVEKAR v. VITHUL PARSHOTAM*.

[I. L. R. 12 Bom. 23

## (b) BUILDINGS, ERECTION OR REMOVAL OF

12.—*Suit for removal of obstruction—Decree for plaintiff qualified by declaring that parties retain rights exercised prior to obstruction.* In a suit for the removal of a building which the defendants had erected and which was an obstruction to the plaintiffs' right to use a courtyard adjoining their residences, it appeared that the land on which the building stood did not belong to either party, but that all the inhabitants of the *mohulla* had from time immemorial exercised a right of way over it to and from their houses. It also appeared that on a part of the same land, there had formerly stood a thatched building used as a "sitting place" by the residents of the *mohulla*. The lower Appellate Court, while decreeing the claim, observed that the defendants, if they liked, could construct and use a shed "according to the old state of things" and "without offering obstruction to" the right of the plaintiffs to "use it as a sitting place when necessary." *Held* that this was not a declaration of a right in the defendants to build, but merely a statement that the decree would not operate as an interference with the rights of the parties to have a similar thatched building set up as had existed in former times, *Official Trustee of Bengal v. Krishna Chunder Mozoomdar*, I. L. R. 12 Calc. 239; L. R. 12 I. A. 166 distinguished. *FATEHYAR KHAN v. MUHAMMAD YUSUF MUHAMMAD YUSUF v. FATEHYAR KHAN*.

[I. L. R. 9 All. 434



## DECREE—continued.

(2) CONSTRUCTION OF DECREE—continued.  
(c) COSTS.

13.—*Execution of decree—Decree on mortgage bond—Costs against judgment-debtors personally.* Certain plaintiffs were the holders of the following decree obtained on a mortgage-bond: "It is ordered that the defendants shall pay to the plaintiffs the sum of Rs. 2,550 and costs Rs. 312, total Rs. 2,862, within two months from the date of the signing of the decree; interest will run on the said amount at the rate of 6 per cent. per annum up to realization. If the defendants do not pay the amount within the time prescribed, they will lose their right of redeeming the property mortgaged, and possession thereof will be given to the plaintiffs." On the judgment-debtors making default, the decree-holders applied for execution. The Subordinate Judge directed execution to issue, but held that execution could not be had for costs under the terms of the decree; and this order was upheld by the District Judge on appeal: *Held*, that the decree-holders were entitled to their costs of the suit from the judgment-debtors personally, or from properties belonging to the judgment-debtors other than those mortgaged. *RUTNESSUR SEIN v. JUSODA*.

[I. L. R. 14 Cal. 185]

14.—*Decree on mortgage—Decree for foreclosure—Order absolute for foreclosure—Mortgagee obtaining possession—Subsequent application by mortgagee to execute order for costs—Civil Procedure Code, s. 220.* A decree for foreclosure containing a distinct and separate order for costs was afterwards confirmed by an order absolute for foreclosure, and the mortgagee under such order obtained possession. Subsequently he applied for execution of the order for costs: *Held*, that the costs awarded could not be considered part of the money due upon the mortgage, and as such, superseded by the order absolute and the mortgagee's possession thereunder, and the application must, therefore, be allowed. *RUTNESSUR SEIN v. JUSODA*, I. L. R. 14 Cal. 185, referred to. *DAMODAR DAS v. BUDH KUR*.

[I. L. R. 10 All. 179]

## (d) INSTALMENTS.

15.—*Construction of decree for money payable by instalments—Term making the entire sum payable on default in payment of some of the instalments at certain dates.* A decree for money payable by yearly instalments made the full amount payable on both the first instalment being unpaid on the due date, and two consecutive instalments being in default and unpaid at the same time. Defaults were made, and questions as to the rate of interest, on what amounts, and for what periods, by reason of the debtor's delay, interest was payable, were dealt with in an order of Her Majesty in Council, which made declarations as to the allowances of interest to which the decree-holder would be entitled on the adjustment of accounts

## DECREE—continued.

(2) CONSTRUCTION OF DECREE—continued.  
(d) INSTALMENTS—continued.

between the parties. The accounts having been taken in the Court executing the order, the decree-holder applied for execution to the full amount. *Held*, that the instalments having been paid, though not at due date, and applied in payment of interest, he was not entitled to such execution, because the contingency, on the happening of which he would have been entitled thereto, had not happened. *SHAM KISHEN DAS v. RUN BAHADUR SINGH*.

[I. L. R. 15 Cal. 751]

## (e) MESNE PROFITS.

16.—*Declaratory decree—Separate suit—Mesne profits, Meaning of—Decree awarding mesne profits.* In 1878 the plaintiff obtained a decree declaring that he was entitled to receive every year from the defendant 12 per cent. of the rents and profits of a certain *nam* village. The decree also awarded mesne profits from the date of the institution of the suit. In 1884 the plaintiff sought in execution of this decree to recover his share of the profits of the village for the years 1882-83 and 1883-84. *Held*, that the plaintiff could not proceed to enforce his rights under the decree by way of execution. His remedy was by a suit on the right established by the decree. The decree had merely declared the right of the plaintiff to a certain share of produce, and payment was ordered of mesne profits computed according to certain principles. Such an award was not an award of a periodical payment *in æternum*. The very word "mesne" implied a terminus *ad quem* as well as *à quo*, and in the absence of a special order the terminus was the date of the decree. *VINAYAK AMRIT DESHPANDE v. ABAJI HAIBATRAY*.

[I. L. R. 12 Bom. 416]

## (f) MORTGAGE.

17.—*Practice—Decree for redemption directing payment of mortgage-debt within a specified time—Computation of time allowed for payment when the decree is affirmed on appeal.* Where a decree of a lower Court is confirmed on appeal, and that decree directs something to be done within a specified time, time is to be counted from the date of the appellate decree. Where, therefore, in a suit by a mortgagee on a mortgage, the decree of the Court of First Instance directed payment of the mortgage-debt within two months from the date of the decree from which the defendants appealed, but which was confirmed by the Appellate Court: *Held*, under the circumstances of the case, that it was the intention of the Appellate Court that the term of two months allowed for payment should be counted from the date of its own decision, and not from the date of the original decree. *DAULAT JAGJIVAN v. BHUKNADAS MANEKCHAND*.

[I. L. R. 11 Bom. 172]

## DECREE—continued.

(2) CONSTRUCTION OF DECREE—concluded  
(g) POSSESSION.

18.—*Decree for possession of a village—Right of the holders of such a decree to the possession of village account books and other papers relating to the management of the village—Title-deeds.* The plaintiffs, as managers of a temple, obtained a decree for the possession of a certain *nam* village. After taking possession of the village, they called upon the defendants to hand over to them the village account books and other documents relating to the management of the village. The defendants refused. Thereupon the plaintiffs presented a *darbhast* in execution, praying (*inter alia*) for the delivery of those books and documents. The Subordinate Judge rejected this application, on the ground that it was beyond the terms of the decree: *Held*, on appeal to the High Court, that the plaintiffs were entitled to the possession of the account books and documents in question, as being essential to the proper and effectual enjoyment and management of the village awarded by the decree. Such books and documents were properly to be regarded as accessory to the estate and as claimable by those to whom it had been awarded. The title-deeds of an estate counterpart leases, and other documents of the like kind, such as *kabulats* in India, ought to be regarded as accessory to the estate, and to pass with it whether the transfer is made by a conveyance, a decree, or a certificate of sale. *BHAVANI DEVI v. DEVRAV MADHAVRAV.*

[I. L. R. 11 Bom. 485]

(3) ALTERATION OR AMENDMENT OF  
DECREE.

19.—*Limitation Act, 1877, Art. 175—Application for execution of decree—Order on petition to pay by instalments—Civil Procedure Code, s. 210.* An application to execute a decree, dated 30th August 1880, was made on 25th May 1881. While the application was pending, the judgment-debtor presented a petition to be allowed to pay the debt by instalments, and the decree-holder consenting to this, the Court made the following order: "According to the application of both parties it is ordered that the case be struck off, and the decree be returned." The details of the instalments mentioned in the petition were endorsed on the decree by one of the *amlahs* of the Court, but it did not appear when or by whose order this was done. In an application for execution in accordance with this arrangement made on 7th March 1885: *Held*, that the order was not one recognising or sanctioning the arrangement within the meaning of s. 210 of the Civil Procedure Code, inasmuch as the Court at the time it made the order had no power to make any order for instalments, any application for that purpose being then barred by Art. 175 of Act XV of 1887, *Jhoti Sahu v. Bhudun Gir*, I. L. R. 11 Cal. 143, dissented from. *ABDUL RAHAMAN SODAGUR v. DULLARAM MARWARI.*

[I. L. R. 14 Cal. 348]

## DECREE—continued.

(3) ALTERATION OR AMENDMENT OF  
DECREE—continued.

20.—*Practice—Liberty to apply—Relief after judgment—Damages—Specific performance—Review—Alternate relief.* On the 27th April 1886, a plaintiff brought a suit praying for specific performance of a contract, or in the alternative for damages; and on the 24th November 1886, obtained therein a decree for specific performance with the usual liberty to apply. On the 6th December 1886, the plaintiff discovered that it was out of the defendant's power to specifically perform his contract; and he, thereupon, on the 13th April 1887, applied to the Court which had granted the decree for a re-hearing of the suit on the question of damages, asking that, in lieu of the decree for specific performance, a decree for damages when assessed might be entered up: *Held*, that he was entitled to ask for such relief. *PEARISUNDARI DASSEE v. HARI CHARAN MOZUMDAR CHOWDHRY*

[I. L. R. 15 Cal. 211]

21.—*Specific performance—Decree in favor of plaintiff—Rectification of decree on application of defendant—Practice—Objection taken at hearing that application made to Court was not the application of which notice had been given to opposite party—Preliminary point.* The plaintiffs sued in 1877 for specific performance of an agreement, dated 27th September 1871, by which certain landed properties were to be divided, as specified in the agreement between them and the defendants. The case came on for hearing on the 13th September 1878. The defendants did not appear, and a decree *ex parte* was made, which declared that the plaintiffs were entitled to have the agreement of the 17th September 1871, specifically performed, and referred the suit to the Commissioner for the preparation of conveyances, &c. The decree was sealed on the 9th October 1878. No further steps were taken by any of the parties for six years, and in September 1884, the matter was first brought before the Commissioner. He then directed the defendants to lodge with him all the title-deeds of the properties which by the agreement were to go to the plaintiffs as their share. The defendants thereupon applied that the plaintiffs should be directed to lodge the title-deeds of the properties which by the agreement were to go to them, but the Commissioner refused to make this order being of opinion that he was not authorized to do so under the decree, which contained no direction to him in respect thereof. The defendants on the 10th November 1884, gave notice to the plaintiffs, that they would apply to the Court—(1) "to set aside or vary its order of the 13th September 1878, so far as it related to the lodging of title-deeds, &c.; (2) to appoint a receiver of certain properties mentioned in the agreement; (3) to order the plaintiffs to deliver up to the defendants the properties which belonged to their share under the agreement; (4) to order certain accounts to be taken." This motion was not brought on until the 10th September 1885, on which day it was

## DECREE—continued.

(3) ALTERATION OR AMENDMENT OF  
DECREE—continued

dismissed with costs; the Judge holding that the defendants had not shown sufficient cause to justify the setting aside of the decree under s. 103 of the Civil Procedure Code (Act XIV of 1882). The plaintiffs having still kept possession of certain of the properties which by the agreement were to go to the defendants, notice was given by the defendants to the plaintiffs on the 28th April 1887, that they would apply to the Court for an order that the plaintiffs should perform their part of the agreement of the 27th September 1871, so far as it remained unperformed by them, by giving up to the defendants possession of certain properties, and by accounting for the rents thereof, &c., &c. At the hearing of this motion, counsel for the defendants asked that the decree should be rectified, by directing that the agreement should be specifically performed by the plaintiffs and defendants respectively: *Held*, that the defendants were entitled to have the decree rectified. The fact that the decree declared that the plaintiffs were entitled to have the agreement of the 27th September 1871, specifically performed, implied an order for specific performance of that agreement by all the parties to it. The mandatory words, however, as against the plaintiffs having been, in the first instance, omitted, might now be inserted in the decree, so as to put the decree into the ordinary and usual form of decree in cases of this nature. The Court has inherent power over its own records so long as those records are within its power, and it can set right any mistake in them. Counsel for the plaintiffs contended that the defendants were not entitled, in the present motion, to ask for a rectification of the decree, inasmuch as their notice of motion did not intimate that the point would be raised. *Held*, that such an objection ought to be taken at once as a preliminary point. As it was not made until the argument of counsel for the defendants was concluded, it should be taken that the form of the motion as made to Court was acquiesced in. The objection was then too late. **KARIM MAHOMED v. RAJOOOMA.**

[I. L. R. 12 Bom. 174]

**22.—Decree for redemption within specified time—Appeal against decree—Power of Court in execution to extend time for redemption allowed by decree—Special ground for enlarging time.** The plaintiffs sued for the redemption of certain mortgaged property. On the 1st March 1886, a decree was passed declaring the plaintiffs entitled to redeem on payment by them to the defendants of Rs. 649-11-0 within three months from the date of the decree. Against this decree the defendants (the mortgagees) appealed, on the ground that a much larger sum than Rs. 649-11-0 was due to them on the mortgage. The plaintiffs also filed objections to this decree under s. 561 of the Civil Procedure Code (XIV of 1882), on the ground that the mortgage-debt had been long ago paid off, and

## DECREE—continued.

(3) ALTERATION OR AMENDMENT OF  
DECREE—continued.

that now a large sum was due to them from the mortgagees who had been in receipt of the profits of the property. Under these circumstances the plaintiffs did not pay the Rs. 649-11-0 within three months as ordered by the decree. On the 12th October 1886, they presented an application for execution, and paid into Court the Rs. 649-11-0. The lower Court granted their application, and ordered possession of the property to be given to them. The defendant appealed to the High Court. *Held*, reversing the order of the Court below, that the Court in executing the decree had no power to alter the language of the decree, which it would virtually do if it enlarged the time mentioned in it by accepting the Rs. 649-11-0 paid into Court by the plaintiffs on the 12th October 1886: *Held*, also, that even if the Court had power to enlarge time in the course of execution, the mere fact that the plaintiff had lodged an appeal would afford no special ground for enlarging the time. **ISHWAR-GAR v. CHUDASAMA MANABHAI.**

[I. L. R. 13 Bom. 106]

**23.—Civil Procedure Code, s. 206—Power of lower Court to amend decree affirmed on appeal.** Where a decree for possession of immoveable property, passed by a lower Appellate Court, omitted to specify the plots of land to which it related, and was upheld by the High Court by a decree which likewise gave no specification of those plots, and the lower Appellate Court subsequently, on the decree-holder's application, amended its decree, under s. 206 of the Civil Procedure Code, by inserting the required specification—*held* that inasmuch as the effect of the amendment was not to alter the effect of the High Court's decree, or to affect property other than that actually claimed and decreed, the amendment was not contrary to law. **Shohrat Singh v. Bridgman**, I. L. R. 4 All. 376; **Govardhan Das v. Gopal Ram**, I. L. R. 7 All. 366; **Kisto Kinkur Roy v. Burrudacant Roy**, 14 Moore's I. A. 165, and **Sundara v. Subbana**, I. L. R. 9 Mad. 354, referred to. **RAM SARAN c. PERSIDHAR RAI,**

[I. L. R. 10 All. 51]

**24.—Decree affirmed on appeal—Jurisdiction—Civil Procedure Code, ss. 206, 579, 623, 624—Review of judgment.** The effect of s. 579 of the Civil Procedure Code is to cause the decree of the Appellate Court to supersede the decree of the first Court even where the appellate decree merely affirms the original decree, and does not reverse or modify it. Where a decree has been affirmed on appeal, the only decree which can be amended under s. 206 of the Code is the decree to be executed, and the decree to be executed is that of the Appellate Court and not the superseded decree of the first Court, though the latter may, if necessary, be referred to for the purpose of executing the appellate decree. The

## DECREE—continued.

(3) ALTERATION OR AMENDMENT OF  
DECREE—concluded.

only Court which has jurisdiction to amend the appellate decree is the Court of Appeal. So held by the Full Bench, MAHMOOD, J., dissenting. *Shohrat Singh v. Bridgman*, 1 L. R. 4 All. 376, explained and followed. *Kistokinkur Roy v. Burrodacant Roy*, 14 Moore's I. A. 465, discussed. The insertion of the word "not" in the last line but one of the judgment and also in the head-note in *Shohrat Singh v. Bridgman* was a clerical error. *Per* MAHMOOD, J.—Where a decree has been simply affirmed on appeal, s. 579 of the Code does not imply that the appellate decree supersedes the original decree so as to render it ineffective for purposes of execution. In such a case the lower Court continues to have jurisdiction to entertain an application for amendment of its own decree under s. 206 of the Code; and such application is not governed by any article of the Limitation Act, and may be made at any time. It may be granted under s. 206, even where an application for review of judgment under s. 623 upon the same grounds would be barred by s. 624. A decree awarding the plaintiffs possession of immovable property did not comply with s. 206 of the Code by containing the particulars of the claim or specifying clearly the relief granted. On appeal by the defendant, the High Court, in general terms, confirmed the decree and dismissed the appeal. The decree-holders then applying for execution, the judgment-debtors objected that the decree was incapable of execution, and this objection was allowed by the High Court on appeal. The decree-holders applied to the High Court to amend its decree, but the application was refused; and they then made a similar application to the first Court to amend its original decree which had been affirmed on appeal. This application was granted by a Judge who was not the Judge who had passed the original decree. *Held* by the Full Bench (MAHMOOD, J., dissenting) that the Court below had no jurisdiction to make such amendment, the original decree having been superseded by the High Court's appellate decree: *Held* by MAHMOOD, J., *contra*, that the Court below had jurisdiction to make such amendment, and could make it any time; that the High Court's decree could not be amended, because the former order refusing amendment had become final and operated as *res judicata*; that the amendment of the original decree under s. 206 was not barred by s. 624; and that it would be denying justice on account of technicalities to hold that the original decree, though affirmed on appeal, could be neither executed nor amended. MUHAMMAD SULAIMAN KHAN v. MUHAMMAD YAR KHAN.

[I. L. R. 11 All. 267]

See MUHAMMAD SULAIMAN KHAN v.  
FATIMA.

[I. L. R. 11 All. 314]

## DECREE—concluded

## (4) EFFECT OF DECREE.

25.—*Decrees, Priority of* ] A decree takes priority over other decrees in respect of the date on which it was passed, and not in respect of the priority of the debt which it enforces. GHERAN v. KUNJ BEHARI.

[I. L. R. 9 All. 413]

26.—*Decree determining rights of rival religious sects—Decree whether executory or declaratory—Limitation—How far a sect bound by decree against some of its members* ] In a suit determined in 1840, in which various members of the Vadagalai sect residing in a certain village were plaintiffs and various members of the Tengalai sect residing in the same village were defendants, it was held that an image of a priest revered by the latter sect was not entitled to a place in a certain temple of the village, or to public worship in a certain street, or to procession in the streets of the village; and it was directed that, if the defendants continued to make the image an object of public worship, it should be removed. In 1888 various members of the Vadagalai sect, asserting that the members of the Tengalai sect had acted in contravention of the decree in the above suit, filed an execution-petition therein, praying that various members of the Tengalai sect be arrested, and "that the image of their priest, which they attempt to worship publicly, be removed until they obey the terms of the decree." It appeared that, in 1868, the District Magistrate had granted an application to restrain the Tengalais from acting contrary to the above decree. The execution-petition was dismissed by the District Court. *Held*, the petition was rightly dismissed, since the execution of the decree was barred by limitation, and the decree, if it was capable of execution at all, could not be executed against the parties to the present petition. SADAGOPACHARI v. KRISHNAMACHARI.

[I. L. R. 12 Mad. 356]

27.—*Decree for redemption not providing for payment in fixed time* ] A decree for redemption which does not provide for payment of the mortgage debt within a fixed time or for foreclosure in case of default operates of itself as a foreclosure decree if not executed within three years. MALOGI v. SAGAJI.

[I. L. R. 13 Bom. 567]

## DEED

Col.

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—, Suit to set aside.

See LIMITATION ACT 1877, ART. 91.

[I. L. R. 15 Calc. 58]

## DEED—continued.

See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY COURT (INEQUITABLE CONTRACTS.)

[I. L. R. 10 All. 535]

## (1) EXECUTION.

1.—*Proof of Execution—Admissibility in Evidence.* A deed of conveyance was tendered in evidence which purported to bear the mark of G as vendor, and which was duly attested by four witnesses. G, however, denied that she had ever executed the deed, and said that the mark was not her's. All the attesting witnesses were dead. A witness was called who knew the handwriting of one of the attesting witnesses, and who swore that the signature of that witness to the attesting clause of the deed was genuine. *Held*, on the authority of *Whitelocke v. Musgrave*, 2 Cr. and M. 511, that the deed was admissible in evidence, its execution by G being sufficiently proved. *ABDULLA PARU v. GANNIBAI*.

[I. L. R. 11 Bom. 690]

## (2) CONSTRUCTION.

2.—*Construction of rāzinama disposing of estate with words "naslan bad naslan"* In cases decided on the construction of documents, in which the expressions *mokurrari istemrari, istemrari mokurrari*, have been considered upon the question whether an absolute interest has been conferred by such documents or not, it has been taken for certain that if the words "*naslan bad naslan*" had been added, an absolute interest would have been clearly conferred. Accordingly, in constituting a *rāzinama* between parties dividing family estate and expressly declaring that the shares should descend "*naslan bad naslan*" *Held*, that the insertion of these words was conclusive in itself, the expressed objects of this *rāzinama* pointing to the same construction, viz. that the estate taken under it was absolute. *HARIHAN BAKSH v. UMAN PRASHAD*.

[I. L. R. 14 Calc. 296]

[L. R. 14 I. A. 7]

3.—*Malikana—Heritable charge—Suit for arrears of malikana allowance.* S sold a share in immovable property to M, by registered deed of sale which contained the following provisions — "The said vendee is at liberty either to retain possession himself or to sell it to some one else; and he is to pay Rs. 25 of the Queen's coin to me annually (as *malikana*), which he has agreed to pay." M mortgaged the property to B, who obtained possession, and after the mortgage, the annual payments provided for by the deed of sale ceased. The representatives of the vendor sued M and B to recover arrears of *malikana*. *Held* that the words "*as malikana*" in the deed of sale could not be rejected as surplusage; that they showed an intention that the payment of the Rs. 25 should be an annual charge upon the property and the profits arising therefrom an-

## DEED—continued.

## (2) CONSTRUCTION—concluded.

alogous to that of a *malikana* reserved on a settlement by a Government Settlement-officer for a zemindar, that the use of these words was intended to reserve and create a perpetual and heritable charge upon the property, and that the Court was not prevented from coming to this conclusion by the omission of specific words of inheritance. *Heeranand Sahoo v. Ozeeran*, 9 W. R. 102; *Bhoolde Singh v. Neemoo Bohoo*, 10 W. R. 302; *Hormuzi Bagum v. Hirday Narain*, I. L. R. 5 Calc. 921; *Mahomed Karamtoollah v. Abdool Majed*, 1. N. W. 205, *Kooldeep Narain Singh v. The Government*, 14 Moore's I. A. 217; *Tulshi Pershad Singh v. Ram Narain Singh* I. L. R. 12 Calc. 117; *Gaya v. Ramjivan Ram*, I. L. R. 8 All. 569, and *Gyan Singh v. Koner Pectum Singh*, 1. N. W. 73, referred to. *CHURAMAN v. BALLI*.

[I. L. R. 9 All. 591]

4.—*Danger of deciding case upon a document by construction put on another document in another suit* The danger pointed out of deciding one case relating to a bond by the construction placed in another suit on another and a different bond. *BAGWANT SINGH v. DARRAO SINGH*

[I. L. R. 11 All. 416]

## (3) PROOF OF GENUINENESS.

5.—*Validity of transfer—Benami transactions.* A transfer by registered deed, admitted to have been executed, but alleged to have been *benami* and merely colorable was held, on the evidence, to have been valid and effective in the absence of evidence showing the contrary. *UMAN PRASHAD v. GANDHARP SINGH*.

[I. L. R. 15 Calc. 20]

[L. R. 14 I. A. 127]

## (4) RECTIFICATION.

6.—*Specific Relief Act (I of 1877), s. 31—Rectification of instrument* A mortgagor alleged that a sum in excess of his debt to the mortgagee had been inserted in the instrument, but, on the facts, there being no reason to suppose that there was any fraud or deceit on the part of the mortgagee or that there was any mutual mistake of the parties as to the amount stated as that for which the security was given, a suit under s. 31 of Act I of 1877 (the Specific Relief Act), to have the instrument rectified was held to have been rightly dismissed. *AMANAT BIBI v. LACHMAN PERSAD*.

[I. L. R. 14 Calc. 308]

[L. R. 14 I. A. 18]

## (5) CANCELLATION.

1.—*Voluntary Transfer—Undue influence—Act IX of 1872 (Contract Act), s. 16.* In a transaction between two persons where one is so

**DEED—concluded.****(5) CANCELLATION—concluded.**

situated as to be under the control and influence of the other, the Courts in this country have to see that such other does not unduly and unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognise. Where a fiduciary or quasi-fiduciary relation had existed Courts of Equity have invariably placed the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The exercise of this beneficial jurisdiction is not confined to cases only between guardian and ward, attorney and client, father and son, but the relief thus granted stands upon a general principle, applying to all variety of relations in which dominion may be exercised by one person over another. The plaintiff, who on the death of the widow of his brother became entitled to the estate of the deceased, found himself resisted in his claim by wealthy relatives. He was a man without means. The defendant took him to his house, kept him there, and found him all the money for the purpose of carrying on his litigation with his relatives, in which the plaintiff succeeded. While the litigation for mutation of names in respect of the property was pending in the Revenue Court, and while plaintiff was residing with the defendant, he executed a sale-deed in favor of defendant's brother for the nominal consideration of Rs 9,500, or half the property he claimed; and again shortly after the mutation case had terminated in his favor, he executed a deed of endowment of the remaining half in favor of a temple founded by the ancestor of the defendant, and in which the defendant was interested, and the result was that plaintiff was left as poor as he was when he first came into the defendant's hands. Plaintiff sued for cancellation of the deed of endowment, on the ground that the same had been obtained from him by the exercise of undue influence and by means of fraud, and obtained a decree. On appeal by the defendant it was held that, looking at all the facts, such a relation between plaintiff and defendant in the course of the years 1885 had been established as to cast upon the latter the obligation of satisfying the Court that the transaction, which was given effect to by the deed of endowment, was an honest *bonâ fide* transaction and one that ought to be upheld. **SITAL PRASAD v. PARBHU LALL.**

[I. L. R. 10 All. 535]

**DEFAMATION**

*See* COMPLAINT—INSTITUTION OF COMPLAINT AND NECESSARY PRELIMINARIES.

[I. L. R. 10 All. 39]

**DEFAMATION—continued.**

*See* PRIVILEGED COMMUNICATION

[I. L. R. 12 Mad. 374]

*See* RIGHT OF SUIT—WITNESS.

[I. L. R. 10 All. 425]

*See* WITNESS—CIVIL CASES—PRIVILEGES OF WITNESSES.

[I. L. R. 10 All. 425]

1.—*Penal Code, s. 499, Expln. 4—Words, per se defamatory.* Expln 4 of s. 499 of the Penal Code does not apply where the words used and forming the basis of charge are *per se* defamatory; though when the meaning of words spoken or written is doubtful, and evidence is necessary to determine the effect of such words and whether they are calculated to harm a particular person's reputation, it is possible that the principle enunciated in the explanation might and would with propriety be applied. **QUEEN-EMPRESS v. MCCARTHY.**

[I. L. R. 9 All. 420]

2.—*Penal Code, s 500—Statement by witness—Privilege of witness.* M S was convicted under s. 500 of the Indian Penal Code of defaming S S by making a certain statement when under cross-examination as a witness before a Court of criminal jurisdiction. Held that the conviction was bad. The statements of witnesses are privileged; if false, the remedy is by indictment for perjury and not for defamation. **MAN-JAYA v. SETHA SHETTI.**

[I. L. R. 11 Mad. 477]

3.—*Republication of defamatory matter already published—Penal Code (Act XLV of 1860), s. 499—Dismissal of complaint—Criminal Procedure Code (Act X of 1882), s. 203* A complain was filed, under s 499 of the Indian Penal Code, against the proprietors editor and printer of a newspaper for publishing matter alleged to be defamatory. The Magistrate, before whom the complaint was lodged, found that the publication complained of was a mere reproduction or republication of what had been previously printed and published in another newspaper. He was therefore of opinion that, unless and until criminal proceedings had been taken in respect or the earlier publication, a charge of defamation could not properly be brought with regard to the later publication. He therefore dismissed the complaint under s. 203 of the Code of Criminal Procedure (Act X of 1882). Held that the order of dismissal was improper. The Penal Code (s 499) makes no exception in favor of a second or third publication as compared with a first. If the complaint is properly laid in respect of a publication which is *prima facie* defamatory, the Magistrate is bound to take cognizance of the complaint, and deal with it according to law. **IN RE HOWARD.**

[I. L. R. 12 Bom. 167]

DEFAMATION—*concluded.*

4.—*Suit by father in his own right for defamation of daughter.*] A suit for defamation of his daughter cannot be maintained by a Hindu father suing in his own right and not as general attorney or on behalf of the daughter. A suit for defamation can only be brought by the person actually defamed, if the person is *seu juris*, and if not *seu juris*, then under the provisions of the Civil Procedure Code by his guardian or next friend. *Dawan Singh v. Mahip Singh*, I. L. R. 10 All. 425, and *Parvathi v. Mannar*, I. L. R. Mad. 175 distinguished. *Subbayar v. Kristanagar*, I. L. R. 1 Mad. 383, and *Luckumsey Romji v. Harben Nersey*, I. L. R. 5 Bom. 580, referred to *DAYA v. PARAM SUKH*.

[I. L. R. 11 All. 104]

5.—*Illegal declaration that one is outcasted.*] According to the usage of certain Nambudis, a caste enquiry is held when a Nambudi woman is suspected of adultery, and if she is found guilty, she and her paramour are put out of caste. An enquiry was held into the conduct of a certain woman so suspected; she confessed that the plaintiff had had illicit intercourse with her, and thereupon they were both declared outcastes, the plaintiff not having been charged nor having had an opportunity to cross-examine the woman or to enter on his defence and otherwise to vindicate his character. In a suit for damages for defamation by the plaintiff against those who had declared him an outcaste. *Held* the declaration that the plaintiff was an outcaste was illegal, and it having been found that the defendants had not acted *bona fide* in making that declaration, the plaintiff was entitled to recover damages. *VALLABHA v. MADUSUDANAN*.

[I. L. R. 12 Mad. 495]

## DEKKAN AGRICULTURISTS RELIEF ACT (XVII OF 1879).

*See* APPELLATE COURT — OBJECTION TAKEN FOR FIRST TIME ON APPEAL — SPECIAL CASES — JURISDICTION.

[I. L. R. 13 Bom. 424]

*See* HINDU LAW — ALIENATION — ALIENATION BY WIDOW — WHAT CONSTITUTES LEGAL NECESSITY.

[I. L. R. 11 Bom. 325]

*See* JURISDICTION — QUESTION OF JURISDICTION — WHEN IT MAY BE RAISED.

[I. L. R. 13 Bom. 424]

*See* REVIEW — PROCEDURE ON RE-HEARING OF CASE.

[I. L. R. 11 Bom. 591]

*See* SPECIAL OR SECOND APPEAL — PROCEDURE ON SPECIAL APPEAL.

[I. L. R. 13 Bom. 424]

DEKKAN AGRICULTURISTS RELIEF ACT (XVII OF 1879)—*continued.*

—, s. 3 cl 3.

*See* PLEADER—AUTHORITY TO BIND CLIENT.

[I. L. R. 11 Bom. 591]

*See* VALUATION OF SUIT—SUITS.

[I. L. R. 13 Bom. 489]

—, s. 12—*Act XXIII of 1881, s. 4—Act XXII of 1882, s. 3—Definition of "agriculturist"—Change in the definition—Effect of a change of status on the rights of parties to litigation—Effect of change of law.*] A change in the law does not generally affect any proceeding begun when it comes into force. But a change of status or legal capacity generally operates at once to extinguish, diminish, or vary the extent to which a party may claim the aid or protection of a Court. The plaintiff, who was earning his livelihood partially by agriculture within the district to which the Dekkan Agriculturists Relief Act (XVII of 1879) applied, brought a suit for redemption. At the time of the institution of the suit he was an agriculturist as defined by s. 4 of Act XXIII of 1881. During the pendency of the suit the definition of agriculturist was changed by s. 3 of Act XXII of 1882. *Held* that, if the plaintiff was not an agriculturist within the meaning of Act XXII of 1882 at the time of adjudication, he had no right to redeem on the special terms of s. 12 of Act XVII of 1879, as he had lost, *pendente lite*, the specific personal character on which the right depended. *Shantilal v. Harachand*, I. L. R. 10 Bom. 367, followed. *PADGAYA SOMSHETTI v. BAJI BABAJI*.

[I. L. R. 11 Bom. 469]

—, s. 20—*Act XXII of 1882, s. 15 B—Payment of decree by instalments—Default—Whole sum payable on default—No second order for instalments.—Agreement—Effect of taking out of Court instalments paid in under second order.*] S. 15B of the Dekkan Agriculturists Relief Act (XXII of 1882) allows the Court to order payment of a decree by instalments either in its decree or in the course of the execution. But it does not authorise a variation of any order once so made. Nor does s. 20 of Act XVII of 1879 authorise a series of instalment orders each one varying from the preceding. A decree was made payable by instalments, with a proviso that in default of payment of any one instalment, the whole amount remaining due should be recoverable at once. The judgment-debtor made default. Thereupon the decree-holder sought to recover the whole amount of the decree. The judgment-debtor then applied for a fresh order for payment by instalments. The Court of First Instance refused, but the Subordinate Judge on appeal granted the application. The judgment-debtor paid into Court the amount of instalments which had become due under the second order. The decree-holder took out the money so paid in;



**DEKKAN AGRICULTURISTS RELIEF ACT (XVII OF 1879) s. 20—concluded.**

*Held*, that the Subordinate Judge on appeal had no power to make a fresh order for payment by instalments varying the original order. *Held* also, that the judgment-creditor by taking out the money paid into Court by the judgment-debtor as instalments due under the second order for instalments did not bind himself to abide by that order. **BALKRISHNA INDRABHAN v. ABAJI BIN BAHIRJI MORE.**

[I. L. R. 12 Bom. 326]

—, s. 39—and ss 49, 47, 48,—*Village conciliator—Proceedings before a conciliator—Certificate of a conciliator—Exclusion of the time occupied in proceedings before a conciliator in computing the period of limitation—Limitation*.] Under s. 39 of the Dekkan Agriculturists Relief Act (XVII of 1879), the conciliator to whom application is to be made for an amicable settlement of a dispute must be the one appointed for the local area in which the agriculturist is residing, and not for the district in which the land in dispute is situated. The plaintiff was an agriculturist residing in the Kopergaon Taluka. He purchased the house in dispute from the defendant on the 30th January 1872, but did not get possession. On the 12th December 1883, the plaintiff applied to be put into possession under s. 39 of the Dekkan Agriculturists Relief Act (XVII of 1879) to the conciliator appointed for the Khatav Taluka where the house in dispute was situate. The proceedings before the conciliator lasted until the 19th February 1884, on which day a certificate under s. 46 of the Act was granted to the plaintiff. On the 20th February 1884, the plaintiff brought this suit to recover possession of the house. The defendant pleaded limitation. The plaintiff contended that under s. 48 of Act XVII of 1879, the time occupied in the proceedings before the conciliator should be deducted in computing the period of limitation. *Held*, that the plaintiff was not entitled to such deduction, as the conciliator, before whom the proceedings had been instituted, was not the one appointed for the local area in which the plaintiff was residing, as required by s. 39 of Act XVII of 1879, and had, therefore, no jurisdiction to deal with plaintiff's application. *Held*, also, that the certificate obtained by the plaintiff was not such a certificate as is required by s. 47 of the Act. *Held*, also, that the want of a proper certificate was not fatal to the suit. As soon as a defect in a certificate becomes apparent, the proper course is for a Court to stay proceedings to enable the plaintiff to make good the defect by producing the requisite certificate. **NYAMTULA v. NANA VALAD FARIDSHA.**

[I. L. R. 13 Bom. 424]

—, ss. 46, 47, 48,

*See* s. 39.

[I. L. R. 13 Bom. 424]

**DEKKAN AGRICULTURISTS RELIEF ACT (XVII OF 1879)—concluded**

—, ss. 53, 54.—*Special Judge, Powers of in revision—Withdrawal of suit—Mistake in filing suit.*] A Special Judge appointed under s. 54 of the Dekkan Agriculturists Relief Act (XVII of 1879) is not competent in the exercise of his revisional powers, to allow a plaintiff to withdraw his suit with liberty to bring a new one, merely on the ground that he has made some mistake in filing the suit. **MUKTAJI BHAGOJI v. MANAJI.**

[I. L. R. 12 Bom. 684]

—, s. 56—*Account adjusted and signed by two debtors, one of whom was an agriculturist—Suit against one agriculturist—Evidence—Inadmissibility of unregistered khata for any purpose whatever.*] The plaintiff sued two defendants, one of whom was an agriculturist, on a khata which contained an acknowledgment of liability to pay the amount due to the plaintiff, and also an agreement to pay interest. The defendant who was an agriculturist was struck off the record and the plaintiff proceeded against the other, and obtained a decree against him for the amount claimed—the Court being of opinion that s. 56 of Act XVII of 1879 did not apply, and that the khata sued on was valid and admissible in evidence although not registered. *Held*, by the High Court, that the khata was an instrument purporting to evidence an obligation to pay money within the meaning of s. 56 of Act XVII of 1879, which section applied, although only one of the executants was an agriculturist. *Held*, also, that, under the provisions of s. 56, the khata was not admissible in evidence in any case whatever, not even to enforce a liability against one who was not an agriculturist. **DINSHA KUVARJI v. HARGOVANDAS GOVERDHANDAS.**

[I. L. R. 13 Bom. 215]

**DELAY.**

*See* CASES UNDER COSTS — SPECIAL CASES—DELAY.

**DEMURRAGE.**

*See* CONTRACT—CONSTRUCTION OF CONTRACT.

[I. L. R. 13 Bom. 392]

**DEPOSIT.**

*See* LIMITATION ACT, 1877, ART. 59.

[I. L. R. 13 Bom. 338]

*See* LIMITATION ACT, 1877, ART. 60.

[I. L. R. 16 Calc. 25]

**DEPOSITIONS.**

*See* CASES UNDER EVIDENCE—CRIMINAL CASES—DEPOSITIONS.



**DEPUTY COMMISSIONER, JURISDICTION OF.**

*District Court—Insolvent judgment-debtors—Civil Procedure Code, 1882, ss. 344, 360—Application to have judgment-debtor declared insolvent—Costs* ] The Court of the Judicial Commissioner, and not that of a Deputy Commissioner, is the "District Court" in Chota Nagpur under ss. 2 and 344 of the Civil Procedure Code. A Deputy Commissioner therefore invested by the local Government with powers under s. 360 of the Code has no jurisdiction, apart from any transfer by the "District Court," to entertain an application by a judgment-creditor under s. 344 to have his judgment-debtor declared insolvent. *In re Waller*, I. L. R. 6 Mad. 430; and *Purbhudas Felji v. Bhugun Ranchand*, I. L. R. 8 Bom. 196, followed. The question of jurisdiction not having been raised in the lower Court, the order was set aside without costs. *JOYNARAYAN SINGH v. MUDHOO SUDUN SINGH*.

[I. L. R. 16 Calc. 13]

**DEPUTY MAGISTRATE, POWER OF, TO ADMINISTER OATH.**

*See FALSE EVIDENCE—GENERALLY.*

[I. L. R. 14 Calc. 653]

**DETENTION OF ACCUSED BY POLICE.**

*Criminal Procedure Code, s. 167—Remand of prisoners in custody of the police* ] The right construction of s. 167 of the Code of Criminal Procedure is that in proceedings before the police under chapter XIV, the period of remand cannot exceed in all fifteen days, including one or more remands. *QUEEN-EMPRESS v. ENGADU*.

[I. L. R. 11 Mad. 98]

**DETENTION OF FEMALE CHILD FOR UNLAWFUL PURPOSE.**

*See CRIMINAL PROCEDURE CODE, 1882, s. 531.*

[I. L. R. 16 Calc. 487]

**DISABILITY TO CONTRACT.**

*See SPECIFIC PERFORMANCE—SPECIFIC PERFORMANCE ALLOWED.*

[L. R. 16 I. A. 221 : I. L. R. 17 Calc. 223]

**DISCHARGE OF ACCUSED.**

*Criminal Procedure Code, s. 494—Irregular procedure—Discharge of prisoner committed to Sessions—New trial—Autrefois acquit* ] A prisoner committed to sessions on a charge cannot be discharged by the Sessions Court under s. 494 of the Code of Criminal Procedure, but must be convicted or acquitted. Where a prisoner was erroneously discharged by a Sessions Court under s. 494 (a) —*Held* that as the prisoner was entitled to be acquitted, a conviction obtained in a second trial for the same offence was bad in law. *QUEEN-EMPRESS v. SIVARAMA*.

[I. L. R. 12 Mad. 35]

**DISCOVERY.**

*See CASES UNDER INSPECTION OF DOCUMENTS*

**DISCRETION OF COURT.**

*See RECEIVER.*

[I. L. R. 15 Calc. 818]

*See CERTIFICATE OF ADMINISTRATION—CERTIFICATE UNDER BOMBAY REG. VIII OF 1827.*

[I. L. R. 13 Bom. 37]

**DISTRICT JUDGE, JURISDICTION OF.**

*See CRIMINAL PROCEDURE CODE, 1882, s. 487.*

[I. L. R. 16 Calc. 121]

1.—*Bengal Tenancy Act (VIII of 1885), s. 153—Revisional power of District Judge in rent-suit—Judicial Officer.* ] The words "Judicial Officer as aforesaid" as used in the proviso to s. 153 of the Bengal Tenancy Act have reference to the "Judicial Officer" spoken of in cl. (b) of that section and to such officer only, and a District Judge has no power to revise decrees or orders passed by a District Judge, Additional Judge, or Subordinate Judge referred to in cl. (a) of the section. *SANKAR-MANI DEBYA v. MATHURA DHUPINI*.

[I. L. R. 15 Calc. 327]

2.—*Stamp Act, 1879, s. 49—Reference to High Court, power to make.* ] A bail-bond was executed to a District Munsif, who expressed no doubt as to the amount of duty to be paid and made no application to have the case referred. The District Judge referred the case to the High Court: *Held* that the District Judge was not authorized to make the reference. *REFERENCE UNDER STAMP ACT, s. 49.*

[I. L. R. 11 Mad. 38]

3.—*Civil Procedure Code, 1882, ss. 223, 228 249—Mofussil Small Cause Court Act (Act XI of 1865), ss. 20, 21—Execution-proceedings—Appeal.* ] The plaintiff obtained a decree in a Small Cause suit in a Subordinate Court in the Mofussil and a certificate was granted to him under s. 20 of the Mofussil Small Cause Court Act for the execution of the decree against immoveable property of the judgment-debtor in the jurisdiction of a District Munsif. He accordingly presented a petition to the District Munsif under s. 247 of the Code of Civil Procedure, but his petition was dismissed. An appeal to the District Judge was dismissed on the ground that he had no jurisdiction to entertain an appeal in a Small Cause Court case: *Held*, that an appeal lay to the District Court and that the Judge had jurisdiction to entertain it. *PERT-MAL v. VENKATARAMA*.

[I. L. R. 11 Mad. 130]

## DIVORCE ACT (IV OF 1869).

—, ss. 16 & 17.—*Suit for dissolution of marriage—Decree made by District Judge—Confirmation by High Court—Application by petitioner and respondent that decree should not be made absolute—Compromise.* In a suit for divorce by the husband as petitioner against his wife and another person as co-respondent, the Court of the Judicial Commissioner of Oudh, where the suit was instituted, passed a decree *nisi*, and the record of the case was forwarded to the High Court for confirmation under s. 17 of the Indian Divorce Act. The petitioner and the respondent, his wife, also forwarded to the High Court through the Registrar of the Court of the Judicial Commissioner a petition in which they expressed their intention of living together as man and wife, and asked the Court not to make the decree absolute. On the 2nd June the case came before the Court, when an order was passed that it should stand over for a fortnight to enable the petitioners to appear in person or by pleader. At the adjourned hearing both the petitioner and the respondent were represented by one vakil, and he prayed the Court not to make the decree *nisi* absolute. *Held* by EDGE, C. J. and BRODHURST, J., that the Court should accede to the prayer of the petitioner and not make absolute the decree passed by the Judicial Commissioner of Oudh. Further, that a suit for a divorce is to be dealt with like all other cases between private litigants, and therefore the High Court should not make a decree *nisi* absolute without a motion being made to it to that effect: *Held* by MAHMOOD, J., that proceedings in a Divorce Court are quasi-criminal, and that they are governed by rules in many respects vastly different from those which govern ordinary civil litigation, especially in the matter of compromise or mutual agreement between the parties: *Held*, further, that as in the Indian Divorce Act no express power is given to the parties to the suit to prevent a decree *nisi* passed in it by the District Judge from being made absolute, the principles of the practice of the English Divorce Act in such a matter might well be followed, and an order be made at the desire of both parties staying the proceedings in the cause and not setting aside the decree *nisi* which cannot be done. *Lewis v. Lewis*, 30 L. J. P. & M. 199 referred to. *CULLEY v. CULLEY*.

[I. L. R. 10 All. 559]

—, s. 35.—*Costs of suit by husband against wife for divorce—Deposit of costs—Stay of proceedings until costs paid—Poverty of husband* In a suit brought for dissolution of a marriage solemnised in 1859 (the parties to such marriage being of Anglo-Indian domicile) the respondent, being possessed of no separate property of her own, applied to the Court for an order directing her husband to deposit in Court a sum sufficient to cover her probable costs of suit. The Court made an order directing the Registrar to estimate and certify the wife's probable costs of suit, and directed the husband to pay the sum so certified into Court. The husband being a man of next

DIVORCE ACT (IV OF 1869), s. 35—*concluded.*

to no means failed to pay into Court the sum certified by the Registrar: *Held*, on an application by the wife to stay proceedings until such costs were paid that it would be unreasonable to stay proceedings on account of the husband being unable to pay into Court that which he did not possess; but that, inasmuch as the affidavits filed by the parties were contradictory as to the means of the husband, the matter should be referred (if the parties so desired it) for an enquiry by an officer of the Court into the question of means. *THOMSON v. THOMSON*.

[I. L. R. 14 Calc. 580]

## DURESS.

*North-West Provinces Land-Revenue Act (XIX of 1873), ss. 94, 97.—Assent to and validity of mutation of names in the Collectorate record-of-rights.* The question was, according to the judgment of the High Court, whether a change of names in the Collectorate record-of-rights represented a *bona fide* transfer by the plaintiff, or whether there was a mere assent by her to a paper transaction, relating to the ownership of a share in a village, in giving which assent she had not acted freely, but under undue influence. Reversing the decision of the High Court, which was that the plaintiff had assented to the proceedings under intimidation, their Lordships held that, on the evidence, no intimidation had been proved, and that a suit to cancel this *dakhil khary* and for a declaration of the proprietary right of the plaintiff, in whose name the village stood before the mutation, had been rightly dismissed in the first Court. *HAR LAL v. SARDAR*.

[I. L. R. 11 All. 399]

## EASEMENT.

*See* LAND ACQUISITION ACT, ss. 15, 38 AND 55.

[I. L. R. 14 Calc. 423]

*See* CUSTOM.

[I. L. R. 10 All. 358]

*See* PARTITION—EFFECT OF PARTITION.

[I. L. R. 14 Calc. 797]

*See* CASES UNDER PRESCRIPTION—EASEMENTS

*See* RIGHT OF SUIT—EASEMENTS.

*See* RIGHT TO USE OF WATER.

[I. L. R. 11 Mad. 16]

## EASEMENTS' ACT (V OF 1882), ss. 6, 7, and 17.

*See* PRESCRIPTION—EASEMENTS—RIGHT TO WATER.

[I. L. R. 11 Mad. 16]

*See* RIGHT TO USE OF WATER.

[I. L. R. 11 Mad. 16]

**EJECTMENT.**

See CASES UNDER LANDLORD AND TENANT—EJECTMENT.

*Landlord and tenant—Tenant remaining in occupation after passing a razinama—Effect of the razinama—Ejectment suit by owner of "interesse termini."* The first and second defendants were sub-tenants of the third defendant, who had certain land which was part of the *inam* village of D. In 1883 the third defendant executed a razinama in the following terms which he gave to the receiver who had been appointed by the Court to manage the village — "Up to the present time my father and I have been cultivating the land, but the land belongs to the *inamdar*. I have no title over it, and the *inamdar* can give it for cultivation to any one he pleases." Shortly after the date of this razinama the *inamdar* gave the land to the plaintiff, who now sued to obtain it from the defendants, who had remained in possession. *Held* that the plaintiff was entitled to sue in Ejectment, although he had not been put in possession of the land. BHUTIA DHONDU v. AMBO.

[I. L. R. 13 Bom. 294]

**ENDORSEMENT ON DEED.**

See REGISTRATION ACT, 1877, s. 17.

[I. L. R. 9 All. 108]

See STAMP ACT, 1879, s. 39.

[I. L. R. 11 Mad. 40]

See STAMP ACT, 1879, SCH. II. ART. 15.

[I. L. R. 10 Mad. 64]

**ENDOWMENT.**

*Charitable Endowment—Trust property sold in execution—Rights of heirs of the creator of the trust against execution purchaser.* A trust-deed of certain property executed by the member of a Hindu family provided that neither he nor his heirs should incumber or alienate it, but that in case of necessity his heirs might maintain themselves out of the income while administering the trust of a certain charity. The provisions of the trust were not proved to have been observed by the settlor or his family, and the settlor on one occasion disclaimed the trust. The trust property was attached and sold in execution of personal decrees passed against the settlor and another member of his family. The widow of the latter, after the death of settlor, sued to recover the land from the execution purchaser as heir to the settlor: *Held*, the plaintiff was not entitled to recover the land. *Rupa Jugshet v. Krishnapu Gowind*, I. L. R. 9 Bom. 169, distinguished. SUPPAMMAL v. THE COLLECTOR OF TANJORE.

[I. L. R. 12 Mad. 387]

**ENGLISH LAW.**

See HINDU LAW—GIFT—CONSTRUCTION OF GIFTS.

[I. L. R. 16 Calc. 677]

See PARSIS.

[I. L. R. 13 Bom. 302]

**ENHANCEMENT OF RENT.**

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| 1. Liability to Enhancement               | ... 286 |
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See ESTOPPEL—STATEMENTS AND PLEADINGS.

[I. L. R. 15 Calc. 8]

See GUARDIAN—DUTIES AND POWERS OF GUARDIAN.

[I. L. R. 15 Calc. 8]

See MINOR—LIABILITY ON CONTRACTS.

[I. L. R. 15 Calc. 8]

**(1) LIABILITY TO ENHANCEMENT.****(a) GENERAL LIABILITY.**

1.—*Transferable tenure—Mutation of names—Tenant who has transferred his holding, Liability of.* The main object of a suit for enhancement is to have the contract between the landlord and tenant as regards the rate of rent re-adjusted. In a suit for enhancement it was found that the defendant had, prior to institution, sold his holding, which by custom was transferable without the consent of the landlord, to a third party. There had been no mutation of names, or payment of a *nazar*, or execution of *fi-h lease*; but the landlord had received rent from the third party and was fully aware of the transfer: *Held* that the connection of the defendant with the holding had come to an end, and the suit against him did not lie. ABDUL AZIZ KHAN v. AHMED ALI.

[I. L. R. 14 Calc. 795]

2.—*Settlement of a Government khas mahal—Regulation VII of 1822—Bengal Act III of 1878—Bengal Act VIII of 1879, ss. 10—14* In order to make the enhanced rent, stated in a *jummabandi* settled under Reg. VII of 1822, binding upon a tenant, there must be either an assent to that enhancement, or else a compliance with the provisions of the rent law, with reference to enhancement of rent in force at the time of such enhancement. *D'Silva v. Rajagoomar Dutt*, 16 W. R. 153, *Enaytoollah Meah v. Nabo Coomar Sircar*, 20 W. R. 207; and *Razzooldun Mahomed v. McAlpine*, 22 W. R. 540, followed. AKSHAYA COOMAR DUTT v. SHAMA CHARAN PATITANDA.

[I. L. R. 16 Calc. 586]

**ENHANCEMENT OF RENT—concluded.****(1) LIABILITY TO ENHANCEMENT—concl'd.****(b) PARTICULAR TENURE HOLDERS AND TENURES.**

3.—*Government khas mehal*—Mode of enhancement of rent of.] The rent of a Government khas mehal can only be enhanced by the same process as the rent on any private estate *AKSHAYA COOMAR DUTT v. SHAMA CHARAN PATITANDA*.

[I. L. R. 16 Calc. 586

**(c) DEPENDENT TALUKDARS**

4.—*Bengal Regulation VIII of 1793, ss 48—52—Bengal Regulation XLIV of 1793, ss. 2—5*] A purchaser of a zemindari at a public sale may, by virtue of his ordinary right as zemindar, enhance the rent of a dependent taluk from time to time under the provisions of Bengal Regulation VIII of 1793, and is not barred from so doing by the provisions of s. 5 of Bengal Regulation XLIV of 1793. The words "for the same period as the term of their own engagements with Government" in s. 48 of Bengal Regulation VIII of 1793, refer to the period of the decennial settlement and do not mean "in perpetuity"—*Doorga Soondree v. Chundernath Bhadooree*, S. D. A. (1852) 642, dissented from. In an enhancement suit of the nature indicated above, the rate of rent to be fixed as payable by the under-tenure holder must ordinarily be fixed with reference to the rents paid by ryots within the tenure itself and not with reference to those paid by ryots in the neighbourhood outside the limits of the tenure. *BISSESSURI DEBI CHOWDHRAIN v. HEM CHUNDER CHOWDERY*.

[I. L. R. 14 Calc. 133

**ESCAPE FROM CUSTODY.**

1.—*Penal Code, s. 225. — Criminal Procedure Code, s. 59—Arrest of thief—Rescue from custody of private person*] To support a conviction under s. 225 of the Indian Penal Code, it is not necessary that the custody from which the offender is rescued should be that of a policeman it is enough that the custody is one which is authorised by law. *Held*, therefore, that rescue from the custody of a private person who had arrested a thief in the act of stealing was an offence *QUEEN-EMPRESS v. KUTTI*.

[I L. R. 11 Mad. 441

2.—*Penal Code, s. 224—Criminal Procedure Code, s. 59—Local Custody*] The accused was arrested in the act of stealing and was handed over to the village Magistrate, who forwarded him in custody of the village servants to a police station. The accused escaped on the way. He was convicted under s. 224 of the Penal Code. On appeal the conviction was reversed on the ground that the custody was not legal: *Held* that the conviction was right. S. 59 of the Code of Criminal Procedure, which requires a private person who arrests a thief in the act to take the thief to the nearest police station, is

**ESCAPE FROM CUSTODY—concluded.**

sufficiently complied with by sending the offender in custody of a servant. *QUEEN-EMPRESS v. POTADU*.

[I. L. R. 11 Mad 480

**ESCHEAT.**

*See CO-SHAREERS—ERECTION OF BUILDINGS ON JOINT PROPERTY*

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*See HINDU LAW—PARTITION—AGREEMENTS NOT TO PARTITION AND RESTRAINT ON PARTITION*

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*See MALABAR LAW—MORTGAGE.*

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**ESTOPPEL.**

*Col.*

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**(1) STATEMENT AND PLEADINGS.**

1.—*Denial of genuineness of mortgage—Subsequent suit to redeem*] V sued to eject K from certain land, alleging that K having entered under a lease held as a trespasser. K pleaded that he held as mortgagee. It was found that K obtained possession under a mortgage-deed for Rs. 1,000, which had not been registered, and that he held also a second mortgage for Rs. 50, and it was held on second appeal that K was entitled to defend his possession by virtue of the mortgage for Rs. 50 and, as V had not offered to redeem the charge but had sued on false averments, the suit was dismissed. V then sued K to recover the land on payment of Rs. 50. In his plaint V stated that, though the mortgage-deed for Rs 50 was fabricated, the High Court had decided that he was bound to pay Rs. 50 before recovering the land from K. The District Court on appeal dismissed the suit on the ground, *inter alia*, that as V denied the genuineness of

**ESTOPPEL—continued**

(1) STATEMENTS AND PLEADINGS—*concl'd* the mortgage, he could not sue for redemption: *Held* that *V* was entitled to redeem. *VARATHAYANGAR v. KRISHNASAMI*

[I. L. R. 10 Mad. 102]

2.—*Admission not amounting to estoppel—Statement in suit for enhancement as to certain person being tenant.* A putnidai obtained decrees for enhancement of rent on *kabuliats* signed by a widow for her minor son by which she agreed to pay it. *Held*, while finding that the minor was liable for the enhanced rent, that the putnidai was not precluded by the fact that he had, after the son had attained full age, sued the mother as tenant, stating that she and not the son, was tenant. *WATSON AND COMPANY v. SHAM LALL MITTER.*

[I. L. R. 15 Cal. 8]

[L. R. 14 I. A. 178]

(2) LANDLORD AND TENANT, DENIAL OF TITLE.

3.—*Co-sharers—Lease from one of several co-sharers—Denial of lessor's title.* A person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment. *JAMSEDDI SORABJI v. LAKSHMIRAM RAJARAM.*

[I. L. R. 13 Bom. 323]

4.—*Evidence Act (I of 1872), s. 116—Unassessed waste reclaimed by plaintiff—Patta granted to defendant.* The plaintiff, who was the holder of a *warg* in Canara, demised adjacent waste land to one who brought it into cultivation and remained in occupation for two years. The land was not assessed to revenue in the name of either of these persons. At the end of two years the tenant let into occupation a sub-tenant who subsequently assigned his right to the defendant, the holder of a neighbouring *warg*. The defendant obtained a *patta* for the land from the Revenue authorities. In a suit by plaintiff to eject the defendant. *Held*, that the defendant was not estopped from setting up a title adverse to the plaintiff, and that his possession became adverse when the *patta* was granted to him. *SUBBARAYA v. KRISHNAPPA.*

[I. L. R. 12 Mad. 422]

(3) ESTOPPEL BY DEEDS AND OTHER DOCUMENTS.

5.—*Minor, Contract by—Deed of relinquishment executed by minor—Ratification by acquiescence.* *A* sued in 1885 to recover certain estates from *B* alleging claim under his adoption which took place in 1865. In 1875 *A*, being still a minor, relinquished by deed his claim to the estates for Rs 12,000; but now alleged that he thought he was relinquishing it only in favour of the defendant's predecessor in title who died in 1883,

W., D.

**ESTOPPEL—continued.**

(3) ESTOPPEL BY DEEDS AND OTHER DOCUMENTS—*concluded.*

having been in possession of the estates since 1867. The plaintiff attained his majority in 1878. *Held*, that whether the cause of action arose in 1865 or 1867, it was equally barred from 1879, and that the plaintiff was bound by the deed of relinquishment. Assuming the plaintiff was a minor of 15 years of age at the date of the deed of relinquishment, it is not likely he would not have understood its effect, or that he failed to ascertain it when he attained his majority in 1878. His conduct of acquiescence in it, had moreover acted as a ratification of the contract of relinquishment. *VENKATACHALAM v. MAHALAKSHMAMMA.*

[I. L. R. 10 Mad. 272]

(4) ESTOPPEL BY JUDGMENT.

6.—*Civil Procedure Code, 1882, s. 335—Order rejecting claim petition.* An order rejecting a claim petition under s. 335 of the Civil Procedure Code, not being appealed against within one year acquires the force of a decree.—*Telaguthan v. Lukshmana, I. L. R. 8 Mad. 506*, followed. *ACHUTA v. MAMMAVU.*

[I. L. R. 10 Mad. 357]

(5) ESTOPPEL BY CONDUCT.

7.—*Evidence Act, s. 115—Auction-purchaser—Representation.* *A*, a Hindu governed by the Mitakshara law, died on the 12th May 1867 leaving a widow *B* and a brother *R*, who was admittedly the next reversioner. In July 1867 *B* purported to adopt a son *D* to *A*, and subsequently in September 1867 obtained a certificate under Act XL of 1858. In 1872 *B* obtained a loan from the plaintiff *M* of Rs 9,000 and to secure its repayment executed as guardian of *D* a mortgage of seven mouzahs in favour of *M*. The money was advanced and the mortgage executed at the instigation of *R* and with his consent, and on his representation that *D* was the duly adopted son of *A*, and it was admitted that the money was advanced for, and specifically applied towards the payment of, decrees obtained against *A* in his lifetime and against his estate after his death. *B* died in 1873. On the 14th August 1880 *M* instituted a suit against *D* upon his mortgage, and in that suit he made *S* a party defendant as being a purchaser of the mortgagor's interest in one of the mouzahs included in his mortgage. On the 26th June 1882, *M* obtained a decree declaring that he was entitled to recover the amount due by sale of the mortgaged mouzahs. In the proceedings taken in execution of that decree, *M* was opposed by *L*, who was afterwards held to be a benamidar for *S*, who claimed that he had on the 8th November 1880, purchased five out of the seven mouzahs at a sale in execution of certain decrees against *R*. On the 28th February 1884, *L*'s claim was allowed, and on the 11th August 1884, *M* brought this suit against *L*, *S*, *R*, and *D*, and the decree-holders in the suit against *R*

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**ESTOPPEL—continued.****(5) ESTOPPEL BY CONDUCT—continued.**

for a declaration of his right to follow the mortgaged property in the hands of *S*. It was found as a fact that the adoption of *D* was invalid—that the advance by *M* to *B* was justified by legal necessity, and that *L* was the benamidar of *S*. It also appeared that *M* had himself become the purchaser of one of the mortgaged mouzahs. The lower Court gave *M* a decree declaring him to be entitled to recover the full amount of the mortgaged money from the five mouzahs in the hands of *S*. *L* and *S* appealed and *M* filed a cross appeal alleging the adoption to be valid and binding on *S*. It was contended that *S* as the representative of *R* was estopped from denying the validity of *D*'s adoption, and thus having been a party to *M*'s first suit the question as to the liability of the mouzahs to satisfy the mortgage lien was *res judicata* as against him: *Held* that a purchaser at an execution sale is not as such the representative of the judgment-debtor within the meaning of s. 115 of the Evidence Act: *Held*, further, that, though *R* was estopped by his conduct from disputing the validity of the adoption, or of *M*'s rights as mortgagee, *S* being an auction-purchaser was not bound by *R*'s acts, and was not estopped from disputing the adoption as he derived his title by operation of law adversely to *R*, and was thus in a different position from a person claiming under a voluntary alienation. *LALA PARBHU LAL v. MYLNE*.

[I. L. R. 14 Calc. 401]

**8.—Adoption—Suit to establish validity of adoption.]** In a suit to establish the validity of an adoption of the plaintiff by the defendant where it was shown that she had taken him in adoption, brought him up and married him as the adopted son of her husband, and had put herself forward as his mother: *Held*, that the defendant was estopped from denying the validity of the plaintiff's adoption, and could not, when the plaintiff might have lost all right in his natural family, assert that she had not validly adopted him. *RAVJI VINAYAKRAV JAGGANNATH SHAKARSETT v. LAKSHMIBAI*.

[I L R 11 Bom. 381]

**9.—Evidence Act I of 1872, s. 115—Equitable estoppel.]** A decree-holder at a sale in execution of his decree purchased a zemindari share belonging to his judgment-debtors. Afterwards, in execution of a subsequent decree held by another person, the same with other property was again put up for sale. Prior to the sale, the subsequent decree-holder applied to the officer conducting it, stating the fact of the sale and purchase under the previous decree, and requesting that the sale should be confined to a portion of the judgment-debtor's interest which had not been already sold. This application was disallowed, and the whole interest of the judgment-debtors put up for sale, and the prior decree-holder, who was present, made a bid. Ultimately, however, a portion of the property was withdrawn,

**ESTOPPEL—continued.****(5) ESTOPPEL BY CONDUCT—continued.**

and the remainder only was sold, including part of the property sold in execution of the prior decree. The prior decree-holder did not bid again. Afterwards the prior decree-holder brought a suit for a declaration that the share which he had purchased at the sale in execution of his decree was not affected by the auction sale in execution of the subsequent decree: *Held* that the plaintiff was not estopped from claiming such a declaration by his conduct in bidding at the sale at which the defendant had purchased, inasmuch as it could not be said that by bidding he meant to show that he had no title to the property or had waived his title, or that he had encouraged the defendant to purchase, or had power to forbid the sale. *Rai Seeta Ram v. Kishun Dass*, 1 N. W. 402; *McConnell v. Mayer*, 3 N. W. 315; *Agrawal Singh v. Foujdar Singh*, 8 C. L. R. 346, and *Solano v. Ram Lal*, 2 C. L. R. 481, distinguished. *GHERAN v. KUNJ BEHARI*.

[I. L. R. 9 All. 413]

**10.—Prior incumbrancer bidding at auction-sale in execution of decree and not announcing his incumbrance—Sale by first mortgagee in execution of decree upon second mortgage held by him—Interest acquired by purchaser at such sale—Sale of portions of mortgaged property—Mortgagee not compelled to proceed first against unsold portions—Enforcement of mortgage against purchaser not having obtained possession.]** At a sale in execution of a decree for enforcement of a hypothecation-bond, the decree-holder, by permission of the executing Court, made bids, but the property was purchased by another. At that time the decree-holder held a prior registered incumbrance which he did not personally announce. In a suit brought by him subsequently to enforce this incumbrance, it was contended on behalf of the auction-purchaser that he was estopped by his conduct from setting it up as against her: *Held* that there was no estoppel; that under s. 114 of the Evidence Act the Court was entitled to presume that the provisions of s. 287 (c) of the Civil Procedure Code had been complied with, and that consequently the notification of sale disclosed the existence of the incumbrance now sued upon; that the plaintiff was entitled to assume that intending purchasers would read the notification or search the register for the purpose of ascertaining what was the property being sold; and that his rights were not affected by his not having personally announced his incumbrance, nor could it be said that solely by bidding at the sale he had encouraged the purchaser to buy. *Mackenzie v. British Linen Co.*, L. R. 6 App. Ca. 82, and *Gheran v. Kunj Behari*, I. L. R. 9 All. 413, referred to: *Held* also that it could not be said that under the circumstances the plaintiff must be taken to have sold, in execution of his decree, the interest which he held under the bond now in suit; that he could not be compelled to proceed first against those portions of the mortgaged property which had not

**ESTOPPEL—continued.****(5) ESTOPPEL BY CONDUCT—continued.**

been sold; and that the bond was enforceable against a purchaser of part of the mortgaged property who had never obtained possession  
**BANWARI DAS v. MUHAMMAD MASHIAT**

[ I. L. R. 9 All. 690 ]

**11.—Mudras Rent Recovery Act, ss. 3, 9, 79. 80.—Yeomiah lands—Unregistered holder rendering service and granting pattas—Estoppel by acquiescence of person entitled to the yeomiah holding.** A yeomiahdar died leaving a brother who was then out of India. Shortly before his death, he made an invalid assignment of his holding to a third person who performed the service, and granted *pattas* of the land. The holding was resumable on failure of the service. The brother of the late yeomiahdar returned after three years and obtained registration of his title. He now filed this suit to enforce acceptance of *pattas* tendered by him to the raiyats who had already accepted *pattas* from and executed *muchalkas* to the assignee. *Held*, that the suit was not maintainable, as under the circumstances the plaintiff's conduct justified the tenant's belief that the assignee was entitled to collect rent from them until the assignment was questioned by the plaintiff and notice of his title given them.  
**KHADAR v. SUBRAMANYA.**

[ I. L. R. 11 Mad. 12 ]

**12.—Mortgaged land subsequently sold by mortgagee in execution of a money-decree—Purchaser at such sale without notice of mortgage—Mortgagee estopped from subsequently enforcing his mortgage as against purchaser.** Where a judgment-creditor in execution of a money-decree sells property as belonging to his judgment-debtor, he is afterwards estopped from enforcing, as against the purchaser, a previous mortgage of the property which has been created in his own favour, but of which he has given no notice at the time of the sale, and in ignorance of which the purchaser has bid for the property and paid the full price. This principle applies, even though the mortgage-deed has been registered.  
**AGARCHAND GUMAN CHAND v. RAKHMA HANMANT.**

[ I. L. R. 12 Bom. 678 ]

**13.—Benami transaction—Misrepresentation—Heir when bound by the acts of ancestor.** B purchased some property from D (a member of a joint Mitakshara family) in the name of his wife K, with the object of concealing from certain persons that he was the real purchaser, and further lest, in the event of a dispute arising in respect of such property, which was heavily encumbered, his exclusive property might be prejudiced and attached with debt. After the death of her husband K obtained a certificate of guardianship of her infant son S, in which she did not include this property, and in fact continued to treat the property as her own. During S's minority, O, the nephew of D, who was now of age, brought

**ESTOPPEL—continued.****(5) ESTOPPEL BY CONDUCT—continued.**

a suit for pre-emption against K, in respect of this property, and obtained a consent decree under which he took possession. S, then, on attaining majority, instituted a suit against O for the recovery of the property, as the heir and representative of his father, on the ground that K was a mere benamidar. The defence taken by O, amongst others, was that K was the real owner he believed her to be. *Held*, that on the authority of *Luchman Chunder Geer Gosain v. Kalli Churn Singh*, 19 W. R. 292, it was a good defence, for, even on the assumption that the purchase was benami, S as heir of B was bound by the misrepresentation of the latter.  
**CHUNDER COOMAR v. HUBBANS SAHAI**

[ I. L. R. 16 Calc. 137 ]

**14.—Benami transaction—Persons claiming under person who creates the benami.** The mere fact of a benami transfer does not in itself constitute such misrepresentation as to bind all persons claiming under the person who creates the benami. O made a benami gift of his property to his wife A. The deed of gift was registered and purported to be made in consideration of the fixed dower due to A. There was no mutation of names; but O managed the property as A's *am-mukhtar* under a general power-of-attorney executed by her in his favour. On the death of O, A mortgaged the property. At a sale in execution of a decree obtained by the mortgagee against A, the mortgaged property was purchased by the defendants. On the death of A, H and R, the son and daughter of A, sold their shares in the property, which they had inherited from their father O, to the plaintiff. In a suit by the plaintiff against the defendants for a declaration of his right to the shares of H and R, and for partition: *Held*, that the acts of O were not such as to constitute an estoppel as against his heirs, and therefore the plaintiff was entitled to the relief he sought.  
**Luchman Chunder Geer Gosain v. Kalli Churn Singh**, 19 W. R. 292, explained.  
**SARAT CHUNDER DEY v. GOPAL CHUNDER LAHA.**

[ I. L. R. 16 Calc. 148 ]

**15.—Evidence Act (I of 1872), s. 115—Assignee of mortgagee—Right to sue for redemption.** Where the plaintiff in a suit for redemption of a usufructuary mortgage was the original mortgagor, who had by a registered instrument assigned his interest in the mortgaged property to another, and the assignee did not apply to be made a party to the suit, but put forward or consented to have put forward the original mortgagor as the person entitled to redeem: *Held* that as there was nothing in that litigation to show that the defendant-mortgagee was in any way induced to alter his position or to do any act which he would not otherwise have done in consequence of the assignee's conduct, the latter was not estopped by s. 115 of the Evidence Act (I of 1872) or by any principle of equitable estoppel from



**ESTOPPEL—concluded.****(5) ESTOPPEL BY CONDUCT—concluded.**

afterwards suing on his own account for redemption. **MUHAMMAD SAMI-UD-DIN KHAN v. MANNU LAL.**

[I. L. R. 11 All. 386]

**EUROPEAN BRITISH SUBJECT**

See **CASES UNDER JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS.**

See **MAGISTRATE, JURISDICTION OF—POWERS OF MAGISTRATES.**

[I. L. R. 9 All. 420]

—, in Bangalore.

See **HIGH COURT, JURISDICTION OF—HIGH COURT, MADRAS—CRIMINAL.**

[I. L. R. 12 Mad. 39]

**EVIDENCE—CIVIL CASES.**

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**(1) DECREES, JUDGMENTS AND PROCEEDINGS IN FORMER SUITS.****(a) GENERALLY.**

1.—*Statements made by parties managing properties in suit—Evidence of conduct* ] The appellants filed an application for the admission in evidence of certified copies of certain judgments and decrees rejected by the lower Court. The appellants sought to make use of these documents not as constituting matters in dispute *res judicata*, but as containing summaries of statements made by parties concerned in the management of the plaint properties and as evidence of conduct: *Held*, that the documents were inadmissible in evidence. **SUBRAMANYAN v. PARAMASWARAN.**

[I. L. R. 11 Mad 116]

**EVIDENCE—CIVIL CASES—continued.****(1) DECREE, JUDGMENTS AND PROCEEDINGS IN FORMER SUITS—contd.****(b) UNEXECUTED, BARRED AND EX-PARTE DECREES.**

1.—*Estoppe!—Ex-parte decree, Effect of—Rate of rent—Rent suit—Civil Procedure Code (Act XIV of 1882), s. 13.* ] A mere statement of an alleged rate of rent in a plaint in a rent-suit in which an *ex-parte* decree has been obtained, is not a statement as to which it must be held that an issue within the meaning of s. 13 of the Code of Civil Procedure was raised between the parties so that the defendant is concluded upon it by such decree. Neither a recital in the decree of the rate of rent alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter a *res judicata*, assuming that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case. **MODHU SUDUN SHAHA MUNDUL v. BRAE.**

[I. L. R. 16 Calc. 390]

**(c) DECREES AND PROCEEDINGS NOT INTER PARTES.**

3.—*Evidence Act (I of 1872), s. 13—Custom—Admissibility in evidence of judgments not “inter partes.”* ] In a suit for rent the amount of the land held by the defendant was questioned, and it was contended that the land must be measured with a *hath* of 21½ inches and not one of 18 inches, as claimed by the plaintiff zemindar. Certain decrees obtained by the zemindar against other tenants in the same pergunnah in suits in which 18 inches had been taken as the *hath* were tendered in evidence in support of the plaintiff's contention that the customary *hath* in the pergunnah was one of 18 inches: *Held*, that such decrees were admissible in evidence under the provisions of s. 13 of the Evidence Act, as they furnished evidence of particular instances in which a custom was claimed. **JIANUTULLAH SIRDAR v. ROMONI KANT ROY, PIR BUKSH MUNDUL v. ROMONI KANT ROY.**

[I. L. R. 15 Calc. 233]

4.—*Suit for pre-emption—Evidence of custom—Decree enforcing right.* ] In suit for pre-emption based on custom, evidence of decrees passed in favour of such a custom, in suits in which it was alleged and denied, is admissible evidence to prove its existence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom. **Guggu Lal v. Fateh Lal, I. L. R. 6 Calc. 171**, distinguished. **Koodootoolah v. Mohinee Mohun Shaha, 5 Rev. Civ and Cr. Rep. 290 Sheo Churn v. Goodar, 3 Agra 138**; and **Lachman Rar v. Akbar Khan, I. L. R. 1 All 440**, referred to. **GURDAYAL MAL v. JHANDU MAL.**

[I. L. R. 10 All. 585]



EVIDENCE—CIVIL CASES—*continued.*(1) DECREES, JUDGMENTS. AND PROCEEDINGS IN FORMER SUITS—*concl'd.*(c) DECREES AND PROCEEDINGS NOT INTER PARTES—*concluded.*

5.—*Evidence Act, ss 13, 42—Relevancy of judgments in suits in which right was asserted to collect dues for a temple.* In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple. *Held*, that judgments in other suits against other persons in which claims under the same right had been decreed in favor of the trustees of the temple were relevant under s. 13 of the Evidence Act as being evidence of instances in which the right claimed had been asserted. *Held*, also, that the said judgments were relevant under s. 42 of the said Act as relating to matters of a public nature. *RAMASAMI v. APPAVU.*

[I. L. R. 12 Mad. 9]

## (2) MAPS.

6.—*Survey map—Suit for possession—Ejectment—Evidence of possession and title* In a suit for possession of certain land as appertaining to a certain estate and for ejectment of the defendant, brought by a purchaser at a revenue sale, the only evidence adduced by the plaintiff was two survey maps of the years 1846-47 and 1865-66. The lower Court gave the plaintiff a decree for only a portion of the land claimed, such portion being included in both of the maps. The remainder of the land claimed was not included in the map of 1846-47: *Held*, that a survey map is evidence of possession at a particular time, *viz.*, the time at which the survey was made, and may be evidence of title, but as to whether it is sufficient evidence or not, is a question to be decided in each particular case. *Held*, further, that as the two maps showed that the portion of the land decreed to the plaintiff was in his predecessor's possession at the date of both surveys—that is to say, at two periods with an interval of nearly twenty years between them—they might be sufficient evidence of title, and the decree of the lower Court was correct. *Mohesh Chundra Sen v Juggut Chundra Sen*, I. L. R. 5 Cal 212, discussed. *SYAM LAL SAHU v. LUCHMAN CHOWDHRY.*

[I. L. R. 15 Cal 353]

7.—*Thak-Maps—Boundary—Title, Question of.* The sole question for determination being a question of the boundary of two taluks, the Judge hearing the case refused to give effect to a certain thak-map which had been prepared in 1859, and upon the face of which appeared what were admitted by the parties then owning the taluks to be the boundary lines of the taluks at the time; no evidence was given showing that these boundary lines had ever been altered. *Held*, that the map was clearly evidence of what the boundaries of the properties were at the time

EVIDENCE—CIVIL CASES—*continued.*(2) MAPS—*concluded.*

of the permanent settlement, and also as to what they admittedly were in 1859. *SYAMA SUNDERI DASSYA v. JOGORUNDHU SOOTAR.*

[I. L. R. 16 Cal. 186]

## (3) MISCELLANEOUS DOCUMENTS.

## (a) BOOKS.

8.—*Historical works—Evidence of usage or local custom.* Observations on the use of books of history to prove local custom. *VALABHA v. MADUSUDANAN.*

[I. L. R. 12 Mad. 495]

## (b) PEDIGREE

9.—*Aliyasuntana law—Partition—Evidence—Admissibility as to pedigree in a document that has been set aside by the Court* In a suit for division of the property of an extinct divided branch of the family of the parties who were governed by the Aliyasuntana law, a written agreement which had been set aside by the Court as against the defendants was offered in evidence by the plaintiff to prove that the parties were of equal grade of relationship, in which case it was admitted that partition was enforceable. *Held*, that the written agreement was admissible as evidence of pedigree and that the plaintiff was entitled to the decree sought for. *TIMMA v. DARAMMA.*

[I. L. R. 10 Mad. 362]

## (c) PETITIONS.

10.—*Admissibility of petition signed by a person available but not called as witness* A, the son of a deceased zemindar, sued B and C, his widow and brother, for possession of the zemindari, which was impartible. In order to prove that A was illegitimate, C filed two petitions purporting to have been signed and sent to the Collector of the district by C, in 1871, referring to A's mother as a concubine. C was not examined as a witness: *Held*, that their contents were not evidence, but the petitions were themselves evidence to show that a complaint was made as mentioned therein. *PARYATHI v THIRUMALAI.*

[I. L. R. 10 Mad. 334]

## (d) REGISTERS.

11.—*Winding up Company—Proof of person being share-holder—Register of members—Presumption of membership* The evidence adduced by the official liquidator to show that the defendant was a member of the Company and so liable as a contributory, consisted of the register of members, a letter written by the objector, a reply thereto written by a managing director of the Company, and the oral testimony of the director himself. The objector adduced no evidence at all. *Held*, that the official liquidator might, if he had chosen to do so, have put the register in evidence and waited, before giving any further evidence

**EVIDENCE—CIVIL CASES—continued.****(3) MISCELLANEOUS DOCUMENTS—concluded.****(d) REGISTERS—concluded.**

until the objector had given some to displace the *prima facie* evidence afforded by the register, or to impugn the character of the register; but his case must be looked at as a whole, and having taken the line which he did, he must take the consequence of his other evidence contradicting or impugning the *prima facie* evidence of the register, and, notwithstanding that the objector gave no evidence, the register was not conclusive. **RAM DAS CHAKRABATI v. OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY.**

[I. L. R. 9 All. 366]

**(e) SIGNATURE.**

**12.—Evidence Act, s. 32, cl. (2)—Evidence—Deed—Proof of deed denied by the party by whom it was executed, where attesting witnesses were dead.]** A deed of conveyance was tendered in evidence which purported to bear the mark of G as vendor, and which was duly attested by four witnesses. G, however, denied that she had ever executed the deed, and said that the mark was not her's. All the attesting witnesses were dead. A witness was called who knew the handwriting of one of the attesting witnesses, and who swore that the signature of that witness to the attestation clause of the deed was genuine. *Held*, on the authority of *Whitelocke v. Musgrove*, 2 Cr. & M. 511, that the deed was admissible in evidence, its execution by G being sufficiently proved. **ABDULLA PARU v. GANNIBAI**

[I. L. R. 11 Bom. 690]

**(4) SECONDARY EVIDENCE.****(a) GENERALLY.**

**13.—Evidence Act (I of 1872), ss. 65 and 74—Secondary evidence of contents of document—Public document.]** Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such manner as to bring it within one or other of the cases provided for in s. 65 of the Evidence Act I of 1872. **KRISHNA KISHORI CHAUDHRANI v. KISHORI LAL ROY.**

[I. L. R. 14 Calc 486]

[L. R. 14 I. A. 71]

**14.—Evidence Act (I of 1872), ss. 65, 66—Admission of secondary evidence.]** On an appeal to the Judicial Committee from a decree given on first appeal by an Appellate Court, and maintaining a finding of fact by the Original Court, the only question was whether secondary evidence had been properly admitted on a case that had arisen for its admission. The question was decided in the affirmative by their Lordships on the ground that whether the evidence offered would itself prove the making of the document or not, it formed good ground for holding that there was a document capable of being proved

**EVIDENCE—CIVIL CASES—continued****(4) SECONDARY EVIDENCE—continued.****(a) GENERALLY—concluded.**

by secondary evidence admissible with reference to the Indian Evidence Act (I of 1872), ss. 65, 66. **LUCHMAN SINGH v. PUNA.**

[I. L. R. 16 Calc 753]

[L. R. 16 I. A. 125]

**(b) UNSTAMPED OR UNREGISTERED DOCUMENTS.**

**15.—Evidence Act, s. 91—Suit for money lent—Unstamped promissory note—Cause of action.]** The terms of a contract to repay a loan of money with interest having been settled and the money paid, a promissory note specifying these terms was executed latter in the day by defendant and given to plaintiff. This promissory note was not stamped. In a suit brought to recover the unpaid balance of the loan on an oral contract to pay: *Held*, that plaintiff could not recover. **POTHI REDDI v. VELAYUDASIVAN.**

[I. L. R. 10 Mad. 94]

**16.—Evidence Act, s. 91—Contract—Promissory note executed by way of collateral security—Unstamped document—Admissibility of evidence of consideration aliunde.]** A decree-holder agreed with the employer of his judgment-debtor who had been arrested in execution of the decree, to discharge the latter from arrest upon the condition that his master would pay the amount of the debt. Accordingly, the master executed a document, the material portion of which was as follows: "Be it known that I have borrowed Rs. 986-15 from you in order to pay a decree which was due to you by D P, so I write this in your favour to say that I will pay the said amount to you in six months with interest at 12 annas on every hundred rupees every month, and then take back this *parwana* from you" This was written upon plain unstamped paper. Subsequently, the amount due not having been paid, the decree-holder sued the executant of the document for its recovery. It was objected that the suit was not maintainable without the document being put in evidence, but that, being a promissory note and not stamped as required by art. 11 of sch. i. of the General Stamp Act (I of 1879), it was inadmissible in evidence, with reference to s. 34. *Held*, that the document, though it was a promissory note, was not the contract out of which the defendant's liability arose, but was merely a collateral security for the defendant's fulfilment of his promise to pay the debt, and that under the circumstances the plaintiff was entitled to give evidence of consideration, and to maintain the suit as for money lent, apart from the note altogether. **BALBHADAR PRASAD v. THE MAHARAJA OF BETTIA.**

[I. L. R. 9 All. 351]

**17.—Evidence Act, s. 65, cl. (b), and s. 91—Stamp Act (I of 1879) s. 34, Prov. I—Suit on an unstamped promissory note.]** The plaintiff sued

**EVIDENCE—CIVIL CASES—continued.****(4) SECONDARY EVIDENCE—continued****(b) UNSTAMPED OR UNREGISTERED DOCUMENTS—continued**

to recover from the defendant the balance of a debt due on an unstamped note passed to him by the defendant for consideration of Rs. 38. The note recited that the defendant had received the amount, and would repay it after three months from the date of its execution. The defendant admitted, by his written statement, execution of the note and the receipt of Rs. 37 in the shape of paddy, but alleged that he had paid off the debt. He also contended that the note being unstamped could not be admitted in evidence. The plaintiff contended that the note was a bond, and could be admitted on payment of the stamp-duty and the penalty, under s. 34 of the Stamp Act I of 1879, which he offered to pay. The Subordinate Judge was of opinion that the note in question was a promissory note, but that the defendant's admission of the consideration enabled the plaintiff to sue, although the note itself was inadmissible. On reference to the High Court: *Held per JARDINE, J.*, that the document sued on was a promissory note, and that the suit being brought on it as the original cause of action, the admission of its contents by the defendant did not avail the plaintiff, the document itself being inadmissible for want of a stamp. *Held per BIRDWOOD, J.*, that the plaintiff could not recover irrespectively of the promissory note, as he did not seek to prove the consideration otherwise than by the note which was inadmissible in evidence. The admission contained in the defendant's written statement did not amount to an admission of the claim as for money lent. The case was one in which no secondary evidence under s. 65, cl. (b) of Act I of 1872 was admissible, the primary evidence, the document itself, being forthcoming. The plaintiff not having offered any independent evidence of the advance alleged by him, and the defendant not having admitted by his written statement that any money was lent to him, as alleged by the plaintiff, but having set up an entirely different transaction, in respect of which he admitted no remaining liability, the plaintiff's suit should be rejected. *DAMODAR JAGANNATH v. AIMARAM BABAJI.*

[I. L. R. 12 Bom. 443]

18.—*Contract Act, s. 91—Hypothecation bond given for amount of account stated—Unregistered bond—Suit on account stated.* The plaintiff sued (1) for registration of a hypothecation bond executed by the defendant, (2) in the alternative for recovery of the amount of the bond upon an account stated. The defendant denied execution of the bond, and that she had had any dealings or stated any account with the plaintiff. The Courts below disallowed the first claim as barred by limitation, and disallowed the second on the ground that the bond had effected a novation of the contract implied by

**EVIDENCE—CIVIL CASES—continued.****(4) SECONDARY EVIDENCE—continued.****(b) UNSTAMPED OR UNREGISTERED DOCUMENTS—continued**

the statement of accounts, and the plaintiff not being able to produce the bond or to maintain a suit on it by reason of its being unregistered, and the registration having been refused owing to the denial of execution by the defendant, the claim on the account stated failed. *Held*, that this decision was wrong and that the plaintiff was entitled to sue upon the account stated. *Sirdar Khar v. Chandrawati*, I. L. R. 4 All. 530, distinguished. Where two parties enter into a contract of which registration is necessary, it is essential that each should do for the other all that is requisite towards such registration. *KIAM-UD-DIN v. RAJJO.*

[I. L. R. 11 All. 13]

**(c) LOST OR DESTROYED DOCUMENTS.**

19.—*Civil Procedure Code, s. 525—Loss of award, Procedure on.* When an award has been lost, a Court acting under s. 525 of the Code of Civil Procedure, cannot take secondary evidence of its provisions and pass a decree accordingly. *GOPI REDDI v. MAHANANDI REDDI.*

[I. L. R. 12 Mad. 331]

**(d) NON-PRODUCTION FOR OTHER CAUSES.**

20.—*Mahomedan Law—Dower—Written contract, Effect of failing to prove, when alleged.* A suit was brought by a Mahomedan wife for dower alleged to be due to her under a *kabinnamah* executed by her husband at the time of the marriage. She alleged the amount of dower to be Rs. 10,000, of which Rs. 5,000 was prompt and Rs. 5,000 deferred, and she claimed to be entitled to the whole on the ground that she had lawfully divorced her husband in pursuance of power reserved to her in that behalf by the *kabinnamah*. At the hearing she failed to prove the *kabinnamah*, but the Court gave her a decree, holding that there was evidence to show that a dower of Rs. 10,000 was usually payable in that plaintiff's family, and that, in the absence of evidence to the contrary, the whole amount must be considered prompt, but as the plaintiff only claimed Rs. 5,000 as prompt, the decree was limited to that amount. *Held* that the Court was wrong in decreeing the case upon an oral contract not alleged in the plaint, nor admitted by the defendant, the suit being based upon a written agreement, which the plaintiff failed to prove. *KHAJA MAHOMED ASGHUR v. MANIJA KHANUM alias BAKKA KHANUM.*

[I. L. R. 14 Calc. 420]

**(c) COPIES OF DOCUMENTS, &c.**

21.—*Evidence Act ss. 16, 114—Company—Winding up—Contributories—Shareholders—Notice of allotment—Secondary evidence of notice—Press-copy letter—Evidence of original letter having been properly addressed and posted.* Upon the settlement of the list of contributories to the

**EVIDENCE—CIVIL CASES—concluded.****(4) SECONDARY EVIDENCE—concluded.****(c) COPIES OF DOCUMENTS, &c.—concluded.**

assets of a Company in course of liquidation under the Indian Companies Act, one of the persons named in the list denied that he had agreed to become a member of the Company or was liable as a contributory. The District Court admitted as evidence on behalf of the official liquidator, a press-copy of a letter addressed to the objector, for the purpose of proving that a notice of allotment of shares was duly communicated. No notice to the objector to produce the original letter appeared on the record; but at the hearing of the appeal, it was alleged by the official liquidator and denied by the objector, that such notice had been in fact given. There was no evidence as to the posting of the original letter, or of the address which it bore; but the press-copy was contained in the press-copy letter-book of the Company, and was proved to be in the handwriting of a deceased secretary of the Company, whose duty it was to despatch letters after they had been copied in the letter-book. The objector denied having received the letter or any notice of allotment: *Held* that the Court should not draw the inference that the original letter was properly addressed or posted; that the press-copy letter was inadmissible in evidence; and that there was no proof of the communication of any notice of allotment. **RAM DAS CHAKRABARTI v. OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY.**

[I. L. R. 9 All. 366]

**22—Evidence Act (I of 1872), ss. 65, 66—Admission of secondary evidence—Copy of document.** On an appeal to the Judicial Committee from a decree given on first appeal by an Appellate Court, and maintaining a finding of fact by the Original Court, the only question was whether the evidence offered constituted secondary evidence of the matter in dispute, which was the making of a document. The question was decided in the affirmative by their Lordships, because the evidence consisting of a copy which was made of a document, and filed (in another suit) among the records of the Court, and still there, endorsed, "copy in accordance with the original," signed by the Judge who presided in the Court, who alone was authorized to compare and accept such copy, there were grounds for considering it genuine. **LUCHMAN SINGH v. PUNA.**

[I. L. R. 16 Calc. 753]

[L. R. 16 I. A. 125]

**EVIDENCE—CRIMINAL CASES.***Col.*

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**EVIDENCE—CRIMINAL CASES—contd.****(1) DEPOSITIONS.**

**1—Criminal Procedure Code, s. 509—Deposition of medical witness taken by Magistrate tendered at sessions trial—Magistrate's record not showing, and evidence not adduced to show that deposition was taken and attested in accused's presence—Deposition not admissible in evidence—Evidence Act (I of 1872), s. 114, illustration (c).]** Before the deposition of a medical witness taken by a committing Magistrate can, under s. 509 of the Criminal Procedure Code, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record or be proved by the evidence of witnesses to have been taken and attested in the accused's presence. It should not merely be presumed, under s. 114, illustration (c) of the Evidence Act (I of 1872) to have been so taken and attested. **QUEEN-EMPRESS v. RIDING**

[I. L. R. 9 All. 720]

**2—Criminal Procedure Code, s. 509—Deposition of medical witness taken by Magistrate tendered at sessions trial—Magistrate's record not showing, and evidence not adduced to show, that deposition was taken and attested in accused's presence—Evidence Act (I of 1872), s. 80.]** Although all depositions of witnesses in criminal cases should be taken and attested in the presence of the accused, and a few apt words should be used on the face of the deposition to make it apparent that this has been done there is no provision of the law which makes the attestation of the deposition by the Court in the presence of the accused obligatory. S. 80 of the Evidence Act therefore does not warrant the presumption that the deposition of a medical witness taken by a committing Magistrate has been taken and attested in the accused's presence, so as to make such deposition admissible in evidence at the trial before the Court of Session under s. 509 of the Criminal Procedure Code. **Queen-Empress v. Riding, I. L. R. 9 All. 720,** referred to. **QUEEN-EMPRESS v. POH! SINGH.**

[I. L. R. 10 All. 174]

**3—Criminal Procedure Code, s. 288—Evidence—Confession retracted—Corroboration—Depositions of witnesses before Magistrate.]** Where a prisoner was convicted of murder on a confession, retracted at the trial, corroborated by depositions read under s. 288 of the Code of Criminal Procedure, and also retracted at the trial. *Held* that the prisoner should not have been convicted on such evidence. **QUEEN-EMPRESS v. BHARMAPPA**

[I. L. R. 12 Mad. 123]

**(2) EXAMINATION AND STATEMENTS OF ACCUSED.**

**4—Criminal Procedure Code, ss. 312, 364—Withdrawal of uncorroborated evidence by the witness—Examination of the accused—Confessions.]** A and B were charged with the murder of C, the husband of B. There was some evidence that

EVIDENCE—CRIMINAL CASES—*contd.*(2) EXAMINATION AND STATEMENTS OF ACCUSED—*concluded.*

*B* had said her husband was dead a few days after his disappearance; and some bones, a skull, and some cloths were found in a neighbouring burying ground which were identified as those of *C*. *B* made a statement, recorded on June 4th by the village munsif, to the effect that she had lured *C* into a garden, and that *A*, who was her paramour, had murdered him in her arms, which statement she repeated frequently with greater detail in answer to questions from the committing Magistrate, and subsequently before the Sessions Court. On her appeal to the High Court after she had been sentenced to death, she retracted her former statements and made the usual charges of ill-treatment against the Police. *A* made a statement to the committing Magistrate which he subsequently repudiated before the Sessions Court, to the effect that he had assisted in disposing of the corpse of *C* at the request of his brother-in-law, who corroborated the statement in two depositions before the Magistrate which were likewise repudiated by the deponent before the Sessions Court: *Held*, that the conviction of *A* was wrong and further (PARKER, J., dissenting) that the conviction of *B* was wrong. *Per* KERNAN, J.—“As the second prisoner has withdrawn all the confessional statements made by her, it is necessary, according to the rulings of this Court, to examine the evidence and see if there is reliable independent evidence to corroborate to a material extent and in material particulars the statements contained in the withdrawn confessional statements. If no such corroborative evidence exists, then the contradictory statements of the second prisoner remain and doubt exists as to which statement is true, and the confessional statements cannot be safely relied on against the prisoner.” *Sumbe.*—The same rule should be followed when a witness withdraws his deposition before the Sessions Court. *Per* KERNAN, J.—“The examination of an accused person under Criminal Procedure Code, s. 364, is subject to the purpose referred to in s. 312, *viz.*, “to enable him to explain any circumstances appearing against him,” and not to supplement the case for the prosecution against him to show that he is guilty. QUEEN-EMPRESS *v.* RANGI.

[I. L. R. 10 Mad. 295]

## (3) MEDICAL EVIDENCE

5.—*Experts, Evidence of—Medical examination, Evidence of—Opinion of experts, how elicited—Evidence Act (I of 1872), s. 45.* A medical man who has not seen a corpse which has been subjected to a *post-mortem* examination, and who is called to corroborate the opinion of the medical man who made such *post-mortem* examination, and who has stated what he considered was the cause of death, is in a position to give evidence of his opinion as an expert. The proper mode of eliciting such opinion is to put the signs observed at the *post-mortem* to the witness and to

EVIDENCE—CRIMINAL CASES—*contd.*(3) MEDICAL EVIDENCE—*concluded.*

ask what in his opinion was the cause of death on the hypothesis that those signs were really present and observed. QUEEN-EMPRESS *v.* MEHER ALI MULLICK.

[I. L. R. 15 Calc. 589]

## (4) PREVIOUS CONVICTIONS

6.—*Previous conviction for the purpose of increasing the evidence at the trial against accused—Evidence Act (I of 1872), s. 54—Criminal Procedure Code (Act X of 1882) s. 310.* Under s. 54 of the Evidence Act a previous conviction is in all cases admissible in evidence against an accused person. QUEEN-EMPRESS *v.* KARTICK CHUNDER DAS

[I. L. R. 14 Calc. 721]

## (5) STATEMENTS TO POLICE-OFFICERS.

7.—*Evidence Act, ss. 153 and 159—Criminal Procedure Code (Act X of 1882), s. 162—Statement taken down by a police-officer under s. 162—Evidence.* A statement reduced to writing by a police-officer under s. 162 of the Code of Criminal Procedure (Act X of 1882) cannot be used as evidence for the accused. But though it is not evidence, the police-officer, to whom it was made, may use it to refresh his memory under s. 159 of the Evidence Act (I of 1872), and may be cross-examined upon it by the party against whom the testimony aided by it is given. The person making the statement may also be questioned about it, and, with a view to impeach his credit, the police-officer, or any other person in whose hearing the statement was made, can be examined on the point under s. 155 of the Evidence Act. *Reg. v. Uttamchand*, 11 Bom. 120, followed. QUEEN-EMPRESS *v.* SITARAM VITHAL

[I. L. R. 11 Bom. 657]

8.—*Criminal Procedure Code, 1882, s. 161—Statement taken down by police-officer.* A statement taken down in the course of a police investigation by a police-constable under s. 161 of the Criminal Procedure Code (Act X of 1882) is not evidence at any stage of a judicial proceeding. QUEEN-EMPRESS *v.* ISMAIL VALAD FATARU.

[I. L. R. 11 Bom. 659]

9.—*Statement of accused to police-officer during investigation—Admission—Confession—Criminal Procedure Code, ss. 25, 26, 27.* Instances of statements made by an accused person to a police officer held to be admissible or inadmissible in evidence against such accused person. QUEEN-EMPRESS *v.* MEHER ALI MULLICK.

[I. L. R. 15 Calc. 589]

10.—*Evidence Act, ss. 26, 27—Confessional statements made in the custody of police—Test of admissibility.* The test of the admissibility under s. 27 of the Evidence Act of information

**EVIDENCE—CRIMINAL CASES—concl'd.****(5) STATEMENTS TO POLICE-OFFICERS—concluded.**

received from an accused person in the custody of a police-officer, whether amounting to a confession or not, is.—“Was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact?” *QUEEN-EMPRESS v. COMMER SAHIB*.

[I. L. R. 12 Mad. 153]

11.—*Criminal Procedure Code (Act X of 1882) ss. 116, 172, 211—Statements of witnesses recorded by police-officers investigating under chap. XIV. Criminal Procedure Code, Right of accused to call for and inspect—Police Diaries.* Statements of witnesses recorded by a police-officer, while making an investigation under s. 161 of the Criminal Procedure Code, form no portion of the police diaries referred to in s. 172, and an accused person on his trial has a right to call for and inspect such statements and cross examine the witnesses thereon. *BIKAO KHAN v. QUEEN-EMPRESS*.

[I. L. R. 16 Calc. 610]

*MAHOMED ADI HADJI v. QUEEN-EMPRESS.*

[I. L. R. 16 Calc. 612 note]

**EVIDENCE—PAROL EVIDENCE Col.**

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See SUCCESSION ACT, s. 128.

[I. L. R. 15 Calc. 83]

**(1) VALUE OF, IN VARIOUS CASES.**

1.—*Limitation Act, 1877. s. 19—Oral evidence of acknowledgment.* Under s. 19 of the Limitation Act, XV of 1877, oral evidence of the contents of an acknowledgment cannot be received. *ZIULNISSA LADLI BEGAM v. MOTIDEV RATANDEV*.

[I. L. R. 12 Bom. 268]

**(2) VARYING OR CONTRADICTING WRITTEN INSTRUMENTS**

2.—*Evidence Act, s. 92* ] Where the defendant claimed the property as a preferential heir, and also set up an alternative defence of an alleged oral agreement cancelling a registered deed of sale of property by her co-widow to the plaintiffs, the lower Court was of opinion that proviso 4 of s. 92 of the Evidence Act I of 1872 was a bar to any inquiry into the merits of this defence. *Held*, that the lower Court was wrong. The object of the oral agreement was not to rescind the original transaction, but to transfer any rights acquired by the plaintiffs, to the defendant, and was an entirely new transaction. *RAKHMABAI v. TUKARAM*.

[I. L. R. 11 Bom. 47]

**EVIDENCE—PAROL EVIDENCE—cont'd.****(2) VARYING OR CONTRADICTING WRITTEN INSTRUMENTS—continued.**

3.—*Evidence Act, s. 92—Agreement for renewal inconsistent with terms of lease.* In a suit by a lessor for possession and for occupation after the expiry of a lease for three years, the defendant pleaded that it had been verbally agreed between himself and his lessors that he should be entitled to a renewal of the lease for a further period of three years, if he so desired: *Held* that evidence of this oral agreement was inadmissible under s. 92 of the Indian Evidence Act I of 1872 being inconsistent with the terms of the second clause of the lease, which was as follows:—“If you mean me to vacate at the completion of the term, you must give one month's notice. In accordance therewith I will vacate and give up possession to you.” *EBRAHIM PIR MAHOMED v. CURSETJI SORABJI DE VITRE*.

[I. L. R. 11 Bom. 644]

4.—*Evidence Act, s. 22—Verbal assignment of rent of land in lieu of interest—Jamog* ] Subsequently to the execution and registration of a bond, a *jamog* was made orally between the creditor and debtor, by which the former agreed to take the rents of certain tenants of the latter in satisfaction of interest, the latter agreed to release the tenants from payment of rent to himself and the tenants (who who were parties to the arrangement) agreed to pay their rents to the creditor. No mutation of names was effected in the revenue registers. The creditor brought a suit against the debtor to recover the principal and interest agreed to be paid under the bond, alleging that he had never received any rents under the *jamog*: *Held* that the *jamog* was not a subsequent oral agreement rescinding or modifying a contract which was registered according to the law for the time being in force, within s. 92, proviso (4) of Act I of 1872. *AUTU SINGH v. AJUDHIA SAHU*.

[I. L. R. 9 All 249]

5.—*Evidence Act, s. 92—Bond—Contemporaneous oral agreement providing for mode of repayment.* In defence to a suit upon a hypothecation bond payable by instalments, it was pleaded that, at the time of the execution of the bond, it was orally agreed that the obligee should, in lieu of instalments, have possession of part of the hypothecated property, until the amount due on the bond should have been liquidated from the rents; that, in accordance with this agreement, the plaintiff obtained possession of the land; and that he thus realized the whole of the amount due: *Held* that the oral agreement was not one which detracted from, added to, or varied the original contract, but only provided for the means by which the instalments were to be paid, and that it was therefore admissible in evidence. *RAM BAKSH v. DURJAN*.

[I. L. R. 9 All 392]

**EVIDENCE—PAROL EVIDENCE—*contd.*****(2) VARYING OR CONTRADICTING WRITTEN INSTRUMENTS—*continued.***

6.—*Evidence Act, s. 92—Civil Procedure Code, s. 317.*] By an agreement in writing, A, after reciting that he bid for certain property sold in execution of a decree *benami* for B, and paid the deposit amount into Court for B, and that B paid the balance, promised to convey the property to B. In a suit by B to recover the property from A. *Held* that, under s. 92 of the Evidence Act, B was not debarred from proving that A bought the property for himself and not *benami* for B. *KUMARA v. SRINIVASA.*

[I. L. R. 11 Mad. 213]

7.—*Evidence Act, 1872, s. 92—Evidence—Oral agreement inconsistent with written documents.*] R, prior to his death, was a partner with defendants in the firm of N C & Co. He died on 8th November 1884. On the 9th November 1885, his executors passed a release to the defendants, which decided that R's share in the firm and future business had ceased on his death; that the surviving partners had requested the executors to settle the account of their testator with the firm, and that, after examining the books and taking accounts, &c., a balance of Rs. 8,395-11 was found due, on payment whereof the executors released the defendants from all claims in respect of the share and interest of R, &c. On the 7th April 1887, the executors assigned over to the plaintiff a one-anna share in the said firm, and the plaintiff as assignee, brought this suit for a declaration of his right to the share and for an account. He alleged that there had been no accurate examination of the books at the time of the release; that the amount really due to the testator's estate by the firm had not been ascertained; and that it had been agreed on by the partners, at the time of the release, that, in addition to the sum therein mentioned, the executors, as representing the testator's estate, should receive a one-anna share in the partnership. The defendants denied the right of the plaintiff, and contended that the interest of R and his estate in the partnership ceased at his death. They relied on the release, and denied any agreement to give the executors a share; and contended that, under s. 92 of the Evidence Act I of 1872, no evidence could be given of the alleged agreement. For the plaintiff it was contended that the agreement as to the one-anna share was quite independent of the release. *Held* that evidence of the agreement that the executors should continue to have a one-anna share in the partnership was inadmissible, as being inconsistent with the written release (Evidence Act, s. 92). By the release the executors of R released the partners from all claims whatever in respect of R's share, and the consideration for that release was stated in the document to be a lump sum, on payment of which, under the writing, all claims arising out of the old partnership ceased and determined. The oral agreement added another term to the consideration for release in respect of the past accounts, viz., the continu-

**EVIDENCE—PAROL EVIDENCE—*concl'd.*****(2) VARYING OR CONTRADICTING WRITTEN INSTRUMENTS—*concluded.***

ance of a one-anna share in the partnership. Such an agreement was not a purely collateral or additional agreement. It was an addition to the terms of a contract that had been reduced to writing, and was inconsistent with those terms. *COWASJI RUTTONJI LIMBOOWALLA v. BURJORJI RUSTOMJI LIMBOOWALLA.*

[I. L. R. 12 Bom. 335]

8.—*Evidence Act, s. 92, Provision I—Contract—Wagering contract—Bombay Act III of 1865—Oral evidence admissible to prove a contract to be a gaming transaction.*] In an action on a contract for the purchase and sale of goods on a certain day the defendant pleaded that the contract was a wagering contract; that the parties never intended to give or take delivery of the cotton, and that the contract was therefore void: *Held* that oral evidence was admissible to prove the defence set up by the defendant. *ANUPCHAND HEMCHAND v. CHAMPSI UGERCHAND.*

[I. L. R. 12 Bom. 585]

9.—*Exclusion of evidence of oral agreement—Evidence Act (I of 1872), s. 92—"Between the parties."*] The words in s. 92 of the Evidence Act (I of 1872) "between the parties to any such instrument" refer to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favor a deed of sale purported to be executed, from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to the purchase, and that the plaintiff was solely entitled to the property to which it related. *It* conveyed certain houses and promises to plaintiff and defendant jointly by a sale-deed. Plaintiff sued defendant for ejectment from the premises, alleging that he alone was the real purchaser, and that defendant was only nominally associated with him in the deed: *Held* that s. 92 of the Evidence Act did not preclude plaintiff from showing by oral evidence that he alone was the real purchaser, notwithstanding that the defendant was described in the sale-deed as one of the two purchasers. *MULCHAND v. MADHO RAM.*

[I. L. R. 10 All. 421]

**EVIDENCE ACT (I OF 1872), s. 3.***Sec. s. 57.*

[I. L. R. 14 Cal. 176]

—, s. 3.

"Court," *Meaning of.*] The definition of "Court" given in the Evidence Act (I of 1872) is framed only for the purposes of the Act itself, and should



EVIDENCE ACT (I OF 1872), s. 3.—*contd.*  
not be extended beyond its legitimate scope.  
QUEEN-EMPRESS v. TULJA

[I. L. R. 12 Bom. 36

—, s. 13.

See EVIDENCE—CIVIL CASES—DECREES,  
JUDGMENTS AND PROCEEDINGS IN  
FORMER SUITS — DECREEES AND  
JUDGMENTS NOT INTER PARTES.

[I. L. R. 15 Calc. 233

[I. L. R. 12 Mad. 9

—, s. 16.

See COMPANY—WINDING UP—GENERAL  
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—, s. 25.

See EVIDENCE — CRIMINAL CASES —  
STATEMENTS TO POLICE-OFFICERS.

[I. L. R. 15 Calc. 589

—, s. 26

See CONFESSION—CONFESSIONS TO MA-  
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—, s. 27

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—, s. 32, cl. 2.

See DEED—EXECUTION.

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See EVIDENCE—CIVIL CASES—MISCELLA-  
NEOUS DOCUMENTS—SIGNATURE.

[I. L. R. 11 Bom. 690

—, s. 32, cl. 3.—*Declaration of party against  
proprietary interest—Presumption of party being  
dead.* In 1847, A, a Hindu widow, executed in  
favour of B a *varaspatra* (a deed of heirship) in  
the following terms: "My husband has died.  
We have no issue, and you are a son of my hus-  
band's cousin. Taking this into consideration,

EVIDENCE ACT (I OF 1872), s. 32, cl. 3—  
*continued.*

my husband expressed his wish, when he was on  
the point of death, that all the houses and shops  
situate in Poona, except the house at Benares,  
should be given to you, and that you should be  
made owner of all money-dealings connected with  
Poona. I, therefore, in obeying his command  
pass this deed of heirship to you, and make you  
owner of all the property mentioned above like  
our son. You, therefore, enjoy the property in  
your name joyfully." Under this *varaspatra*, B  
took possession of the property mentioned therein,  
and enjoyed it during his lifetime. After his  
death, his *gumasta* (agent) managed it for and on  
behalf of B's minor son C. In 1881, C filed a  
suit to redeem a house and a garden, part of the  
property covered by the *varaspatra*, and which  
had been mortgaged by A's husband in 1831.  
One of the defences to this suit was that neither  
C nor his father was the heir of the original  
mortgagor, and that therefore C could not  
redeem the property in dispute. At the trial, C  
produced the *varaspatra* of 1847 in support of his  
title, alleging that he had found it among the  
papers of the old *gumasta* of his father, who used  
to look after his affairs during his minority.  
Held, that the *varaspatra* was admissible under  
s. 32, cl. 3, of the Evidence Act (I of 1872), as it  
was manifestly a declaration by A against her  
proprietary interest for by it she divested her-  
self of her widow's estate in the property, and  
there being no evidence of her existence after  
1847, she must be presumed to have been dead in  
1881, when the suit was filed. HARI CHINTAMAN  
DIKSHIT v. MORO LAKSHMAN.

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—, s. 32, cl. 5.—*Statement by deceased person  
as to relationship* [S. 32 (5) of the Evidence  
Act (I of 1872) does not apply to statements made  
by interested parties in denial, in the course of  
litigation, of pedigrees set up by their opponents.  
NARAINI KUAR v. CHANDI DIN.

[I. L. R. 9 All. 467

—, s. 41.—*Probate—Executor, Power of, before  
Hindu Wills Act—Probate Act (V of 1881), ss. 2,  
149.* S. 41 of the Evidence Act is applicable  
to probates granted prior to the passing of the  
Hindu Wills Act. GRISH CHUNDER ROY v.  
BROUGHTON.

[I. L. R. 14 Calc. 861

—, s. 42.

See EVIDENCE—CIVIL CASES—DECREES,  
JUDGMENTS AND PROCEEDINGS IN  
FORMER SUITS—DECREEES AND  
JUDGMENTS NOT INTER PARTES.

[I. L. R. 12 Mad. 9

—, s. 45.

See EVIDENCE—CRIMINAL CASES—MEDI-  
CAL EVIDENCE.

[I. L. R. 15 Calc. 589



EVIDENCE ACT (I OF 1872)—*continued*.

—, s. 44—*Competent Court* ] *Per cur.*—The words “not competent” in s. 44 of the Evidence Act refer to a Court acting without jurisdiction. KETILAMMA v. KELAPPAN.

[I. L. R. 12 Mad. 228

—, s. 54.

See EVIDENCE—CRIMINAL CASES—PREVIOUS CONVICTIONS.

[I. L. R. 14 Calc. 721

—, s. 57.—*Registering Officer*—“Court”—*Registered Power-of-Attorney*—*Judicial Notice*.] A registered power-of-attorney admitted under s. 57 of the Evidence Act without proof, the registering officer being a Court under s. 3 of the Act KRISTO NATH KOONDU v. BROWN.

[I. L. R. 14 Calc. 176

—, s. 66.

See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—GENERALLY.

[I. L. R. 16 Calc. 753

—, s. 65.

See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—GENERALLY.

[I. L. R. 16 Calc. 753

See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—UNSTAMPED OR UNREGISTERED DOCUMENTS.

[I. L. R. 12 Bom. 443

1.—s. 74—*Jumabundi*—*Public documents*.] *Quere*:—Whether a *jumabundi* is a public document? AKSHAYA COOMAR DUTT v. SHAMA CHARAN PATITANDA

[I. L. R. 16 Calc. 586

2.—s. 47 and s. 76.—*Public document*.] An *anumatipatra* is not a public document within the meaning of s. 74, nor, if it were, would its being on the record constitute a copy certified as required by s. 76. KRISHNA KISHORI CHAUDHARANI v. KISHORI LAL ROY.

[I. L. R. 14 Calc. 486

[I. L. R. 14 I. A. 71

—, s. 76.

See s. 74.

[I. L. R. 14 Calc. 486

—, s. 80

See CONFESSION—CONFESSIONS TO MAGISTRATE.

[I. L. R. Calc. 595

See EVIDENCE—CRIMINAL CASES—DEPOSITIONS.

[I. L. R. 10 All. 174

—, s. 83.—*Evidence of title*—*Resumption Chittas*.] Government resumption chittas, in the absence of the resumption proceedings are not con-

EVIDENCE ACT (I OF 1872), s. 83—*contd*

clusive evidence of title as against third persons—*Ram Chunder Sao v. Bunsedhur Nark*, I L. R. 9 Calc. 741, followed. DWARKA NATH MISSEER v. TARITA MOYI DABIA.

[I. L. R. 14 Calc. 120

—, s. 85.

See PRACTICE—CIVIL CASES—LETTERS OF ADMINISTRATION.

[I. L. R. 16 Calc. 776

—, s. 86.—*Evidence*—*Foreign judicial records*—*Execution in British India of decree passed by Courts of Cooch Behar*—*Civil Procedure Code*, 1889 s. 434 ] *Per* NORRIS, J.—*Quere*.—Whether the notification published in the *Calcutta Gazette* of 8th April 1879, signed by the then Deputy Commissioner of Cooch Behar, and stating the mode in which copies of judicial records of the Courts of Cooch Behar are certified as correct copies, and which notification was published after a notification had been published by the Governor-General of India in Council under the provisions of s. 434 of the Civil Procedure Code to the effect that the decrees of the Civil and Revenue Courts of Cooch Behar may be executed in British India, as if they had been made by the Courts of British India, was a compliance with the provision of s. 86 of the Indian Evidence Act at a time when there was a representative of the Government of India resident in Cooch Behar. *Per* NORRIS, J.—The notification of the 8th of April, 1879, is now of no use as there is no representative of Her Majesty or the Government of India residing in Cooch Behar, and consequently certified copies of judicial records of that State cannot now be received in evidence in the Courts of British India under the provisions of s. 86 of the Evidence Act GANEE MAHOMED SARKAR v. TARINI CHARAN CHUCKERBATTI.

[I. L. R. 14 Calc. 546

—, s. 90.—*Ancient Document*—*Weight of Ancient documents as evidence*—*Proper Custody*—*Custody of agent*.] Under a *varaspatra* executed in 1847 by A, a Hindu widow in favor of B, B took possession of the property mentioned therein, and enjoyed it during his lifetime. After his death, his *gumasta* (agent) managed it for and on behalf of B's minor son, C. In 1881, C filed a suit to redeem a house and a garden, part of the property covered by the *varaspatra*, and which had been mortgaged by A's husband in 1831. One of the defences to this suit was that neither C nor his father was the heir of the original mortgagor, and that, therefore, C could not redeem the property in dispute. At the trial, C produced the *varaspatra* of 1847 in support of his title, alleging that he had found it among the papers of the old *gumasta* of his father, who used to look after his affairs during his minority: *Held*, that the *varaspatra* was admissible in evidence under s. 90 of the Evidence Act I of 1872, as a document purporting to be more than thirty years old, and produced from a custody, which under

**EVIDENCE ACT (I OF 1872), s. 90—contd.**

the circumstances of the case was a proper custody, the possession of the *gumasta* being legally the possession of his master. The degree of credit to be given to an ancient document depends chiefly on the proof of transactions or state of affairs necessarily or at least properly, or naturally referable to it. *HARI CHINTAMAN DIKSHIT v. MORO LAKSHMAN*.

[I. L. R. 11 Bom. 89]

As to the weight and admissibility of ancient documents,

See also *TIMANGAVDA v. RANGANGAVDA*.

[I. L. R. 11 Bom. 94 note]

—, s. 91.

See CASES UNDER EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—UNSTAMPED OR UNREGISTERED DOCUMENTS.

—, s. 92.

See CASES UNDER EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS.

—, s. 106.

See *ONUS PROBANDI*—BAILMENTS.

[I. L. R. 9 All. 398]

—, s. 108.

*Missing person—Hindu law—Inheritance—Presumption of death—Claim after seven years—Co-owners—Absent co-owner—Claim to his share of property a question of evidence, not of succession.* *D G* and *B* were co-owners of certain *khoti* villages. *B* disappeared and was unheard of for more than seven years. In his absence, *D* received his (*B*'s) share of the rents and profits. *G* claimed to be entitled to a moiety of *B*'s share therein, and brought this suit against *D*. Held, that *G* was entitled to such moiety. *B* having been absent and unheard of for more than seven years, might be presumed to be dead under s. 108 of the Evidence Act I of 1872; and *G*, as one of his two survivors, was entitled to a moiety of his property. Where the right of a party claiming to succeed to the property of another is based on the allegation that the latter has not been heard of for more than seven years, the question to be decided is one of evidence, and not a part of the substantive law of inheritance. *Parmashar Rai v. Bisheshar Singh*, I. L. R. 1 All. 53, concurred in. *DHONDO BHIKAJI v. GANESH BHIKAJI*.

[I. L. R. 11 Bom. 433]

—, s. 114.

See COMPANY—WINDING UP—GENERAL CASES.

[I. L. R. 9 All. 366]

See ESTOPPEL—ESTOPPEL BY CONDUCT.

[I. L. R. 9 All. 690]

**EVIDENCE ACT (I OF 1872), s. 114—contd.**

See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—COPIES OF DOCUMENTS.

[I. L. R. 9 All. 366]

See EVIDENCE—CRIMINAL CASES—DEPOSITIONS.

[I. L. R. 9 All. 720]

—, s. 115.

See ESTOPPEL—ESTOPPEL BY CONDUCT.

[I. L. R. 14 Calc. 401]

[I. L. R. 9 All. 413]

[I. L. R. 11 All. 386]

—, s. 115.

*Auction-Purchaser—Representative—Estoppel.* A purchaser at an execution-sale is not as such the representative of the judgment-debtor within the meaning of s. 115 of the Evidence Act. *LALA PARBHU LAL v. MYLNE*.

[I. L. R. 14 Calc. 401]

—, s. 116.

See CASES UNDER ESTOPPEL—LANDLORD AND TENANT—DENIAL OF TITLE.

—, s. 118.

See WITNESS—CRIMINAL CASES—PERSON COMPETENT TO BE WITNESS.

[I. L. R. 11 All. 183]

—, s. 120.

See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO.

[I. L. R. 16 Calc. 781]

See WITNESS—CIVIL CASES—PERSON COMPETENT TO BE WITNESS.

[I. L. R. 16 Calc. 781]

—, s. 132.

*Protection given to answers which a witness is compelled to give—"Compelled to give," Meaning of the words—Indian Oaths' Act (X of 1873), s. 14.* S. 132 of the Evidence Act (I of 1872) makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a protection in the latter of these cases only. Protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving, and which then he has been compelled by the Court to give. *Queen v. Gopal Dass*, I. L. R. 3 Mad. 721, followed. *Per BIRDWOOD, J.*, (dissenting).—S. 132 of the Evidence Act (I of 1872), read with s. 14 of the Indian Oaths' Act (X of 1873), compels a witness to answer incriminating questions and he is protected by the proviso to s. 132 from a criminal prosecution for any offence of which he incriminates himself directly or indirectly by his answer, except a

**EVIDENCE ACT (I OF 1872), s. 132—*contd.***

prosecution for giving false evidence by such answer. It is not only when a witness asks to be excused from answering a criminating question, and his request is refused, that he is "compelled to give" the answer within the meaning of the proviso. The compulsion is operative whether he asks to be excused or gives the answer without so asking. *QUEEN-EMPRESS v. GANU SONBA.*

[I. L. R. 12 Bom. 440]

—, ss. 155, 159.

*See EVIDENCE—CRIMINAL CASES—STATEMENT TO POLICE-OFFICERS.*

[I. L. R. 11 Bom. 657]

—, s. 167.

*See CRIMINAL PROCEEDINGS.*

[I. L. R. 9 All. 609]

**EXAMINATION FOR PLEADERSHIP.**

*See BOARD OF EXAMINERS.*

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**EXCHANGE.**

*See CUSTOM.*

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*See TRANSFER OF PROPERTY.*

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**EXCISE.**

*See BENGAL EXCISE ACT, 1878.*

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—, s. 42

*See CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—GENERALLY.*

[I. L. R. 10 All. 577]

**EXECUTION OF DECREE**

*Cal.*

1. Effect of repeal of Act pending suit ... 318
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*See CIVIL PROCEDURE CODE, 1882, s. 544.*

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[I. L. R. 11 All. 228]

*See INSOLVENCY—INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE.*

[I. L. R. 15 Calc. 762]

—, Stay of Execution.

*See CASES UNDER INJUNCTION—UNDER CIVIL PROCEDURE CODE.*

**(1) EFFECT OF REPEAL OF ACT PENDING SUIT.**

1.—*Security for costs—Security bond, Enforcement of, by execution—Civil Procedure Code (Act XIV of 1882), s. 549—Act VII of 1888, s. 46—General Clauses Act (I of 1868), s. 6.* On the 9th June 1888, a decree holder applied for leave to execute his decree (which was one for costs) against a person who had become security for the costs of an appeal which had been dismissed with costs; this application was refused, on the ground that the law, as it then stood, did not authorize such an application, the remedy of the decree-holder being by regular suit against the surety. Subsequently to the passing of Act VII of 1888 the decree-holder made a fresh application for such execution under s. 16 of that Act. The Court, after referring to s. 6 of the General Clauses Act, rejected the application, on the ground that proceedings against the surety had been commenced before Act VII of 1888 had come into force. *Held*, on appeal, that the application should have been allowed. *ABDUL WAHAB v. FARLEDOONISSA.*

[I. L. R. 16 Calc. 323]

2.—*Right of Procedure—Execution under Bengal Act VIII of 1869 and Act VIII of 1885.* Upon the death of the full owner, the mother took out probate of a will in which she was appointed executrix. The will was afterwards disputed by the minor son of the testator, and probate was revoked; but, while the mother was in possession of the estate as executrix, she sued and obtained a decree for rent under Bengal Act VIII of 1869. Upon the application of the minor for the execution of the decree. *Held*, that the mode in which the decree was executed under the old Rent Act, Bengal Act VIII of 1869, was, in so far as it was a right at all that belonged to the judgment-creditor, not a private right, but a mere right of procedure, and the execution was therefore to be governed by Act VIII of 1885. *UMASOONDURY DASSY v. BROJONATH BHUTTA-CHAWER.*

[I. L. R. 16 Calc. 347]

**EXECUTION OF DECREE—continued.****(2) APPLICATION FOR EXECUTION AND POWERS OF COURT.**

3.—*Civil Procedure Code, s. 244—Execution proceedings—Revaluation of improvements allowed for in decree* ] A mortgagor obtained a decree for redemption on payment of the mortgage amount, together with a further sum assessed as the value of improvements made by the mortgagee. When the decree-holder applied for the execution of the decree it was contended on behalf of the mortgagee that the improvements ought to be revalued, as they were at the time of execution of more value than at the date of the decree. *Held*, that the mortgagee was entitled to revaluation in the execution-proceedings. *RAMUNNI v SHANKU*

[I. L. R. 10 Mad 367]

4.—*Application for execution for sum larger than amount of claim—Consent of parties—Compromise* ] The parties to a suit agreed upon a compromise, the result of which was that the plaintiff obtained by the decree a greater quantity of land than he had originally claimed, and a decree was drawn up in accordance with the compromise. In the execution-proceedings, the defendant raised an objection that the plaintiff could not have execution for a greater quantity of land than he had claimed originally, and the Court executing the decree allowed the objection. No appeal from the Court's order was made, but the plaintiff brought a suit to recover possession of the larger amount of land mentioned in the compromise. *Held*, that the order of the Court executing the decree was erroneous in law and might properly be reconsidered upon an application for review; but that the present suit came within s. 244 of the Civil Procedure Code, and therefore could not be maintained. *MOHIBULLAH v IMAMI*.

[I. L. R. 9 All. 229]

5.—*Decrees. Priority of.* ] A decree takes priority over other decrees in respect of the date on which it was passed, and not in respect of the priority of the debt which it enforces. *GHERAN v. KUNJ BEHARI*.

[I. L. R. 9 All. 413]

6.—*Civil Procedure Code, s. 583—Claim for mesne profits on reversal of executed decree for possession of land.* ] A decree for possession of immovable property having been executed was reversed on appeal. The defendant applied under s. 58 of the Code of Civil Procedure for restitution of the mesne profits taken by the plaintiff. The lower Courts dismissed the application on the ground that the proper remedy was by suit: *Held*, that the defendant was entitled to the relief claimed. *KALIANASUNDRAM v. EGNAVEDESWARA*.

[I. L. R. 11 Mad. 261]

7.—*Civil Procedure Code, 1882, ss. 230, 235, 295, 490—Necessity for application for execution.* ] Under s. 230 of the Civil Procedure Code all decree-holders if desirous of enforcing their

**EXECUTION OF DECREE—continued.****(2) APPLICATION FOR EXECUTION AND POWERS OF COURT—continued.**

decreees are required to apply for execution. There is no exception of cases arising under s. 490. A decree-holder who has attached before judgment and who is desirous of sharing in the distribution of sale-proceeds under s. 295 of the Code must make an application for execution under s. 235 before he can become entitled to do so. *PALLONJI SHAPURJI v. JORDAN*.

[I. L. R. 12 Bom. 400]

8.—*Civil Procedure Code, 1882, s. 583—Execution, power of Court to award restitution of benefits on reversal of decree in—Jurisdiction of Court not limited in execution.* ] The procedure provided by s. 583 of the Civil Procedure Code (Act XIV of 1882) for obtaining any benefit (by way of restitution or otherwise) under a decree passed on appeal, is not confined to cases where the restitution desired is provided for by the decree itself. The plaintiff brought a suit for the recovery of certain timber, or damages for its removal, and got a decree. The defendant appealed and was ultimately successful in getting the plaintiff's suit dismissed, but meanwhile the timber had been taken in execution of the decree and sold. The defendant applied to the original Subordinate Judge's Court in execution of the High Court decree for restitution of the timber, or Rs. 13,325 damages. The plaintiff objected that the defendant must bring a suit, and could not make this claim in execution. The Subordinate Judge overruled this objection, but held that he was limited to a grant of Rs. 5,000, the pecuniary limit to his original jurisdiction, and awarded the defendant that sum for his timber. *Held*, that the matter was rightly dealt with in execution, and that the jurisdiction of the original Court in execution was neither ousted by the fact that the value of the property in dispute exceed the pecuniary limits of the Court's jurisdiction, nor was such Court limited in its award to the sum of Rs. 5,000. *BALVANTRAY OZE v. SADRUDIN*.

[I. L. R. 13 Bom. 485]

9.—*Decree for enforcement of hypothecation—Objection by judgment-debtor that property ordered to be sold is not transferable under N-W. P. Rent Act, s. 9—Such objection not entertainable in execution* ] In execution of a decree for enforcement of hypothecation by sale of specific property, an objection by the judgment-debtor that the property is not transferable, with reference to s. 9 of the N-W P. Rent Act, cannot be entertained. *MADHO LAL v. KATWARI*.

[I. L. R. 10 All. 130]

*BISHESHAR RAI v. SUKHDEO RAI.*

[I. L. R. 10 All. 132 note]

10.—*Decree for redemption within specified time—Appeal against decree—Power of Court in execution to extend time for redemption allowed by decree—Ground for enlarging time.* ] The

EXECUTION OF DECREE—*continued*.(2) APPLICATION FOR EXECUTION AND POWERS OF COURT—*concluded*.

plaintiffs sued for the redemption of certain mortgaged property. On the 1st March 1886, a decree was passed declaring the plaintiffs entitled to redeem on payment by them to the defendants of Rs. 619-11-0 within three months from the date of the decree. Against this decree the defendants (the mortgagees) appealed, on the ground that a much larger sum than Rs. 619-11-0 was due to them on the mortgage. The plaintiffs also filed objections to this decree under s. 561 of the Civil Procedure Code (XIV of 1882), on the ground that the mortgage-debt had been long ago paid off and that now a large sum was due to them from the mortgagees who had been in receipt of the profits of the property. Under these circumstances the plaintiffs did not pay the Rs. 619-11-0 within three months as ordered by the decree. On the 12th October 1886, they presented an application for execution, and paid into Court the Rs. 619-11-0. The lower Court granted their application and ordered possession of the property to be given to them. The defendant appealed to the High Court. *Held*, reversing the order of the Court below that the Court in executing the decree had no power to alter the language of the decree, which it would virtually do if it enlarged the time mentioned in it by accepting the Rs. 619-11-0 paid into Court by the plaintiffs on the 12th October 1886. *Held*, also that even if the Court had power to enlarge the time in the course of execution, the mere fact that the plaintiff had lodged an appeal would afford no special ground for enlarging the time. *ISHWARGAR v. CHUDASAMA MANABHAI*

[I. L. R. 13 Bom. 106]

## (3) DECREE TO BE EXECUTED AFTER APPEAL OR REVIEW.

11.—*Decree affirmed on appeal—Jurisdiction—Civil Procedure Code, ss. 206, 579.* The effect of s. 579 of the Civil Procedure Code is to cause the decree of the Appellate Court to supersede the decree of the first Court even where the appellate decree merely affirms the original decree, and does not reverse or modify it. Where a decree has been affirmed on appeal, the only decree which can be amended under s. 206 of the Code is the decree to be executed, and the decree to be executed is that of the Appellate Court and not the superseded decree of the first Court, though the latter may, if necessary, be referred to for the purpose of executing the appellate decree. The only Court which has jurisdiction to amend the appellate decree is the Court of appeal. So *held* by the Full Bench, *MAHMOOD, J.*, dissenting. *Shohrat Singh v. Bridgman*, I. L. R. 4 All. 376, explained and followed. *K. S. Chokankar Roy v. Raja Burroductant Roy*, 14 Mooie's I. A. 465, discussed. *MAHOMED SULAIMAN KHAN v. MAHOMED YAR KHAN*.

[I. L. R. 11 All. 267]

W., D.

EXECUTION OF DECREE—*continued*.(3) DECREE TO BE EXECUTED AFTER APPEAL OR REVIEW.—*concluded*.

12.—*Decree affirmed on appeal—Amendment of decree by first Court after affirmance—Objection by judgment-debtor to execution of amended decree* The decree of a Court of First Instance having on appeal been affirmed by the High Court, the first Court altered the decree which had been affirmed, intending of being it into accordance with the judgment of the High Court. After the decree had been altered, application was made to execute it as altered, but this was opposed by the judgment-debtor on the ground that that was not the decree which could be executed. *Held* by the Full Bench that the objection must prevail, on the grounds that the decree sought to be executed was not that of the Appellate Court, and that the decree had been altered by the first Court, which had no power to alter it. *Abdul Hayat Khan v. Chunia Khar*, I. L. R. 5 All. 377, referred to. *MUHAMMAD SULAIMAN KHAN v. FATIMA*.

[I. L. R. 11 All. 314]

13.—*Civil Procedure Code, s. 214—Pre-emption—Conditional decree—Deposit of purchase-money—Computation of time allowed for payment.* In a suit for pre-emption, the decree of the Court of First Instance was conditional upon payment of the purchase-money within one month from its date. After this period had expired without payment, the defendants appealed from the decree. The appeal was dismissed and the decree affirmed, and no fresh period for payment was expressly allowed by the decree of the Appellate Court. *Held* that the decree of the Appellate Court must be taken to have incorporated the terms of the decree of the Court of First Instance, that the period of one month allowed for payment of the purchase-money must be calculated from the date of the Appellate Court's decree, and that payment by the decree-holder within one month from that date was in time. *Shohrat Singh v. Bridgman*, I. L. R. 4 All. 376; *Luchman Persad Singh v. Kusun Persad Singh*, I. L. R. 8 Calc. 218; *Gobardhun Das v. Gopal Ram*, I. L. R. 7 All. 366; *Noor Ali Chondhuri v. Koni Meah*, I. L. R. 13 Calc. 13, and *Darulul v. Bhukanadas Manekchand*, I. L. R. 11 Bom. 172, referred to. *RUP CHAND v. SHAMSHUL JEHAN*

[I. L. R. 11 All. 346]

## (4) DECREES UNDER RENT LAW.

14.—*Sale for arrears of rent—Under-tenure—Bengal Act VIII of 1869, ss. 34, 59—61 and 65—Sale of property other than under-tenure.* Where a decree had been obtained for arrears of rent of an under-tenure, and in execution thereof application was made for the attachment and sale of a certain property of the judgment-debtor, other than the tenure for which the arrears were due—objection was taken that the *kabuliat* stipulated that the tenure itself should be first sold in execution of the decree: *Held*

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**EXECUTION OF DECREE—continued.****(4) DECREES UNDER RENT LAW—concluded.**

that the *habluliat* not being referred to, or incorporated with the terms of the decree, it was not open to the judgment-debtor to go behind the decree, as to the mode in which it was to be executed. But *held*, on the construction of Bengal Act VIII of 1869, ss. 59–61 and 65 that the under-tenure should first be sold before any other immoveable property could be made available. S. 34 of that Act (introducing the procedure laid down in the Civil Procedure Code into rent-suits, "save as is in Act VIII of 1869 otherwise provided") made no alteration in this respect, ss. 59–61 and s. 65 especially providing for such mode of execution. *LALIT MOHUN ROY v. BINODAI DABEE*.

[I. L. R. 14 Calc. 14]

15.—*Decree for arrears of rent—Under-tenure—Sale of property other than under-tenure—Arrest of judgment-debtor—"Charge"—Bengal Tenancy Act (VIII of 1885), s. 65—Transfer of Property Act (IV of 1882), ss. 68, 100.* A landlord, who has obtained a decree for arrears of rent of an under-tenure, is not restricted by the provisions of the Bengal Tenancy Act (Act VIII of 1885) to executing such decree in the first instance by sale of the under-tenure, but is at liberty to execute it in the ordinary manner against the person or other property, whether moveable or immoveable, of his judgment-debtor. The provisions of s. 68 of Transfer of Property Act are not amongst those made applicable by s. 100 of that Act to a person having a charge within the meaning of the latter section. *Semble*—The "charge" referred to in s. 65 of the Bengal Tenancy Act (VIII of 1885) is not such a "charge" as that defined by s. 100 of the Transfer of Property Act. *Lalit Mohun Roy v. Bindodai Dabee*, I. L. R. 14 Calc. 14, explained. *FOTICK CHUNDER DEY SIRCAR v. FOLEY*.

[I. L. R. 15 Calc. 492]

**(5) TRANSFER OF DECREES FOR EXECUTION, AND POWERS OF COURT AS TO EXECUTION, &c.**

16.—*Civil Procedure Code, 1882, s. 224, cl. (c)—Meaning of the words "a copy of any order for the execution of the decree."* The words "a copy of any order for the execution of the decree" in s. 224, cl. (c), of the Code of Civil Procedure (Act XIV of 1882) mean a copy of any subsisting order. *HATHIBHAI NAHANSI v. PATEL BECHAR PRAGJI*.

[I. L. R. 13 Bom. 371]

17.—*Duty of a Court to which a decree is transferred for execution.* A Court to which a decree has been sent for execution, cannot refuse execution on the ground that questions are raised between the parties that cannot properly be dealt with in execution. *RAJERAV CHANDRA-RAO v. NANARAV KRISHNA JAHAGIRDAR*.

[I. L. R. 11 Bom. 528]

**EXECUTION OF DECREE—continued.****(5) TRANSFER OF DECREES FOR EXECUTION, AND POWERS OF COURT AS TO EXECUTION, &c.—continued.**

18.—*Power of District Judge to transfer execution-proceedings to another Court—Civil Procedure Code, ss. 25, 647.* A District Judge has no power to transfer execution-proceedings to a Subordinate Court. *In the matter of Balaji Ranchoddas*, I. L. R. 5 Bom. 680. and *Gaya Parshad v. Bhup Singh*, I. L. R. 1 All. 180, dissented from. *KISHORI MOHUN SETT v. GUL-MOHAMED SHAHA*.

[I. L. R. 15 Calc. 177]

19.—*British Courts in India, Power of, to send their decrees for execution to Courts not in British India—Practice.* The Courts of British India have no authority to send their decrees for execution to Courts not in British India. *KASTUR-CHAND GUJAR v. PARSHA MAHAR*.

[I. L. R. 12 Bom. 230]

20.—*Jurisdiction—Civil Procedure Code (Act XIV of 1882), ss. 6 and 223.* Having regard to the provisions of s. 6 of the Code of Civil Procedure, a Civil Court has no jurisdiction to execute a decree sent to it for that purpose under s. 223 of the Code, when the decree has been passed in a suit the value of subject-matter of which is in excess of the pecuniary limits of its ordinary jurisdiction. *Narasayya v. Venkata Krishnayya*, I. L. R. 7 Mad. 397, dissented from; *Sudheshwar Pandit v. Harinar Pandit*, 2 I. L. R. 12 Bom. 155; *In re Balaji Ranchoddas*, I. L. R. 5 Bom. 680; and *Mungul Pershad Dicht v. Grga Kant Lahiri*, I. L. R. 8 Calc. 51, referred to. *GOKUL KRISTO CHUNDER v. AUKHIL CHUNDER CHATTERJEE* IN THE MATTER OF THE PETITION OF ISSAN CHUNDER DAS, RASHARAJ BOSE v. GOBINDA RANI CHOWDHURANI, MOOLA KUMARI BIBEE v. MOOL-CHAND DHAMANT, BEESUN CHAND DOODHURIA v. MOOL CHAND DHAMANT.

[I. L. R. 16 Calc. 457]

21.—*Civil Procedure Code, 1882, s. 223—Jurisdiction.* S. 223 of the Code of Civil Procedure, which declares that the Court which passes a decree may, on the application of the decree-holder, send it for execution to another Court, should be interpreted to mean, another Court having jurisdiction and competent to execute that decree, having regard to the amount or value of the subject-matter of its ordinary jurisdiction. *Narasayya v. Venkata Krishnayya*, I. L. R. 7 Mad. 397, dissented from. *DURGA CHARAN MOJUMDAR v. UMATARA GUPTA*.

[I. L. R. 16 Calc. 465]

22.—*Mortgage-decree for sale of properties in different districts and jurisdictions—Civil Procedure Code (Act XIV of 1882), ss. 19, 223 (c), Sch. IV, Form 128—Jurisdiction.* A decree obtained in a suit, brought under the provisions

EXECUTION OF DECREE—*continued*.(5) TRANSFER OF DECREES FOR EXECUTION. AND POWERS OF COURT AS TO EXECUTION, &c.—*continued*

of s. 19 of the Code of Civil Procedure in the Court of the Subordinate Judge of Rajshaye on a mortgage of certain properties situated in the districts and jurisdictions of Rajshaye and Nyadumka, directed that the properties mentioned in the mortgage should be sold and the proceeds applied in payment of the mortgage-debt. The properties were sold by the Court of Rajshaye: *Held* that the authority given by s. 19 of the Code included an authority to make the order for the sale of the properties, and that the Rajshaye Court was within its jurisdiction in directing and carrying out the sale. *Quære*—Whether, where a sale takes place under a money-decree of property partly within the local limits of the Court whose decree is being executed, and partly without that Court's jurisdiction, the sale of the property without the jurisdiction would be valid and binding in consequence of the provisions of ss. 19 and 223 of the Code of Civil Procedure. *Per* GHOSH, J.—S. 223 of the Code of Civil Procedure merely provides that, when it may be necessary for a Court to send a decree for execution to another Court by reason of the property being situate beyond its local jurisdiction, it ought to do so; and the words of sub-section (c), "sale of immoveable property situate without the local limits of the jurisdiction of the Court which passed it," contemplate a case where the whole of the property and not any portion of it, is situate beyond the local limits of the Court which passes the decree. *MASEYK v. STEEL & Co.*

[I. L. R. 14 Calc 661]

23.—*Execution of a decree of the Agent for Sardars—Rights of transferee of a decree—Jurisdiction.* A in 1839 obtained a decree against B, a sardar, in the Court of the Agent for sardars. The decree was executed in the Agent's Court until B's death in 1868. B's status as a sardar under the exclusive jurisdiction of the Agent did not descend to his sons, and the decree was transferred to the Court of the first class Subordinate Judge at Ahmednagar for execution. Various objections were taken to the execution of the decree by that Court, but none on the ground that the Agent's decree could not be executed by a mere transfer to an ordinary Civil Court. The case went up twice to the High Court, under whose orders the execution was for several years continued in favour of A's representatives against the estate of B's sons. In 1885, one of A's representatives assigned his interest under the decree to C and D. Thereupon the transferees C and D applied to the first class Subordinate Judge at Ahmednagar to have their names substituted in the place of the transferor in the execution-proceedings. The Subordinate Judge rejected this application, on the ground that execution had been going on for several years contrary to the ruling in *Ahusaldas v. Sakharan Ramchandra*,

EXECUTION OF DECREE—*continued*.(5) TRANSFER OF DECREE FOR EXECUTION. AND POWERS OF COURT AS TO EXECUTION, &c.—*continued*.

12 Bom 212, which laid down that the Agent's decree could not be executed by a mere transfer to an ordinary Court—the remedy in such cases being by a suit on the decree. On this ground, also, he refused to recognise the transfer of the decree. *Held*, that though the execution-proceedings in this case had been for many years irregularly conducted by a mere transfer of the Agent's decree to an ordinary Civil Court, still as the Court which carried on the execution had jurisdiction to grant the same relief if a suit had been brought upon the decree, the irregularity having been acquiesced in, did not vitiate the former proceedings in execution. *VISHNU SAKHARAM NAGARKAR v. KRISHNARAO MALHAR.*

[I. L. R. 11 Bom, 153]

NARO HARI v. ANPURNABAI.

[I. L. R. 11 Bom, 160 note]

24.—*Scheduled Districts—Execution of decree passed by Court of Scheduled District in Court of a Regulation District—Civil Procedure Code (Act VIII of 1859), s. 284—Civil Procedure Code (Act XIV of 1882), ss. 223, 229—Scheduled Districts Act (XIV of 1874), s. 5* On the 15th May 1876, a judgment-creditor obtained a decree in the Civil Court of the Chittagong Hill Tracts, which are included amongst the Scheduled Districts, and on or about the 15th May 1876, at his instance, it was sent with a certificate of non-satisfaction to the Court of a Munsiff in the Regulation District of Chittagong for execution. After sundry unsuccessful attempts to execute the decree an application was made on the 17th September 1886 for its execution. The judgment-debtor objected that under s. 229 of the Code of Civil Procedure (Act XIV of 1882), the Munsiff's Court had no jurisdiction to execute the decree, as it could only act under that section, and the Code had never been extended to the Chittagong Hill Tracts. *Held* that, as at the time the decree was passed and sent to the Munsiff for execution, Act VIII of 1859 was in force, and by s. 284 of that Act the judgment-creditor had a right to have his decree sent to any Civil Court for execution, he was entitled now to have it executed, as neither Acts X of 1877 or XIV of 1882 by express words or implication deprived him of that right. *Held*, further, that the intention of the Legislature was, with regard to decrees obtained in Scheduled Districts after the Code of 1877 came into force, that such decrees should not be executed by Courts in British India unless and until, under the provisions of s. 5 of the Scheduled Districts Act (XIV of 1874), the Government had issued the notification therein referred to applying to the Scheduled Districts such portion of the Code of Civil Procedure as they thought proper to apply. *Quære*—Whether a decree passed by a Court in a Scheduled District and sent for execution to a Court in a Regulation



**EXECUTION OF DECREE—continued.****(5) TRANSFER OF DECREES FOR EXECUTION, AND POWERS OF COURT AS TO EXECUTION, &c—continued.**

District after Act X of 1877 came into force can be executed by the latter Court in the absence of such a notification extending the provisions of the Code of Civil Procedure to the Scheduled Districts. *KASHI MOHUN BORUA v. BISHNOO PRIA.*

[I. L. R. 15 Calc. 365]

25.—*Civil Procedure Code, ss. 320, 325—Decree transferred to the Collector for execution—Collector's duties and powers in execution—Civil Court's jurisdiction to revise Collector's proceedings in execution* ] A decree was transferred to the Collector for execution. The Mamlatdar under the orders of the Collector, put up for sale certain immoveable property belonging to the judgment-debtors. The sale was confirmed by the Mamlatdar with the sanction of the Collector. Some time afterwards the auction-purchaser applied to the Collector for a certificate of sale, but the Collector refused the certificate, and set aside the sale, on the ground that the purchaser was a relative of the decree-holder, and had really purchased the property on his behalf without the permission of the Court. Against this proceeding of the Collector the purchaser made an application, first to the Subordinate Judge, who had transferred the decree to the Collector for execution, and then to the District Court. But both Courts declined to entertain his application, on the ground of want of jurisdiction: *Held*, on an application to the High Court, that the Subordinate Judge had jurisdiction to deal with the application, and to revise the Collector's proceedings in execution. *Held* also, that the Collector having through his subordinate put up for sale the judgment-debtors' property, and confirmed the sale, had in that way completely executed the decree so far as he could, and was so far *functus officio*. His duty was to make a return to the Court of what he had done. After confirmation of the sale he could not set it aside. *Per WEST, J.*—The Collector, like the Nazir in India, is a ministerial officer when he executes a decree. He, like the Nazir, must carry out the decree of a Civil Court in general subjection to the judicial direction of the Court on whose authority the coercive power exercised by him rests, and which alone can deal judicially with the questions that arise in execution. His proceedings and orders are subject, accordingly, to revision and correction on the application of a party aggrieved, whenever he misconceives the decree or acts illegally in giving effect to it. He is limited strictly to the precise line of activity laid down for him in the Code and the orders under it; and in cases of error or doubt it is the Court that must determine whether he, as its ministerial officer, has or has not transgressed his powers. *Per BIRDWOOD, J.*—A sale made by a Collector under Chapter XIX of the Civil Procedure Code is subject to confirmation by the Civil Court under s. 312. As soon as the Collector

**EXECUTION OF DECREE—continued.****(5) TRANSFER OF DECREES FOR EXECUTION, AND POWERS OF COURT AS TO EXECUTION, &c—continued.**

has exercised or performed the powers or duties conferred or imposed upon him by s. 321 to 325 of the Code, he is *functus officio*. If he has sold the property or re-sold it under the power given by cl. (c) of s. 325, he has completed the execution of the decree so far as he can legally complete it, and it is then his duty to retransmit the decree to the Court, under rules prescribed in that behalf by Government under the second paragraph of s. 320. Where the property has been sold or re-sold, the sale or re-sale cannot be set aside by the Collector. Any application for setting it aside must be made to the Civil Court under s. 311, and dealt with by it under s. 312; and if no application is made to the Court, the sale must be confirmed by it under that section. *LALLU TRIKAM v. RHAVLA MITHIA.*

[I. L. R. 11 Bom. 478]

*See, however, KESHABDEO v. RADHA PRASAD.*

[I. L. R. 11 All. 94]

*MADHO PRASAD v. HANSA KUAR,*

[I. L. R. 5 All. 314]

and *NATHO MAL v. LACHMI NARAIN.*

[I. L. R. 9 All. 43]

26.—*Sale of property covered by decree by Court which passed decree when property is situate outside its local jurisdiction at time of application—Civil Procedure Code (Act XIV of 1882), s. 223 (c)—Jurisdiction.* ] A mortgage-decree was passed directing the sale of certain property wholly situate within the local limits of the jurisdiction of the Court which passed the decree. After the decree the district within which the property was situate was transferred and placed under the local jurisdiction of another Court. The judgment-debtor then applied to the first Court for execution of the decree, and thereupon the judgment-debtor objected that that Court had no jurisdiction to entertain the application or to direct the sale of the property: *Held* that, that Court had authority to execute its own decree and bring the property to sale. *Held*, further, that s. 223 (c) of the Code of Civil Procedure does not curtail the power of a Court to execute its own decree, but gives it a discretion either to execute the decree itself or, on the application of the decree-holder, to send it to another Court for execution, and thereby extends rather than limits the Court's power. *KARTICK NATH PANDEY v. TILUKDHARI LALL.*

[I. L. R. 15 Calc. 667]

27.—*Attachment of assets of a judgment-debtor outside the jurisdiction of the attaching Court—Procedure.* ] The plaintiff having obtained a decree against the defendant in the Court a



**EXECUTION OF DECREE—continued.****(5) TRANSFER OF DECREE FOR EXECUTION, AND POWERS OF COURT AS TO EXECUTION, &c—concluded.**

Bhusaval, sought to execute it by attaching a moiety of the defendant's pay. The defendant was a sorter in the Railway Mail Service, and travelled between Bhusaval and Nagpur, at which latter place he resided and received his pay. By an order of attachment issued, at the plaintiff's instance, by the Bhusaval Court to the defendant's disbursing officer at Nagpur, a moiety of the defendant's pay having been withheld by that officer, the defendant applied to the Bhusaval Court to cancel the order, contending that it was illegal, as neither he nor his disbursing officer resided at Bhusaval. On reference to the High Court. *Held*, that the order, of attachment was *ultra vires*, as neither the defendant nor his disbursing officer resided within the jurisdiction of the Bhusaval Court. The proper procedure was to send the decree of the Bhusaval Court for execution to Nagpur, where the disbursing officer resided, and where the defendant's pay was available for satisfaction of the decree. **RANGO JAIRAM v. BALKRISHNA VITHAL**,

[I. L. R. 12 Bom 44]

**GOPAL v. LAVET.**

[I. L. R. 12 Bom. 45 note]

**(6) MODE OF EXECUTION.****(a) GENERALLY, AND POWERS OF OFFICERS IN EXECUTION.**

**28.—Decree having continuous operation—Decree needing yearly Execution.]** Where a decree is one of continuous operation, taking effect as each year furnishes proceeds for its satisfaction, it must be executed each year according to the law of procedure then in force. **VISHNU SAKHARAM NAGARKAR v. KRISHNARAO MALHAR.**

[I. L. R. 11 Bom. 153]

**29.—Decree how construed for purposes of Execution.]** A decree cannot be extended in execution beyond the real meaning of its terms. **BUDAN v. RAMCHANDRA BHUNJGAYA.**

[I. L. R. 11 Bom. 537]

**30.—Decree for sale of hypothecated property and against judgment-debtor personally—Execution against judgment-debtor's person—Decree holder entitled to proceed against property or person as he might think fit.]** Where a decree upon a hypothecation bond allows satisfaction of the debt from the hypothecated property and also from the judgment-debtor personally, and contains no condition that execution shall first be enforced against the property, and where there is no question of fraud being perpetrated on the judgment-debtor, there is no principle of equity which prevents the decree-holder from enforcing his decree against the judgment-debtor's person or property, which,

**EXECUTION OF DECREE—continued.****(6) MODE OF EXECUTION—continued.****(a) GENERALLY, AND POWERS OF OFFICERS IN EXECUTION—concluded.**

ever he may think best. **Wul. Muhammad v. Turab Ali**, I. L. R. 4 All. 497, explained. **JOHARI MAL v. SANT LAL**,

[I. L. R. 9 All. 484]

**(b) DECLARATORY DECREE.**

**31.—Separate suit—Mesne profits, meaning of—Decree awarding mesne profits—Construction.]** In 1878 the plaintiff obtained a decree declaring that he was entitled to receive, every year, from the defendant, 12 per cent of the rents and profits of a certain *nam* village. The decree also awarded mesne profits from the date of the institution of the suit. In 1884 the plaintiff sought in execution of this decree to recover his share of the profits of the village for the years 1882-83 and 1883-84. *Held*, that the plaintiff could not proceed to enforce his rights under the decree by way of execution. His remedy was by a suit on the right established by the decree. The decree had merely declared the right of the plaintiff to a certain share of produce, and payment was ordered of mesne profits computed according to certain principles. Such an award was not an award of a periodical payment *in æternum*. The very word "mesne" implied a *terminus ad quem* as well as *à quo*, and in the absence of a special order the *terminus* was the date of the decree. **VINAYAK AMBIT DESHPANDE v. ABAJI HAIBATRAY.**

[I. L. R. 12 Bom. 416]

**(c) JOINT PROPERTY.**

**32.—Decree against an undivided brother—Mortgage of joint property.]** A. an undivided member of a Hindu family, mortgaged part of the family property by way of conditional sale to B to secure a loan. B having sued A personally for the amount due, A admitted the mortgage and said he would surrender the property in discharge of the debt, and a decree was passed accordingly. A's undivided brothers intervened in execution. *Held*, that the decree, not being passed against the joint family or its representative, and not describing the property which it directed to be delivered to the plaintiff by way of absolute sale, to be family property, could not be executed against the family property. **GURUVAPPA v. THIMMA.**

[I. L. R. 10 Mad. 316]

**33.—Decree for maintenance against karnavan—Execution against tarwad property.]** A member of a Malabar tarwad having obtained a decree for maintenance against her karnavan, assigned the decree to the plaintiff, who proceeded to execute it against the tarwad property. The then karnavan objected and his claim was allowed. In a suit by plaintiff to have it declared that he was entitled to execute the decree against tarwad

EXECUTION OF DECREE—*continued*.(6) MODE OF EXECUTION—*continued*(c) JOINT PROPERTY—*concluded*.

property: *Held*, that the plaintiff was entitled to execute the decree against the talwad property. CHANDU v. RAMAN.

[I. L. R. 11 Mad 378]

34.—*Joint Hindu family—Money-decree against deceased member—Execution after judgment-debtor's death against joint family property not allowed* ] The mere obtaining of a simple money-decree against a member of a joint Hindu family without any steps being taken during his lifetime to obtain attachment under or execution of the decree, does not entitle the decree-holder, after the judgment-debtor's death and a subsequent partition, to bring to sale in execution of the decree the interest which the judgment-debtor had in the joint family property. *Surya Bansi Koer v. Sheo Pershad Singh*, I. L. R. 5 Cal 148. *Rai Balkrishen v. Rai Sita Ram*, I. L. R. 7 All. 731, and *Balhabar v. Bisheshwar*, I. L. R. 8 All. 695, referred to. JAGANNATH PRASAD v. SITA RAM

[I. L. R. 11 All 302]

## (d) MAINTENANCE.

35.—*Decree for maintenance of widow—Liability of ancestral estate* ] Maintenance decreed to a coparcener's widow by reason of her exclusion from succession in a joint family cannot be regarded as a charge on the family estate, or the decree treated as a decree against the managing member of the family for the time being. A, the widow of an undivided member of a joint Hindu family, obtained a decree for maintenance against B, the brother of her deceased husband, not expressed to be a decree against the head or representative of the joint family. B died, and C, his son, having been brought in as his representative, resisted the execution of the decree by attachment of the family estate. *Held*, that the family estate was not liable. *Per cur.*—In a regular suit, C might clearly be held liable to pay maintenance to A, and a decree might be passed against him; but in execution-proceedings the decree must be taken as it stands and executed against the son as his legal representative in the mode prescribed by s 234 of the Code of Civil Procedure, and it is not open to extend the scope of the decree in such proceedings—*Karpakambal v. Cubbayan*, I. L. R. 5 Mad. 231, approved and followed. MUTTIA v. VERAMMAL.

[I. L. R. 10 Mad. 283]

36.—*Decree directing payment of a certain sum every month for life—Declaratory decree.* ] Where a decree ordered the defendants to pay to the plaintiff the sum of Rs. 15 per mensem by way of maintenance during her lifetime, and directed that such maintenance should be charged on certain zemindari property: *Held*, that the decree-holder could obtain the amount ordered in execution of the decree, which was more than a mere

EXECUTION OF DECREE—*continued*.(6) MODE OF EXECUTION—*continued*.(d) MAINTENANCE—*concluded*.

declaration of right, and which, by allowance of a fixed rate per mensem, stood exactly on the footing of a decree ordering payment by instalments. *Peareenath Brohmo v. Juggessur*, 15 W. R. 128, referred to. MANSA DABI v. JIWAN LAL

[I. L. R. 9 All 33]

## (e) MARRIED WOMEN.

37.—*Liability of married women—Arrest—Stridhan* ] R as surety for her husband joined with him in executing a bond for Rs. 90. In a suit brought upon the bond a decree was passed against both. R was arrested in execution of the decree, and brought before the Court. She was then asked if she desired to apply to be declared an insolvent under the insolvency sections of the Civil Procedure Code (Act XIV of 1882), but not doing so she was committed to jail. Subsequently, however, she applied to be declared an insolvent, but her application was rejected. She then claimed to be released, on the ground of her coverture. The Judge rejected her application as being too late. On reference to the High Court. *Held*, that although the decree was absolute in its terms, and contained no express limitation of R's liability, nevertheless the law being clear that she could only be liable to the extent of her *stridhan*, it was to be assumed that the direction to pay, contained in the decree, had reference to that fund only. IN RE THE PETITION OF RADHI.

[I. L. R. 12 Bom. 228]

## (f) MORTGAGE.

38.—*Decree against mortgaged property—Liability of judgment-debtor to arrest under such decree—Decree not to be extended in execution beyond its terms* ] A decree cannot be extended in execution beyond the real meaning of its terms. A decree obtained on a mortgage directed that the judgment-debtor should pay the sum adjudged out of the property mortgaged. After executing the decree against the mortgaged property, the decree-holder made an application for execution against the person of the judgment-debtor. A notice was issued calling upon him to show cause why execution should not be further proceeded with. But the notice did not give him any intimation of the application for the arrest of his person. He did not appear, and, in his absence, an order was made for his personal arrest; but the order was not executed, as the decree-holder did not pay the process fee. Subsequently a fresh application was made for execution against the person of the judgment-debtor. *Held*, that as the decree merely provided for the satisfaction of the judgment-debt out of the property mortgaged, the decree could not be executed against the person of the judgment-debtor. BUDAN v. RAM-CHANDRA BHUNJGAYA.

[I. L. R. 11 Bom. 537]

## EXECUTION OF DECREE—continued.

## (6) MODE OF EXECUTION—continued.

## (f) MORTGAGE—continued.

39.—Decree for enforcement of hypothecation—Decree limiting judgment-debtor's liability to the hypothecated property.] A decree upon a hypothecation bond which only provides for its enforcement against the hypothecated property cannot be executed against the person or other property of the judgment-debtor, though an order for costs contained therein may be so executed. PRAN KUAR v. DURGA PRASAD

[I. L. R. 10 All. 127]

40.—Decree for sale of mortgaged property—Money-decree—Transfer of Property Act (IV of 1882), ss. 88, 89, 90.] A decree in favour of a mortgagee for sale of the mortgaged property cannot be treated as one for money. According to the Transfer of Property Act, ss. 88, 89, and 90, the mortgagee must first sell the mortgaged property, and if the net proceeds of such sale be insufficient to pay the amount due for the time being on the mortgage, and if the balance be legally recoverable from the mortgagor otherwise than out of the property sold, he may ask the Court for a decree for such balance. GOPAL DAS v. ALI MUHAMMAD.

[I. L. R. 10 All. 632]

41.—Transfer of Property Act (IV of 1882), ss. 88, 90.—Decree unsatisfied by sale of mortgaged property—Right to decree for sale of other than mortgaged property.] The holder of a decree on mortgage obtained an order under s. 88 of the Transfer of Property Act for sale of the mortgaged property, and the proceeds of this, when sold, being insufficient to satisfy the decree, he applied for a decree under s. 90 for the sale of other properties belonging to the judgment-debtor. The Subordinate Judge refused the application on the ground that there was no such provision in the order for sale under s. 88. *Held*, that the decree-holder was entitled to the decree asked for. The terms of s. 90 contemplate a decree in the suit for recovery of the mortgage-money after sale of the mortgaged properties under a decree given under s. 88. The decree-holder can then apply to the Court, and if he can show that, after the sale of the mortgaged properties, there is still a balance due to him under the decree obtained under s. 88, and that that amount is legally recoverable from the judgment-debtor, he can ask for and obtain a decree under s. 90 for realization of the balance from other properties of the debtor. SONATUN SHAW v. ALI NEWAZ KHAN.

[I. L. R. 16 Calc 423]

42.—Transfer of Property Act (IV of 1882), ss. 88, 89, 90.—Decree for sale of mortgaged property—Decree not satisfied by sale—Recovery of balance due on mortgage.] The decree contemplated by s. 90 of the Transfer of Property Act (IV of 1882) can be made in the suit in which the decree for sale was passed; and it is not necessary to insti-

## EXECUTION OF DECREE—continued.

## (6) MODE OF EXECUTION—concluded.

## (f) MORTGAGE—concluded.

tute a fresh suit to obtain such decree. RAJ SINGH v. FARMANAND.

[I. L. R. 11 All. 486]

## (g) POSSESSION

43.—Decree for possession of a village—Right of the holders of such a decree to the possession of village account books and other papers relating to the management of the village—Title-deeds.] The plaintiffs, as managers of a temple, obtained a decree for the possession of a certain *nam* village. After taking possession of the village, they called upon the defendants to hand over to them the village account books and other documents relating to the management of the village. The defendants refused. Thereupon the plaintiffs presented a *darkhast* in execution, praying (*inter alia*) for the delivery of those books and documents. The Subordinate Judge rejected this application, on the ground that it was beyond the terms of the decree. *Held*, on appeal to the High Court, that the plaintiffs were entitled to the possession of the account books and documents in question, as being essential to the proper and effectual enjoyment and management of the village awarded by the decree. Such books and documents were properly to be regarded as accessory to the estate, and as claimable by those to whom it had been awarded. The title-deeds of an estate, counterpart leases, and other documents of the like kind, such as *habuliats*, in India, ought to be regarded as accessory to the estate, and to pass with it, whether the transfer is made by a conveyance, a decree, or a certificate of sale. BHAVANI DEVI v. DEVRAY MADHAVRAY.

[I. L. R. 11 Bom. 485]

## (7) EXECUTION BY AND AGAINST REPRESENTATIVES

44.—Decree against executors for debts incurred while acting under a will afterwards found invalid, Effect of—The heir's liability under the decree—The remedy of the decree-holder.] Certain executors, acting under an order of the Court, borrowed a sum of money from K M for the funeral expenses of J D, the testator. K M obtained a decree for the amount against the executors, and the adopted son of J D. Afterwards F D got a decree, whereby both the will and the adoption were set aside, and he was declared the legal heir of J D. K M then sought to enforce his decree against F D by the sale of the property which now formed part of the estate of F D, who objected to the proceedings: *Held*, that as F D was not the legal representative of the judgment-debtors, the decree could not bind the estate in his hands; but, in order to make the estate liable for the debt, the proper course of the decree-holder was to bring a regular suit against F D. FANINDRO DEB RAIKUT v. JUGUDISHWARI DABI.

[I. L. R. 14 Calc. 316]

## EXECUTION OF DECREE—continued.

## (7) EXECUTION BY AND AGAINST REPRESENTATIVES—continued.

45—*Decree for maintenance of widow—Liability of ancestral estate in execution—Civil Procedure Code, s. 234.* A the widow of an undivided member of a joint Hindu family, obtained a decree for maintenance against B, the brother of her deceased husband, not expressed to be a decree against the head or representative of the joint family. B died, and C, his son, having been brought in as his representative, resisted the execution of the decree by attachment of the family estate. *Held*, that the family estate was not liable. *Per cur.*—In a regular suit, C might clearly be held liable to pay maintenance to A, and a decree might be passed against him; but in execution-proceedings the decree must be taken as it stands and executed against the son as his legal representative in the mode prescribed by s. 234 of the Code of Civil Procedure, and it is not open to extend the scope of the decree in such proceedings—*Karpakumbal v. Subbayan*, I.L.R. 5 Mad. 234, approved and followed. MUTTIA v. VERAMMAL.

[I. L. R. 10 Mad. 283]

46.—*Maintenance—Arrears of maintenance due to a Hindu widow at her death—Liability of such arrears to satisfy a decree against her assets.* Where sums due for a widow's maintenance have become a debt, such a debt should be regarded as assets of the widow after her death liable to be taken in execution of a decree against her. A sued upon a bond executed in his favour by R, a Hindu widow, and after her death obtained a decree against N, as her legal representative, directing "that the judgment-creditor should be satisfied out of such assets of the deceased widow as may in course of execution be proved to have come into the possession of the defendant N." A sought, in execution, to obtain satisfaction out of arrears of an annuity due by N to the deceased on account of her maintenance for fifteen years before her death. The Subordinate Judge held that the right to recover these arrears was one personal to the widow R, and though it could be enforced by her, would not pass to her creditor. He therefore dismissed the *darkhast*. *Held*, reversing the order of the Subordinate Judge, that the arrears of the annuity due by N to R, as maintenance, were properly to be regarded as the assets of the widow, and as such were available in execution to satisfy the decree. N owing money in his individual capacity to R, would, in the interest of creditors and justice, be assumed to have paid it to himself as her legal representative. N should therefore be held accountable for sums due by him to R, subject to such objections as he might be able to ground on limitation or other legal excuse. RAJERAV CHANDRARAO v. NANARAV KRISHNA JAHAGIRDAR.

[I. L. R. 11 Bom. 528]

## EXECUTION OF DECREE—continued.

## (7) EXECUTION BY AND AGAINST REPRESENTATIVES—continued.

47—*Representative of decree-holder—Attachment of decree—Civil Procedure Code (Act XIV of 1882) ss. 232, 241, 273.* A person attaching a decree is a representative of the decree-holder within the meaning of that term as used in s. 241, cl. (c) of the Civil Procedure Code, and in every case is entitled to enforce execution of the decree which he has attached. When the decree attached has been passed by the same Court as the decree in execution of which it has been attached, the Court has jurisdiction to execute the attached decree on the application of the attaching creditor. PEARY MOHUN CHOWDHRY v. ROMESH CHUNDER NUNDY.

[I. L. R. 15 Cal. 371]

48—*Civil Procedure Code, 1882, s. 234.* Under s. 234 of the Civil Procedure Code, the legal representative of a deceased judgment-debtor is liable summarily only in respect of property actually received by him, or taken into his disposition. On the 27th March 1878, one B obtained a decree for Rs. 2,100 against one P, who died in July of that year, leaving his son H his legal representative. Subsequently one Homjibhai sued H as the legal representative of P upon a mortgage executed by the latter in his life-time, and obtained a decree, in execution of which he sold the mortgaged property by auction, and bought it in himself for Rs. 810. On appeal, this decree was reversed on the 3rd August 1883. Instead of thereupon recovering the property which had been sold in execution, H on the 16th November 1883, agreed with Homjibhai that the latter should retain it on payment of Rs. 240 as costs of the suit. Shortly before this compromise was effected, B sold her decree to the appellant K, who in 1881 applied for execution against H. The Subordinate Judge made an order for execution against H personally to the extent of Rs. 810, holding that H had fraudulently adjusted the decree in Homjibhai's suit, and that, even if there was no fraud, he, as administrator of P's estate, ought to have recovered back the money realised by the sale, instead of accepting a compromise. On appeal, the order of the Subordinate Judge was reversed by the District Judge. On appeal to the High Court, *held*, confirming the order of the District Judge, that H was not personally liable. Under s. 234 of the Civil Procedure Code (Act XIV of 1882), a representative of a deceased judgment-debtor, who has failed purposely or negligently to recover some debt due to the estate of the deceased, or some property belonging to it, is not liable in the same way as for property of the deceased which has come to his hands. In that section, property is not defined as identical with assets, and so to include mere rights of action. Nor is it provided that in an execution-proceeding the representative shall be made answerable as well for what with diligence on his part would have come to his hands, as what actually has come to his hands. It may well be

**EXECUTION OF DECREE—continued.****(7) EXECUTION BY AND AGAINST REPRESENTATIVES—continued.**

that while the Legislature intended to bring the representative under the control of a summary inquiry where he had actually received property, it did not intend to make him answerable in other cases except through the medium of a suit for administration or other regular action. *KHUSROBHAI NASARVANJI v. HORMAZSHA PHIROZSHA.*

[I. L. R. 11 Bom. 727]

49.—*Representation of estate by mother—Decree against mother when adopted son in existence.* Plaintiff obtained a decree on a bond executed by S against the mother of S, whom he believed to be the heiress of S. In attempting to execute this decree against the estate of S, plaintiff was obstructed by the defendant who was the adopted son of S. Plaintiff sued the defendant for a declaration that he was entitled to execute his decree against the estate of S in the hands of the defendant. *Held*, that the suit must fail inasmuch as the estate of S was not properly represented in the former suit. *Satish Chunder Lahiry v. Nil Komol Lahiry* (I. L. R. 11 Cal. 45), distinguished. *SUBBANNA c. VENKATAKRISHNAN,*

[I. L. R. 11 Mad. 408]

50.—*Death of judgment-debtor—Execution—Execution against one of several representatives of a sole debtor—Death of such representative—Subsequent application for execution against other representatives—Practice.* An application for execution against one of the representatives of a sole judgment-debtor saves limitation against another representative. Accordingly where the plaintiff, on the death of his sole debtor, sued out execution on the 18th June 1881, under a *durhast* No. 718 of 1878, against V one of the three sons of the debtor, and the execution-proceedings continued till the death of V in March 1884, whereupon the plaintiff applied on the 28th May 1884, to put M and N, the brothers of V on the record as his representatives. *Held*, that the application was not too late against M and N regarded as joint representatives with their brother V of their father, the original judgment-debtor. *KRISHNAJI JANARDAN c. MURRAY.*

[I. L. R. 12 Bom. 48]

51.—*Joint-decree—Decree for possession of immoveable property—Purchase by judgment-debtor of rights of some of the joint decree-holders—Decrees extinguished pro tanto.* Where, subsequent to a decree, a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only, and where it is for immoveable property. The rule of law against breaking up the integrity of a mortgage security is a rule aiming at the protection of the

**EXECUTION OF DECREE—continued.****(7) EXECUTION BY AND AGAINST REPRESENTATIVES—concluded.**

mortgagee, and is not applicable to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property. *Benarsi Das v. Maharani Kuar*, I. L. R. 5 All. 27; *Wise v. Abdool Ali*, 7 W. R. 136; and *Pogose v. Fukuooddeen Muhomed Ahsan*, 25 W. R. 343, referred to. *KUDHAI c. SHEO DAYAL.*

[I. L. R. 10 All. 570]

**(8) JOINT DECREE, EXECUTION OF AND LIABILITY UNDER.**

52.—*Right to execute decree—Civil Procedure Code (Act XII of 1882), s. 541—Appeal by one of several plaintiffs claiming under a joint right—Decree in such appeal binds other co-plaintiffs, although not parties to the appeal—Procedure.* A and B brought a suit against C and obtained a decree awarding a part of their claim. B appealed and the Appellate Court reversed the decree, and rejected the plaintiff's claim altogether. Subsequently A, who had not joined in the appeal applied for execution of the original decree. *Held*, that although A had not been a party to the appeal, he was bound by the decision of the Appellate Court, and was not entitled to take out execution. *BABAJI DHONDSHE v. COLLECTOR OF SALT REVENUE.*

[I. L. R. 11 Bom. 596]

53.—*Decree for possession of immoveable property—Purchase by judgment-debtor of rights of some of the joint decree-holders—Decree extinguished pro tanto.* Where, subsequent to a decree, a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only and where it is for immoveable property. The rule of law against breaking up the integrity of a mortgage security is a rule aiming at the protection of the mortgagee, and is not applicable to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property. *Benarsi Das v. Maharani Kuar*, I. L. R. 5 All. 27; *Wise v. Abdool Ali*, 7 W. R. 136; and *Pogose v. Fukuooddeen Muhomed Ahsan*, 25 W. R. 343, referred to. *KUDHAI c. SHEO DAYAL.*

[I. L. R. 10 All. 570]

**(9) (STAY OF EXECUTION.)**

54.—*Civil Procedure Code, ss. 545, 546, 547—Stay of execution pending application for review—Jurisdiction.* S. 547 of the Civil Procedure Code provides for the procedure to be followed in miscellaneous matters other than suits and appeals, and its provisions, read with ss. 545 and 546, give

EXECUTION OF DECREE—*continued.*(9) STAY OF EXECUTION—*continued.*

no power to the Court or a judge, after the passing of a final unappealable decree, and before the granting of an application for review of judgment, to order a stay of execution of the decree. No such power exists under the Code. On the 29th July 1886, an application was made by a party against whom the High Court, on second appeal, had passed a decree dated the 18th March 1886, for review of judgment. On the 28th August, the applicant made a further application that execution of the decree might be stayed pending the determination of the application for review, and an order was passed *ex-parte* granting this application. Subsequently, the opposite party applied under s 623 of the Civil Procedure Code for a review of the *ex-parte* order on the grounds (i) that the Court had no jurisdiction to make it, and (ii) that the application of the 29th July was beyond time, and therefore there could be no review of judgment, and no order for stay of execution pending such review. *Held*, that the decree of the 18th March being final and unappealable, and no application for review of judgment having been granted within the meaning of s. 630 of the Code, the application for stay of execution did not fall within s. 545 or s. 546, nor did s. 647 apply to it nor any other provision of the Code. *AMIR HASAN v. AHMAD ALI.*

[I. L. R. 9 All 36]

55.—*Civil Procedure Code, ss. 213, 276, 295—Administration decree—Attachment after date of institution of administration suit under decree obtained prior to such suit—Injunction.* On the 22nd July 1886, one *R L* obtained a money decree against one *P C*. On the 5th November 1886, *P C* died; and on the 18th December 1886, *R L* applied to attach certain properties belonging to the estate of his judgment-debtor, which properties were actually attached on the 8th and 12th January 1887. On the 21st December 1886, one *S* filed a suit to administer the estate of the deceased, and on the 20th January 1887, obtained the usual administration decree. On the 5th May 1887, *S* applied for an order staying all proceedings taken by *R L* against the estate of *P C*, and directing him to come in should he think fit so to do, and prove his claim in the administration suit: *Held*, that the attachment did not create any interest in, or charge upon, the properties in favour of the attaching creditor as against other creditors, and that the order asked for ought to be granted. *IN THE MATTER OF THE APPLICATION OF SOOBUL CHUNDER LAW SOOBUL CHUNDER LAW v. RUSSICK LALL MITTER.*

[I. L. R. 15 Calc. 202]

56.—*Stay of execution pending suit between decree-holder and judgment-debtor—Civil Procedure Code, ss. 235 (d), 581, 583.* The words "such Court" in s. 243 of the Civil Procedure Code do not limit the exercise of the powers given by that section only to decrees passed by the Court in

EXECUTION OF DECREE—*concluded.*(9) STAY OF EXECUTION—*concluded.*

which the suit is pending, but with reference to ss 235 (d), 581 and 583 that Court is empowered to stay execution of decrees transferred to it for execution from either a Court of co-ordinate jurisdiction or a Court of appeal. The plaintiff instituted a suit against defendant for recovery of money and other reliefs which was ultimately dismissed in appeal by the High Court, and he was ordered to pay defendant Rs. 1,000 as cost of the litigation. Plaintiff then brought this suit against defendant in the Court of the Subordinate Judge of Farukhabad, and while it was pending defendant applied to the Court to execute his decree for costs. Plaintiff then applied for stay of the execution, and his application was refused by the first Court, but granted by the District Court. On appeal by defendant to the High Court, *held* that the Judge's order was correct. *Mithun Bibi v. Buzloor Khan*, 8 W. R. 392, disapproved. *KASSA MAL v. GOPI.*

[I. L. R. 10 All 389]

57.—*Appeal—Decree for injunction, damages and costs—Stay of execution as to costs* ] A party appealing against a decree, which directs him to pay money, may obtain stay of execution of the decree, so far as it directs payment, on his lodging the amount in Court, unless the other party gives security for the repayment of the money in the event of the decree being reversed. If such security be given by the successful party, then stay of execution should not be granted. *DHUNJIBHOY COWASJI UMRIKAR v. LISBOA.*

[I. L. R. 13 Bom. 241]

## EXECUTOR.

See EVIDENCE ACT, s. 41.

[I. L. R. 14 Calc. 861]

See PROBATE—EFFECT OF PROBATE

[I. L. R. 14 Calc. 861]

—, de son tort.

See LIMITATION ACT, 1877, ART. 123.

[I. L. R. 12 Mad. 487]

## EXTORTION.

See SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 10 All. 58]

## EXTRADITION ACT (XXI OF 1879).

See HIGH COURT, JURISDICTION OF—HIGH COURT, MADRAS—CRIMINAL.

[I. L. R. 12 Mad. 39]

## "FACTUM VALET," DOCTRINE OF.

See HINDU LAW—MARRIAGE—RIGHT TO GIVE IN MARRIAGE AND CONSENT.

[I. L. R. 11 Bom. 247]



**FALSE CHARGE.**

1.—*Penal Code, s. 211.*] A false charge before the police is a false charge falling within the first portion of s. 211 of the Penal Code. The latter portion of s. 211 of the Penal Code is confined to cases in which criminal proceedings have been instituted, and does not apply to false charges merely. *Empress of India v. Pitam Rai*, I. L. R. 5 All. 215, and *Empress v. Parahu*, I. L. R. 5 All. 598, followed. *QUEEN-EMPRESS v. KARIM BUKSH*.

[I. L. R. 14 Calc. 633]

See *KARIM BUKSH v. QUEEN-EMPRESS*.

[I. L. R. 17 Calc. 574]

2.—*Criminal Procedure Code, Act X of 1882, s. 191—Cognizance of an offence on suspicion—Penal Code, Act XLV of 1860, s. 211—Police report—False charge. Prosecution for without first enquiring into truth of original complaint.*] A person having laid an information before the police, the police reported the case as false; the informant then appeared before a Magistrate asking that his case might be investigated and his witnesses summoned. This application was refused, and the Magistrate after perusing the police report passed an order directing him to be prosecuted under s. 211 of the Penal Code. *Held*, that the application to the Magistrate was a "complaint" within the meaning of s. 191 of the Criminal Procedure Code into which the Magistrate was bound to have enquired. A Magistrate may take cognizance under s. 191 of the Criminal Procedure Code of an offence brought to his notice by a police report which affords ground for a suspicion that an offence has been committed; but, as a matter of sound judicial discretion, a Magistrate should not so proceed and direct that the person suspected be tried until some person aggrieved has complained, or until he has before him a police report on the subject based on an investigation directed to the offence to be tried, and in cases of alleged false charges until it is clear that the original charge has been either heard and dismissed or abandoned. And before the order to prosecute for the false charge is made the person who made the original charge should be offered an opportunity of supporting it or abandoning it. *QUEEN-EMPRESS v. SHAM LALL*.

[I. L. R. 14 Calc. 707]

**FALSE EVIDENCE**

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See **CONFESSION—CONFESSIONS TO MAGISTRATE**

[I. L. R. 14 Bom. 702]

**(1) GENERALLY.**

1.—*Affidavit affirmed before a Deputy Magistrate—Prosecution on facts stated in an affidavit affirmed before a Deputy Magistrate—Penal Code, Act XLV of 1860, ss. 193, 199—Declaration by law receivable as evidence*] A Deputy Magis-

**FALSE EVIDENCE—concluded.****(1) GENERALLY—concluded.**

trate has no power to administer an oath to a person making a declaration in the shape of an affidavit, and such person cannot, on the facts stated in such declaration, be prosecuted for committing an offence either under s. 193 or s. 199 of the Penal Code. *IN THE MATTER OF THE PETITION OF ISHWAR CHUNDER GUHO*.

[I. L. R. 14 Calc. 653]

2.—*Falsely denying possession of document—Witness*] Where a witness denies, on oath, that he has the possession or means of producing a particular document, he can, if he has been guilty of falsehood, be prosecuted for giving false evidence in a judicial proceeding. *IN RE PREMCHAND DOWLATRAM*

[I. L. R. 12 Bom. 63]

**(2) CONTRADICTORY STATEMENTS.**

3.—*Alternative charges—Statement made to Police-officer investigating case—Penal Code (Act XLV of 1860), ss. 191, 193—Criminal Procedure Code (Act X of 1882), s. 161.*] An accused was charged with giving false evidence upon an alternative charge, one statement having been made to a police-officer investigating a case of arson, and the other having been made when he was examined as a witness before the Joint Magistrate when the case was being enquired into. The two statements were contradictory, and no evidence was given to show which of them was false. It was not proved that the statement made to the police-officer was made in answer to questions put by him, and the only evidence given at the trial with regard to the inquiry upon which the police-officer was engaged, was to the effect that an enquiry was being made about the burning of a house. The jury acquitted the accused, and the case was referred to the High Court by the Sessions Judge who disagreed with the verdict of acquittal: *Held*, that the verdict was right. Before a conviction in such a case can be sustained, it must, having regard to the provisions of s. 161 of the Criminal Procedure Code, be clearly proved by the evidence that the statement made to the police-officer was a statement in answer to questions put to the accused by the investigating police-officer, and in the absence of such evidence, even though the statement were proved to be false, a conviction could not be sustained: *Held*, further, that in such a case it is also necessary for the prosecution to establish that the police-constable was making an investigation under Chapter XIV of the Criminal Procedure Code. *QUEEN-EMPRESS v. BAIKANTA BAURI*.

[I. L. R. 16 Calc. 349]

**FIDUCIARY RELATIONSHIP.**

See **FRAUD—WHAT CONSTITUTES FRAUD AND PROOF OF FRAUD.**

[I. L. R. 11 Bom. 78]

**FINE.**

*Criminal Procedure Code, s. 545—Death caused by rash and negligent act—Compensation to widow of deceased.*] An order that the amount of a fine imposed on one convicted of causing death by a rash and negligent act be paid as compensation to the widow of the deceased is illegal. IN RE LUTCHMAKA.

[I. L. R. 12 Mad. 352]

**FISHERY, RIGHT OF.**

See THEFT.

[I. L. R. 15 Calc. 388, 390 note, 392 note, 402]

See SPECIFIC RELIEF ACT, s. 9.

[I. L. R. 12 Bom. 221]

*Fishing in tidal river—Customary right—User—Prescription.*] Plaintiffs claimed a right to catch fish in a tidal river at a certain place by putting up stake nets across the river. This right was alleged to be based on custom which was not denied by defendants and user for thirty years was proved. The claim was decreed. *Held*, that plaintiffs were not bound to prove sixty years' exclusive user to support their claim. NARASAYYA v. SAMI.

[I. L. R. 12 Mad. 43]

**FORECLOSURE.**

See CASES UNDER MORTGAGE—FORECLOSURE.

See TRANSFER OF PROPERTY ACT, s. 2.

[I. L. R. 14 Calc. 451, 599]

**FOREIGN JUDGMENT.**

See RES JUDICATA—COMPETENT COURT—GENERAL CASES.

[I. L. R. 13 Bom. 224]

1.—*Procedure in giving effect to foreign judgment—Proof of service of process—Notice, Service of on contributory of Company.*] Courts in British India, when called upon to give effect to a foreign judgment, should insist upon a strict proof of the validity and service of summonses and other processes alleged to have emanated from a foreign Court, and made a foundation for a liability to be enforced here by Courts that have no cognizance of the case on its merits. EDULJI BURJORJI v. MANEKJI SORABJI PATEL.

[I. L. R. 11 Bom. 241]

2.—*Execution of decree—Foreign decree—Execution in British India of decrees of Courts of Native States—Evidence—Certified copies of foreign judicial records—Cooch Behar, Execution in British India of decree passed by Courts of.*] A decree of the Court of the Civil Judge of Cooch Behar was sent for execution to the Court of the District Judge of Rungpore. The copy of the record

**FOREIGN JUDGMENT—concluded.**

was signed by the Sheristadar instead of by the Judge himself. Upon receipt of the decree by the Subordinate Judge a notice, under s. 248 of the Civil Procedure Code, was served on the judgment-debtor, calling on him to show cause why the decree should not be executed, and an order was forthwith issued for the attachment of his property. The judgment-debtor appeared and objected that the copy of the record was not properly certified, and therefore, that the whole of the execution-proceedings were bad. The Subordinate Judge ordered that the record be sent back to the Cooch Behar Court through the District Judge in order, that a certificate might be given in proper form, and directed that the other points raised should be decided after the return of the papers. On appeal it was urged that the order of the Subordinate Judge was made without jurisdiction, but the District Judge rejected the appeal. The judgment-debtor appealed to the High Court. *Held*, that the Subordinate Judge acted properly in sending the record back to the Cooch Behar Court to be properly certified, and also that he should have set aside the execution-proceedings as being altogether void, but, as that formed no portion of the grounds of appeal urged in the lower Appellate Court, the appeal should be dismissed. GANEE MAHOMED SARKAR v. TARINI CHARAN CHUCKERBATTI.

[I. L. R. 14 Calc. 546]

**FOREST ACT.**

See MADRAS FOREST ACT.

**FORFEITURE**

See CASES UNDER LANDLORD AND TENANT—FORFEITURE.

**FORGERY.**

See CHEATING.

[I. L. R. 12 Mad. 114]

1.—*Intention—Penal Code, s. 466.*] Where a document is made for the purpose of being used to deceive a Court of Justice it is made with the intention of being used for that purpose. A person, therefore, who, at the request of another sent to trap him, fabricates a document purporting to be a notice under the seal and signature of a Deputy Collector, he being informed that the notice was required by such other person for the purpose of being used in a pending suit (there being, however, in reality no such suit in existence), is guilty of forgery, it not being necessary that the intention of fraudulently using the document should exist in the mind of any other person than the person fabricating the document. HARADHAN MAITI v. QUEEN-EMPEESS.

[I. L. R. 14 Calc. 513]

2.—*Penal Code, s. 471—Using a forged document—Fabrication of a receipt as a voucher to cover a contemporaneous embezzlement.*] A Postmaster



**FORGERY—concluded.**

misappropriated a certain sum of money, and at the same time made a false document purporting to be a receipt signed by the person to whom the money was payable. He was convicted of using a forged document under s. 471 of the Indian Penal Code. It was contended that no forgery had been committed, because the receipt was made merely to cover the embezzlement. *Empress of India v. Jivanand* (I L. R. 5 All. 222): *Held*, that the conviction was right. A debtor, who fabricates a release to screen himself from liability to pay the debt, cannot be said not to be guilty of forgery because he intended by the fabrication to cover a dishonest purpose. *QUEEN-EMPRESS v. SABAPATI*.

[I. L. R. 11 Mad 411]

3.—*Penal Code, ss. 463, 467—Criminal Procedure Code, 1889, s 195.* The word 'Forgery' is used as a general term in s. 463 of the Penal Code (Act XLV of 1860); and that section is referred to in a comprehensive sense in s. 195 of the Criminal Procedure Code (Act X of 1882) so as to embrace all species of forgery, and thus includes a case falling under s. 467 of the Penal Code. *QUEEN-EMPRESS v. TULJA*.

[I L R. 12 Bom 36]

4.—*Penal Code, ss. 415, 419, 463—Cheating by personation.* A, falsely represented himself to be B at a university examination, got a hall ticket under B's name, and headed and signed answer papers to questions with B's name. *Held*, that A committed the offences of forgery and cheating by personation. *QUEEN-EMPRESS v. APPASAMI*.

[I. L. R. 12 Mad 151]

5.—*Penal Code, s 471—Using a forged document—Fraudulent intention.* The accused passed the Public Service Examination in 1883, and in a certificate given him by the Educational authorities of his having passed his age was correctly stated as 23. The accused sent a copy of this certificate to the Collector with a petition for employment in the public service; but in the copy the age of the accused had been altered to 20: *Held*, that the accused was guilty of using a forged document within the meaning of s. 471 of the Penal Code. *QUEEN-EMPRESS v. VITHAL NARAYAN*

[I. L. R. 13 Bom. 515 note]

**FRAUD.**

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See GRANT—CONSTRUCTION OF GRANTS.

[I. L. R. 12 Bom. 595]

See KHOTI TENURE.

[I. L. R. 12 Bom. 595]

**FRAUD—continued.**

See LIMITATION ACT, 1877, s. 18.

[I. L. R. 11 Bom. 501]

[I. L. R. 14 Calc. 679]

See LIMITATION ACT, 1877, ART. 91.

[I L R. 15 Calc. 58]

See CASES UNDER LIMITATION ACT, 1877, ART. 95.

See MADRAS REVENUE RECOVERY ACT (MADRAS ACT II OF 1864), s. 59.

[I L, R. 12 Mad 169]

See PLAINT—AMENDMENT OF PLAINT.

[I. L. R. 11 Bom. 620]

See PLAINT—FORM AND CONTENTS OF PLAINT.

[I L. R. 15 Calc. 533]

See RIGHT OF SUIT—SALE IN EXECUTION OF DECREE

[I L R. 15 Calc. 179]

See SALE FOR ARREARS OF REVENUE—SETTING ASIDE SALE—OTHER GROUNDS.

[I. L. R. 16 Calc. 194]

See CASES UNDER SALE IN EXECUTION OF DECREE—INVALID SALES—FRAUD.

See VARIANCE BETWEEN PLEADING AND PROOF—SPECIAL CASES—FRAUD.

[I. L. R. 11 Bom. 620]

See CASES UNDER VENDOR AND PURCHASER—FRAUD.

**(1) WHAT CONSTITUTES FRAUD AND PROOF OF FRAUD.**

1.—*Fiduciary relationship—Onus of proof of fraud—Accounts, Proof of falsity of* [ It is only in cases where one person stands in a fiduciary relation to another that the law requires the former to exercise extreme good faith in all his dealings with the latter, and scrutinises those dealings with more than ordinary care and caution. In the absence of any special confidence reposed by one person in another, it lies on him who alleges fraud to prove it. Where accounts are impeached on the ground of fraud, two or three instances of particular items, which can be taken as false and fraudulent, must be brought to the notice of the Court before it can be called upon to order the accounts to be re-opened from the first. *Williamson v. Barbour*, I. L. R. 9 Ch. D. 529, followed. *BOO JINATBOO v. SHA NAGARVALAB KANGE*.

[I. L. R. 11 Bom. 78]

## FRAUD—continued.

## (1) WHAT CONSTITUTES FRAUD AND PROOF OF FRAUD—concluded.

2.—*Charge of fraud—Alteration in nature of fraud charged* ] It is a well-known rule, that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind cannot, on failure of proof, be substituted for it. In a suit by the Official Assignee to recover a sum which it was alleged had been improperly and fraudulently paid away from the estate of an insolvent the plaintiff as presented alleged the fraudulent concealment of the payment from the assignee. Afterwards when all the evidence had been taken and it had been established that the assignee knew of the payment, this was amended to the statement that if he did know of it he had no power to consent to it, and that his consent would not be binding, the payment being a fraud upon the Court. *Held* that the amendment at the stage when it was made was not permissible. The High Court having decreed the claim on a finding of fraud different from either of the above, *held*, that on this ground alone the judgment might have been reversed. *Montesquieu v. Sandys*, 18 Ves. Jun 302, followed *ABDUL HOSSEIN ZENAIL v. TURNER*.

[I. L. R. 11 Bom. 620  
[L. R. 14 I. A 111]

2.—*Vendor and purchaser—Omission of purchaser to take possession—Sale by him to another—Effect of want of possession.* ] A sold certain land to B by a sale-deed dated 15th July 1871. The deed was optionally registrable, and was not registered. A continued in possession after the date of the sale. A sold the same land to the plaintiff by a deed of sale dated 1st February 1872. The deed was registered, its registration being compulsory. It was unaccompanied with possession. In 1882 B obtained possession of the land from the sons of A and sold it to the defendant by a sale-deed dated 11th October 1882. This deed was registered and accompanied with possession. In 1883 the plaintiff sued for possession of the land in dispute: *Held*, that the defendant's vendor by merely omitting to take possession of the land on his purchase was not guilty of any positive fraud or of any concealment or negligence so gross as to amount to fraud that would entitle the plaintiff to relief against him. *SHIVRAM v. SAYA*.

[I. L. R. 13 Bom. 229]

## (2) ALLEGING OR PLEADING ONE'S OWN FRAUD

4.—*Collusion between parties—Defendant subsequently pleading his own fraud* ] A obtained a decree against B, in execution of which he was put in possession of certain land by proclamation, the land being in the possession of tenants. A subsequently sued B and the tenants to recover possession of the same land. B pleaded that the decree obtained by A was the result of collusion between

## FRAUD—continued.

## (2) ALLEGING OR PLEADING ONE'S OWN FRAUD—concluded.

himself and A in fraud of B's creditors. *Held* that it was not open to B to raise this plea. *VENKATRAMANNA v. VIRAMMA*.

[I. L. R. 10 Mad. 17]

*See CHENVIRAPPA BIN VIRBHADRAPPA v. PUTTAPPA BIN SHIVBASAPPA*.

[I. L. R. 11 Bom. 708]

## (3) EFFECT OF FRAUD.

5.—*Benami transaction for purpose of defrauding creditors—Deed of conveyance not in real purchasers' name—Collusive suit by nominee against real owner—Decree obtained by fraud—Subsequent suit by real owner against nominee for possession—Right of party to fraud to set fraudulent decree aside—Collusive transaction when held binding, and when set aside—Limitation Act, 1877, art. 93—Suit to set aside decree on ground of fraud* ] In 1874 the plaintiff P bought a house from G, but caused the conveyance to be executed by G, in the defendant C's name. This was done with the object of protecting the property against the claims of the plaintiff's creditors. The plaintiff occupied the house, ostensibly as tenant to the defendant, for a nominal rent. In 1880 the defendant brought a suit against the plaintiff to recover possession of the house, and obtained an *ex-parte* decree. He applied for execution of the decree, but allowed the execution-proceedings to drop. In 1883 he made a fresh application for execution. Thereupon the plaintiff filed the present suit for a declaration of his title to the house in question, and of his right to retain possession, alleging that the defendant was a mere *benamidar*: that the sale-deed and the *ex parte* decree were sham and collusive transactions in fraud of the plaintiff's creditors; and that the defendant was merely a trustee for him. *Held*, that the plaintiff was bound by the decree passed in 1880 in the defendant's favor, though it was a collusive decree. The plaintiff could not get the judgment set aside which the defendant had obtained against him by his own contrivance. The plaintiff alleged that the defendant held in trust for him, the object of that trust being to protect the plaintiff's property in fraud of his creditors. Even if such a trust enforceable by the Courts could arise out of such a *turpis causa*, the question was whether this continued to subsist and would be enforced, when the original relations of the parties had become merged in the decree obtained by the defendant against the plaintiff. The general principle is that where a defendant has suffered a judgment to pass against him, the matter is then placed beyond his control. *Held*, also, upon the general principle of *res judicata*, that the plaintiff was estopped from raising the question of fraud in the present suit, which he might and ought to have urged in the former litigation. *Held*, further, that the suit, if regarded as one for setting aside a decree obtained by fraud, was

**FRAUD—concluded.****(3) EFFECT OF FRAUD—concluded.**

barred by limitation, such fraud as there was being as well known to the plaintiff in 1880 as in 1883, when the present suit was filed. A party to a collusive decree is bound by it, except possibly when some other interest is concerned that can be made good only through his. *Ahmedbhoy Habibhoy v. Vulleebhoy Cassumbhoy*, I. L. R. 6 Bom 703, and *Venkatramanna v. Veramma*, I. L. R. 10 Mad. 17, followed *Param Singh v. Lalji Mal*, I. L. R. 1 All 403, dissented from. A decree fraudulently obtained may be challenged by a third party who stands to suffer by it either in the same or in any other Court; but, as between the parties themselves to a collusive decree, neither of them can escape its consequences. Where an illegal purpose has been effected by a transfer of property, the transferee is not to be treated as trustee holding it for the benefit of the transferor. Where a collusive transaction has merely proceeded to the length of sham deeds passed between the parties, or even of false declarations made by them in litigation for their common benefit, the Courts may displace the apparent by the real ownership. In cases in which the transaction was still inchoate, or the grantor still retained a *locus penitentiae*, the formal act has been relieved against by reference to the real intention of the parties. The violation or infringement of the law had not in such cases been completed, and a suspensive condition was annexed to the initial acts of which Courts of Equity could take advantage; but, apart from this, a man cannot confine the operation of his deed within the limits of an intended fraud. The purpose having been once answered, especially by defeat of a third person's rights asserted in Court, a claim for reconveyance would be properly dismissed. *CHENVIRAPPA BIN VIBBHADRAPPA v. PUTTAPPA BIN SHIVBASAPPA*.

[I L. R. 11 Bom. 708]

**FURTHER ENQUIRY.**

See CRIMINAL PROCEDURE CODE, 1882  
s. 437.

[I. L. R. 9 All. 52, 85]

[I. L. R. 15 Calc. 608]

[I L. R. 13 Bom. 376]

**GAMBLING.**

*Bombay Act IV of 1887, ss 3 and 4—Common gaming-house—Rain-betting—What constitutes gaming.* The accused kept a shed where large numbers of people assembled for the purpose of betting on the quantity of rain which might fall in a given time. The instruments used for measuring the quantity of rainfall were two—a rain-gauge, and a gutter attached to the roof of the shed. The accused, who registered the quantity of rainfall, were entitled to a commission on each bet. They were charged under s. 4, cls. (b) and (c) of *Bombay Act IV of 1887*, with keeping the shed for the purpose of a

**GAMBLING—concluded.**

"common gaming-house." *Held*, that *Bombay Act IV of 1887* did not apply to betting. The shed in question was undoubtedly a common betting place, and the instruments used were instruments of betting, but there is no law in India which makes betting illegal. There is a distinction between betting and gaming. There must be a game, before there is gaming; and to constitute a game, there must be a contest, and an active participation of certain persons is also necessary. In the present case there was no contest, no players, and no active part taken by the betters who merely watched the falling of rain. Rain-betting is, therefore, not a game, and the place where it was carried on not a "common gaming-house." *QUEEN-EMPRESS v. NAROTTAMDAS MOTIRAM*.

[I. L. R. 13 Bom. 681]

**GENERAL AVERAGE, LIABILITY FOR.**

See SHIPPING LAW.

[L. R. 16 I. A. 240; I. L. R. 17 Calc. 362]

**GENERAL CLAUSES CONSOLIDATION ACT (I OF 1868.)**

—, s. 2.

See STAMP ACT 1879, SCH. 1, ART. 5.

[I. L. R. 13 Bom. 87]

—, s. 2, cl. 18.

See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO.

[I. L. R. 9 All. 240]

See SENTENCE—IMPRISONMENT—IMPRISONMENT GENERALLY.

[I. L. R. 9 All. 240]

—, s. 6

See BENGAL TENANCY ACT, SS. 20, 21.

[I. L. R. 14 Calc. 553]

[I. L. R. 15 Calc. 376]

See COMPANY—FORMATION AND REGISTRATION.

[I. L. R. 11 All. 349]

See EXECUTION OF DECREE—REPEAL OF ACT PENDING SUIT.

[I. L. R. 16 Calc. 323]

See MORTGAGE—FORECLOSURE—DEMAND AND NOTICE OF FORECLOSURE.

[I. L. R. 15 Calc. 357]

See RIGHT OF APPEAL.

[I L. R. 15 Calc. 107]

# GENERAL CLAUSES CONSOLIDATION ACT (I OF 1868), s. 6—concluded.

See SPECIAL APPEAL—ORDERS SUBJECT TO APPEAL

[I. L. R. 15 Calc. 107

See TRANSFER OF PROPERTY ACT, s. 2.

[I. L. R. 15 Calc. 357

1.—s. 6 —“*Proceedings*,” *Meaning of*—*Service of notice of foreclosure*.] The proceedings referred to in s. 6 of the General Clauses Consolidation (Act I of 1868) are not necessarily judicial proceedings, but ministerial proceedings as *c. g.*, the service of notice of foreclosure. UMESH CHUNDER DAS v. CHUNCHUN OJHA.

[I. L. R. 15 Calc. 357

2.—s. 6.—*Bengal Tenancy Act (VIII of 1885), s. 170—Decree for rent under Bengal Act VIII of 1869—Attachment under decree obtained under Rent Law of 1869, subsequently to the passing of Act VIII of 1883—General Clauses Consolidation Act (I of 1868), s. 6*] Before the Bengal Tenancy Act of 1885 came into operation, a decree for rent was obtained under Bengal Act VIII of 1869. After the Bengal Tenancy Act of 1885 had become law, the tenancy in respect of which the rent had become due, was attached in execution of such decree. A claim was subsequently put in to the attached property by a third person, which claim was disallowed as being forbidden by s. 170 of the Bengal Tenancy Act of 1885. *Held*, that the provisions of the Bengal Tenancy Act of 1885 were applicable to the proceedings in execution; the term “proceedings” in s. 6 of Act I of 1868 not including proceedings in execution after decree DEB NARAIN DUTT v. NARENDRA KRISHNA.

[I. L. R. 16 Calc. 267

## GHWALI TENURE.

*Ghatwali tenure in Bhagulpore—Ghatwali's right of alienation—Sale of ghatwali's estate in execution of decree against him*] Ghatwali tenures are rendered by their origin and incidents distinct in some particulars from other inheritances, and to them the law of the Mitakshara, to its full extent, is not entirely applicable, yielding in their case to a custom, though only to the extent of the custom proved. On a question whether the sale of a ghatwali tenure in the Kharagpore zemindari, in Bhagulpore, in execution of a decree against the ghatwal, had transferred the inheritance as against the ghatwal's son. *Held*, in regard to a proved custom that the ghatwali was not inalienable, but might be aliened by the ghatwal, or sold in execution of a decree against him, if such alienation was assented to by the zemindar, this power of alienation not being limited to the life-interest of the ghatwal for the time being, but forming part of this right and title to the ghatwali. KALI PERSAD v. ANAND ROY.

[I. L. R. 15 Calc 471

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## GIFT.

See HINDU LAW—GIFT.

See MAHOMEDAN LAW—GIFT.

See STAMP ACT 1879 SCH I ART. 36.

[I. L. R. 12 Mad 89

## GOODS SOLD.

See LIMITATION ACT 1877, s. 62.

[I. L. R. 14 Calc. 457

See MONEY HAD AND RECEIVED.

[I. L. R. 14 Calc. 457

## GOVERNMENT, OFFICERS OF, SUIT TO SET ASIDE ORDERS OF.

See LIMITATION ACT, 1877, ARTS. 12 AND 14.

[I. L. R. 11 Bom. 429

## GRANT

1	Construction of Grants	...	352
2	Power to Grant	...	357

### (1) CONSTRUCTION OF GRANT

1.—*Unsettled palayam held on service tenure—Commutation of service for quit-rent—Emfranchisement—Inam patta issued to Hindu widow by Government, effect of acknowledging her absolute title to estate*] The palayam of G was granted during the Muhammadan rule to a Hindu on service tenure, the condition being that the grantee should maintain a body of police for the service of the paramount power. This palayam was not brought under permanent settlement under the provisions of Reg. XXV of 1802. The last male holder died in 1860 leaving him surviving a widow K and a daughter C. In 1865 the Government discontinued the service and, in lieu thereof and of the reversionary interest of the Crown, imposed a quit-rent, and an inam patta was issued to K by the Inam Commissioner by which her title to the estate was acknowledged by the Government of Madras and the estate was confirmed to her as her absolute property subject to the quit-rent. *Held* that the effect of the inam patta was not to confer on K any new estate but merely as between the Crown and the owners of the estate to release the reversionary right of the Crown. NARAYANA v. CHENGALAMMA.

[I. L. R. 10 Mad. 1

2—*Grant of profits of vatun deshmukhi in perpetuity—Hereditary gumastas—How far such grant valid after the death of the grantor*.] By a sanad duly executed on the 20th August 1850, the plaintiffs' father, Y, who was a vatundar deshmukhi, appointed the defendants and their heirs hereditary vatuni gumastas, and granted, by way of remuneration for their services, Rs. 201 and a quantity of grain out of the annual vatun income in perpetuity. In consideration of certain sums obtained from the defendants, Y

## GRANT—continued.

## (1) CONSTRUCTION OF GRANTS—continued.

mortgaged the *vatan* property to the defendants, who subsequently sued Y upon the mortgage. The suit was referred to arbitration, and an award was duly made, and a decree upon the award was obtained by the defendants against Y. In 1859 execution of the decree was granted against Y. In 1864 the services connected with the *vatan* were discontinued by Government. In 1871 Y died. The defendants having kept the decree alive, sought in 1881 to execute the decree against the plaintiffs' eldest brother, who filed objections, but his objections were overruled, and execution was ordered to issue. The plaintiffs brought this suit in 1883 for a declaration that the defendants were no longer entitled to the allowance under the *sanad*, and for an injunction restraining the defendants from the execution of the decree against the *vatan*. The defendants contended (*inter alia*) that the *sanad* could not be cancelled, Y having granted it as full owner; and that the receipt by the defendants of the allowance had been adverse since 1864, when their services had ceased: *Held*, confirming the decree of the lower Courts, that the plaintiffs were entitled to the declaratory decree and to the injunction prayed for. Although the management of the *vatan* was vested by the *sanad* in the defendants and their heirs in perpetuity under the title of *gumastas*, nevertheless the remuneration attached to the office by Y was in derogation of his successor's rights, and was, therefore, at any rate in the absence of proof of custom, invalid against them: *Held*, also, that, having regard to the terms of the *sanad*, it was in the power of the original grantor, or any of his successors, to determine the office and the remuneration at any time after the *vatan* services ceased in 1864. KRISHNAJI v. VITHALRAV.

[I. L. R. 12 Bom. 80]

3.—Proprietary right of *khot* to *khoti vatan* land.—Right of such *khot* to forest land and to timber and wood growing therein—Government, right of, to appropriate to forest preserves assessed or unassessed land.—Construction of such *khoti grants*.] The plaintiff sued the defendant, alleging that the village of Mauza Ambedu, in the Ratnagiri District, was his *khoti vatan* village in which his proprietary right extended to raise crops of any kind or to preserve and cut the jungle and forest trees on the lands therein. He complained that since 1855-56 the Collector of the District had prohibited him from exercising the above alleged rights, and prayed that the obstruction might be removed and Rs. 600 awarded as damages. The plaintiff based his claim mainly on the settlement of 1788, Dunlop's proclamation of 1824, and several other *khoti* grants in the district. The defendant denied that the plaintiff had any proprietary right in the village, and contended (*inter alia*) that the *khot* derived his rights from the yearly *kabuliats* passed by him, that his right to cultivate did not extend to culti-

W., D.

## GRANT—continued.

## (1) CONSTRUCTION OF GRANTS—continued.

vating the jungle land, and that his position was no better than that of a *patel*. The Joint Judge who tried the suit held that under the settlement of 1788 the plaintiff, as *khot*, was entitled to the jungle produce, except timber; that in virtue of Dunlop's proclamation of 1824 the plaintiff acquired an unqualified right to the forest land in the village and timber growing on it, and that the defendant had no right to appropriate assessed or unassessed land for forest purposes, and awarded the plaintiff the sum of Rs. 600 as damages. On appeal by the defendant to the High Court: *Held*, that the application of the general rules of construction of grants to a subject by the State requires that language of such general import as is ordinarily to be found in the *khot's sanads*, should be taken most beneficially to the State: *Held*, accordingly, that, in the absence of a *sanad* expressly granting it the ownership neither of the soil nor of cultivated or uncultivated lands passes by the grant of the *vatan* *khotship*: *Held*, also, that the grant of the *vatan khoti* did not make the *khot* a perpetual tenant of Government in respect of all lands in the village, except *dhara* lands: *Held* on the authority of *Tajubai v. Sub-Collector of Kolaba*, 3 Bom. A. C. 132, and *Ramchandra Narsinha v. Collector of Ratnagiri*, 7 Bom. A. C. 41, that a permanent relationship was created between the Government and the *khot* which could not be interfered with as long as the settlement of 1788 was in force, except with the *khot's* consent, and therefore that in 1855, when the *pahani* of 1788 was in force, the Government could not withdraw the *thikan* in question from the plaintiff's cultivation: *Held*, also, that, in the absence of evidence to show that the right to the jungle produce was intended to be reserved to Government, the plaintiff was entitled to cut down brushwood whether as a source of revenue or for the purpose of bringing the land into cultivation: *Held*, that the respondent was entitled to damages for the years during which he had been excluded, and to an injunction restraining the defendant from excluding him in the future: *Held*, also, that, as *khot*, the respondent had no right to cut timber in forest and uncultivated lands whether by virtue of his *khotship* or Dunlop's proclamation. COLLECTOR OF RATNAGIRI v. ANTAJI LAKSHMAN.

[I. L. R. 12 Bom. 534]

4.—Managing *khot's* right to create tenancies—*Maphi istara* lands—*Suti* lands—*Sanad*, Construction of—*Fraud*.] In 1832 the British Government granted to the plaintiff's father, Mahomed Ibrahim Makba, the village of Ransai on *khoti* tenure by a *sanad* which provided (*inter alia*) as follows:—

1. That the whole of the land waste in the year 1830-31 was granted as *inam*.
2. That exclusive of this *inam* land, all the rest of the village was granted on *khoti* tenure on certain conditions and stipulations set forth in twelve clauses, the chief of which were the following:—Clause 1st provided that the *khot* should annually pay to Govern-

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## GRANT—continued.

## (1) CONSTRUCTION OF GRANTS—continued.

ment a fixed sum of Rs 249 2as. 35rs Clause 7th provided that the *khot* should allow the lands, which had been granted on *maphi istava* tenure to certain *havidars* before the date of the *sanad* to continue in their possession; that he should every year recover from them the Government dues and pay the same over to Government in addition to the amount stipulated with him on account of the *khotship*. Clause 9th provided that the holders of the *suti* lands in the village were the owners of those lands. Should a new survey be made and a new assessment settled, the same should be settled by Government for the holders of the *suti* lands agreeably thereto. From 1845 to 1871 the management of the *khoti* village was entrusted to the defendant as a *maktadar*, or lessee, under two *kabuliats* passed by him—one in 1845 to Mahomed Ibrahim Makba, the grantee of the *khoti* village, and the other in 1858 to the grantee's heirs and legal representatives. By clause 5th of the *kabuliat* of 1858 the defendant agreed to carry on the management of the village and render a detailed account of the balance of the village revenue every year. Clause 7th of the same *kabuliat* was in the following terms:—"I (the lessee) will bring under cultivation and into prosperous state the waste, culturable, and unculturable land of the aforesaid village. I will take the proceeds of the same during the years of my contract. After the expiry of the year of the contract you are to take the assessment of the fields according to the practice of the village. I have nothing to do with the same. I will not let (the village) nor lease to anybody for a longer period than for the period of the contract. If I let it, I will make good the damage you may suffer." In 1859 some of the *maphi istava* lands were sold by the Collector for arrears of assessment, and bought in by Government. The defendant applied to the Collector to have the lands transferred to him, and the Collector transferred them to his name. Shortly afterwards the defendant acquired some more lands, which were held on *suti* tenure in the village. He either purchased them or took them up on the tenants abandoning them. In 1861 when the survey was introduced into the village, he got his title to these lands recognized by the Superintendent of Survey. In 1871 the defendant's management of the village ceased. But he refused to deliver up to the plaintiff either the *maphi istava* or the *suti* lands which he had acquired during his management. The plaintiff, therefore, sued, as *khot* of the village, to recover the said lands with mesne profits, alleging that the defendant had illegally and fraudulently acquired those lands on his own account while acting as plaintiff's agent, and praying that he should be declared to have acquired and held them in trust for the plaintiff. The defendant contended (*inter alia*) that the lands in suit were not included in the *khoti* grant; that they belonged to Government; that he had acquired some from the Collector and the rest from the

## GRANT—continued.

## (1) CONSTRUCTION OF GRANTS—continued.

Superintendent of Survey; that under his *kabuliats* he was entitled to take up the lands direct from Government, and that the plaintiff was only entitled to the assessment due on the lands which he had refused to accept. Lastly, the defendant denied that he had acted in fraud of the plaintiff's rights in acquiring the lands in dispute on his own account. *Held*, on the construction of the *sanad*, that the plaintiff being the *khot* of the whole of the village exclusive of the land granted in *manu* the *maphi istava* lands were included in the *khoti* grant; that the *khot's* interest in them, whatever might be the extent of it, was not separable from the *khoti* estate; and that the *khot* had a reversionary interest in the *maphi istava* lands as well as in the *suti* lands, which had been abandoned by their former occupants. *Held*, also that the defendant was not precluded by the terms of his lease from acquiring the lands in dispute on his own account. The engagement to furnish accounts of the balance of the village revenue at the end of each year was simply an engagement to furnish the plaintiff with information which would be of use to him, and which indeed it would be necessary for him to possess when he resumed the management of the village on the determination of the lease. It imported nothing more than that; and the whole transaction evidenced by the *kabuliats* was merely an assignment, in consideration of a fixed annual payment to be made by defendant to plaintiff, of the rights and liabilities of the latter to be exercised and discharged for a certain period by the former. For that period the defendant was the *maktadar* or tenant of the plaintiff's *khotship*, and though a certain confidence was necessarily reposed in him in connection with a tenancy of this nature, and though he was bound jealously and scrupulously to protect the plaintiff's interest, so far as they were in his keeping, yet he was not bound by the strict rule which prohibits a trustee from acquiring for himself an estate of his *cestui que trust*. Under clause 7th of the *kabuliat* of 1858 the defendant was at liberty either to take up waste lands himself or put in tenants; if he put in tenants on leases, the special advantages of any leases were to expire with his own lease. But the actual occupation of land either by himself or by his tenants was not to be interfered with at the determination of his lease, so long as he or they continued to pay the assessment according to the practice of the village. The defendant could therefore without the intervention of the Collector have taken up the *maphi istava* lands in suit and become himself the tenant; and he could have also acquired the *suti* lands from former *sutidars*, or taken them up if waste, without the intervention of the Survey Superintendent. The circumstance that, when acquiring the lands he needlessly invoked the assistance of the Revenue authorities, would not invalidate his title if it could not be impugned on other grounds: *Held*, further, that the

**GRANT—continued.****(1) CONSTRUCTION OF GRANTS—concluded.**

defendant was not guilty of fraud, as there was no evidence to show that he had acted in a surreptitious or secret manner in acquiring the lands in suit. On the contrary, his action in applying to the Revenue authorities was a sign of his good faith rather than of any fraudulent intent. The plaintiff was, therefore, not entitled to oust the defendant from the lands in suit. **FAKI ISMAIL v. MAHOMED ISMAIL**

[I. L. R. 12 Bom. 595]

5.—*Invalidity of grant, or covenant by grantor, in favor of persons unborn, upon a condition which may never arise—Restraint upon grantor's own power of alienating—Hindu law.* The purpose of a grant was to oblige the grantor and his successors in a Raj estate to give in some way or other maintenance to all the descendants of four persons living at the date of the grant, by declaring that on the failure of the Raja of the day, at any future time to maintain such descendants, the latter were to have an immediate right to four of the Raj villages. This might be regarded as importing a present assignment to persons not yet in existence, subject to a suspensive condition, which might prevent its ever taking effect; or it might be regarded as a covenant intended to run with the Raj estate, in favor of non-existing covenantees, to give the villages to them in the event specified: *Held*, that in either view, it was equally ineffectual: *Held*, also, that the High Court had correctly construed the instrument in holding that the words, "if ever in the time of my descendants you are not provided with means of maintenance," formed a condition, which also was unfulfilled—the descendants being in possession of villages granted to them by the Raja, other than those claimed, more than sufficient for their maintenance. **CHANDI CHURN BARUA v. SIDHESWARI DEBI.**

[I. L. R. 16 Calc. 7.]

[L. R. 15 I. A. 149]

**(2) POWER TO GRANT.**

6.—*Grant by widow for religious benefit of husband—Power of successor to resume grant.* Where two widows of a zemindar granted a small portion of the zemindari to a Brahman who had been brought up by them with a view that he should perform the funeral and annual ceremonies of their deceased husband: *Held* that the grant was not *ultra vires*, and could not be resumed by the zemindar's successor. **LAKSHMINARAYANA v. DASU.**

[I. L. R. 11 Mad. 288]

7.—*Invalidity of grant, or covenant by grantor, in favor of persons unborn, upon a condition which may never arise—Restraint upon grantor's own power of alienating—Hindu law.* A Hindu owner cannot make a conditional grant of a future interest in property in favor of persons unborn, who may happen at a future time to be

**GRANT—concluded.****(2) POWER TO GRANT—concluded.**

the living descendants of the grantees named, to take effect upon the occurrence of an event which may never occur. That he would thereby impose a restraint contrary to the principles of Hindu law, upon his own power of alienating his estate, discharged of such future interest is a reason for the invalidity of such a grant. The purpose was to oblige the grantor and his successors in a Raj estate to give in some way or other maintenance to all the descendants of four persons living at the date of the grant, by declaring that on the failure of the Raja of the day, at any future time to maintain such descendants, the latter were to have an immediate right to four of the Raj villages. This might be regarded as importing a present assignment to persons not yet in existence, subject to a suspensive condition, which might prevent its ever taking effect; or it might be regarded as a covenant intended to run with the Raj estate, in favor of non-existing covenantees, to give the villages to them in the event specified: *Held* that in either view, it was equally ineffectual. **CHANDI CHURN BARUA v. SIDHESWARI DEBI.**

[I. L. R. 16 Calc. 71]

[L. R. 15 I. A. 149]

**GROWING CROPS.**

*See STAMP ACT 1879, SCH. I, ART. 5*

[I. L. R. 13 Bom. 89]

**GUARANTEE.**

1.—*Consideration—Guarantee on condition of taking criminal proceedings—Compounding felony.* S gave to the creditors of H a guarantee for the payment of the debts due to them by H. As a consideration for this guarantee the creditors were to abstain from taking criminal proceedings against H for fifteen days, and by implication were to abstain from taking such proceedings altogether if the said debts were paid within that time: *Held*, that such a guarantee could not be enforced by the creditor. A man, to whom a civil debt is due, may take securities for that debt from his debtor, even though the debt arises out of a criminal offence and he threatens to prosecute for that offence, provided he does not, in consideration of such securities, agree not to prosecute. He must not, however, by stifling a prosecution obtain a guarantee from third parties. **KESOWJI TULSIDAS v. HURJIYAN MULJI.**

[I. L. R. 11 Bom. 566]

4.—*Lease—Guarantee for rent—Indemnity—Liability—Continuing guarantee—Death of surety—Contract Act IX of 1872, ss. 124, 125, cl. (2), 126, 129, 131.* One B proposed to take a lease of zemindari property from M for the period of eight years at a rental of Rs 3,900 per annum. M declined to grant the lease until the payment of rent during the term of eight years was guaranteed by one S, the father of the



**GUARANTEE—concluded.**

plaintiff. *S* on his part required a guarantee or indemnity against any rent which might not be paid by *B*, and which he might under his proposed guarantee become liable to pay. The defendant's father, *G*, accordingly gave a guarantee to *S* in the following terms: "And for your satisfaction, I write that if any money remains due from *B* on account of the lease for any year or harvest, and if you have to pay the same on account of the suretyship, I am responsible to you to pay that amount to you. Rest assured." *S* then gave his guarantee to *M*, and he granted the lease to *B*. *G* died on 22nd May 1880. *B* failed to pay the rent due for the year 1883. *M* having died, his representatives sued *S* on his guarantee and recovered from him the rent due and certain costs and expenses. *S* then died, and the plaintiff, as his representative, brought this action against defendant the legal representative of *G*, to recover the amount of the decree and costs which *S* had to pay. The Court of First Instance decreed the whole claim with costs to be recovered from the estate of *G*, and this decree was confirmed on appeal by the District Judge. On second appeal it was contended that under s. 131 of the Indian Contract Act, the death of *G* was a complete answer to the claim: *Held*, that assuming that the case was that of a continuing guarantee within the meaning of s. 131 of the Indian Contract Act, still, having regard to the object for which the two guarantees were given, it must be concluded that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that *S* should be guaranteed for any of that rent which by reason of his contract of guarantee he should be made to pay, and consequently, even if it were a continuing guarantee, the liability of *G* was not determined on his death: *Held* further, that neither *G*, if he were alive, nor on his death the defendant, as his representative, could be made liable for costs and expenses which *S* had incurred in defending the previous suit against him for rent brought by the lessor, there being no evidence to show that *S* acted as a prudent man would have done in defending the action against him or was authorized by defendant to defend the suit. *Lloyds v. Harper*, L. R. 16 Ch. D. 290, was referred to. *GOPAL SINGH v. BHAWANI PRASAD*.

[I. L. R. 10 All. 531]

**GUARDIAN.**

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See ACT XL OF 1858, s. 3.

[I. L. R. 14 Calc. 55]

See COMPROMISE—COMPROMISE OF SUITS  
UNDER CIVIL PROCEDURE CODE.

[I. L. R. 12 Mad. 433]

**GUARDIAN—continued.**See LIMITATION ACT 1877, ART. 179—  
NATURE OF APPLICATION—IRREGULAR AND DEFECTIVE APPLICATIONS.

[I. L. R. 12 Bom. 427]

See MAJORITY ACT, s. 3.

[I. L. R. 13 Bom. 285]

See MINOR—CASES UNDER BOMBAY  
MINORS ACT 1864.

[I. L. R. 13 Bom. 285]

See MINOR—REPRESENTATION OF MINOR  
IN SUITS.

[I. L. R. 14 Calc. 204]

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[I. L. R. 12 Mad. 433]

**—, Ad litem**See PRACTICE—CIVIL CASES—NEXT  
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[I. L. R. 16 Calc. 771]

**—, Consent of.**

See PARSIS.

[I. L. R. 13 Bom. 302]

**(1) APPOINTMENT.**

1.—*Guardianship of female minor—Female minor, Right to custody of—Mahomedan law, Shia Sect—Act IX of 1861—Act XL of 1858, s. 27.* A Mahomedan father of the Shia sect is entitled to the custody of a daughter above the age of seven years as against the mother. The decision in *Fuseehun v. Kajo*, I. L. R. 10 Calc. 15, has no application to a case where the father is seeking to get the custody of his daughter. IN THE MATTER OF THE PETITION OF MAHOMED AMIR KHAN, LARDLI BEGUM v. MAHOMED AMIR KHAN.

[I. L. R. 14 Calc. 615]

2.—*Minor, suit against—Nazir appointed guardian ad litem—Power of Court to direct fee to be paid by plaintiff for communication with natural guardian—Civil Procedure Code (Act XIV of 1882), s. 458—Procedure.* There is no power in the Court to order a plaintiff to pay a fee for the purpose of enabling the Nazir, who has been appointed guardian ad litem, to put himself in communication with the natural guardians and other friends, but the Court may refuse to go on with the suit if it should be of opinion that the Nazir has been unavoidably prevented from making himself acquainted with the case against the minor. In a suit against a minor residing in a Native State at a distance from the Nazir of the Court, who was appointed guardian ad litem, and where the Nazir was prevented from conducting the minor's defence without incurring expense which the plaintiff refused to pay: *Held* that the Court if it chose might cancel the appointment of the Nazir as guardian ad litem under s. 458 of the Civil

## GUARDIAN—continued.

## (1) APPOINTMENT—concluded.

Procedure Code (Act XIV of 1882). NARAYANDAS RAMDAS v. SAHEB HUSSEIN.

[I. L. R. 12 Bom. 553]

## (2) DUTIES AND POWERS OF GUARDIANS.

3.—*Inability of guardian to contract on behalf of infant ward so as to bind him personally—Effect of Act VI of 1862 (Bombay). s. 12. in regard to a charge upon a talukdari estate in the Ahmedabad District during the period of management.* A guardian cannot contract in the name of a ward, so as to impose on him a personal liability. Act VI of 1862 (Bombay). "for the amelioration of the condition of talukdars in the Ahmedabad Collectorate and for their relief from debt," was intended to deal with all debts and liabilities which could possibly impose a charge upon the talukdari estate at the end of the period of management; when the estate was to be restored to the talukdar free of incumbrance, excepting the Government revenue. If debts amounted to more than the surplus of rents during the management, of which the maximum period was twenty years, they were not to be paid. A widow, as guardian of her infant son, the heir of talukdari estate in the above district validly transferred villages, part thereof; and in the deed of transfer, to which her ward was by her as his guardian nominally a party, contracted to indemnify the purchaser in case the Government should claim and enforce a right to revenue upon the villages which she transferred as being rent free. The deed purported to make both guardian and ward personally liable in this respect, and also charged the liability upon other parts of the talukdari estate. The infant attained majority, and the estate was then placed under management within Act VI of 1862. During the period of management the Government claimed and enforced payment of revenue upon the villages. Held, that there was no personal liability on the part of the talukdar created by the above; also, that if the charge on the state had been validly made, it fell, at all events, within the terms of s. 12 of Act VI of 1862, absolving estates from liability for debts incurred not only before, but during the period of management. WAGHELA RAJSANJI v. MASLUDIN.

[I. L. R. 11 Bom. 551]

[L. R. 14 I. A. 89]

4.—*Act XL of 1858, s. 18—Mortgage by certificated guardian without sanction of District Court—Mortgage money applied partly to benefit of minor's estate—Suit by minor to set aside the mortgage—Contract Act IX of 1872, s. 65* [S. 18 of the Bengal Minor's Act (XL of 1858) does not imply that a sale or mortgage or a lease for more than five years, executed by a certificated guardian without the sanction of the Civil Court, is illegal and void *ab initio*; but the proviso means that in the absence of such sanction the certificated guardian, who otherwise would have all the

## GUARDIAN—continued.

## (2) DUTIES AND POWERS OF GUARDIANS—continued.

powers which the minor would have if he were of age, shall be relegated to the position which he would occupy if he had been granted no certificate at all. If any one choses to take a mortgage or a lease for a term exceeding five years under these circumstances, the transaction is on the basis of no certificate having been granted. In a suit brought by the guardian of a Muhammadan minor for a declaration that a mortgage-deed executed by the minor's mother was null and void to the extent of the minor's share, and for partition and possession of such share, it was found that a considerable proportion of the monies received by the mortgagor had been applied for benefit of the minor's estate by discharging incumbrances imposed on it by his deceased father. It appeared that at the time of the mortgage, the mother held a certificate of guardianship under the Bengal Minor's Act, and that she had not obtained from the Civil Court any order sanctioning the mortgage, under s. 18 of that Act. Held that the omission to obtain such sanction did not make the mortgage illegal or void *ab initio*, but relegated the parties to the position in which they would have been if no certificate had been granted, *i. e.*, that of a transaction by a Muhammadan mother affecting to mortgage the property of her minor son, with whose estate she had no power to interfere: Held that, this fell within the class of cases in which it has been decided that if a person sells or mortgages another's property having no legal or equitable right to do so, and that other benefits by the transaction, the latter cannot have it set aside without making restitution to the person whose money has been applied for the benefit of the estate. Held that even if mortgages executed by a certificated guardian without the sanction required by s. 18 of the Bengal Minor's Act were void, the section did not make them illegal; and with reference to s. 65 of the Contract Act, the plaintiff could not obtain a decree for a declaration that the mortgage was inoperative as against his share, except on condition of his making restitution to the extent of any monies advanced by the defendant under the mortgage-deeds which had gone to the benefit of the plaintiff's estate, or had been expended on his maintenance, education, or marriage. *Mauji Ram v. Tara Sing*, I. L. R. 3 All. 852, distinguished; *Shurrut Chunder v. Rajkissen Mookerjee*, 15 B. L. R. 350; *Pana Ali v. Sadiq Hossein*, 7 N. W. 231; *Saheer Ram v. Mahomed Abdul Rahman*, 6 N. W. 268; *Hamir Sing v. Zakia*, I. L. R. 1 All. 57, and *Gulshere Khan v. Naubey Khan*, Weekly Notes All. 1881, p. 16, referred to. GIRRAJ BAKSH v. HAMID ALI.

[I. L. R. 9 All. 340]

5.—*Enhancement of rent, Effect of—Acts of mother and guardian how far binding on minor son—Kabuliat given by widow in possession to bind her son and successor to pay enhanced rent decreed against her.* A putndar obtained decrees for

## GUARDIAN—continued.

(2) DUTIES AND POWERS OF GUARDIANS  
—continued.

the enhancement of the rent of holdings in the possession of the widow, of a deceased tenant, one decree being in respect of land formerly held by the latter, and the other in respect of a holding purchased by the widow, on behalf of her minor son by the deceased, whilst the enhancement suits were pending. The widow also signed *kabuliats* relating to both tenancies, agreeing, as mother of the minor, to pay the enhanced rent. *Held*, that as the putnadar was entitled to sue for enhancement, and it was not to be presumed that the mother held adversely to her son; also as she had come to what she believed to be, and was, a proper arrangement, the son on his attaining full age, and entering into possession of the tenancies, was bound by the *kabuliats*. WATSON & Co. v. SHAMLAL MITTER.

[I. L. R. 15 Calc. 8]

[L. R. 14 I. A. 178]

6.—*Validity of lease—Act XL of 1858, s. 18—Lease granted by guardian of minor's property for term exceeding five years without sanction of Court, Effect of*] A lease granted by a guardian of minor's property who has obtained a certificate under Act XL of 1858 for a term exceeding five years without the sanction required by s. 18 of that Act is invalid. BHUPENDRO NARAYAN DUTT v. NEMYE CHAND MONDUL.

[I. L. R. 15 Calc. 627]

7.—*Act XX of 1864, s. 18—Sanction of alienation of minor's property—Civil Procedure Code (Act X of 1877), s. 462—Compromise on behalf of a minor—Mortgage—Assignment of mortgage by guardian of minor—Suit on mortgage by assignee—Proof of assignment when necessary—Consideration for assignment—Adequacy of consideration—Parties.*] S. 18 of the Bombay Minor's Act XX of 1864 applies only to persons to whom a certificate has been granted under that Act. An assignment of a mortgage, therefore, by a widow, acting as natural guardian of her minor son, but who has not obtained a certificate under the Act is not invalid because effected without the sanction of the Court. Where a widow acting as natural guardian of her minor son assigned a mortgage which had been executed to her deceased husband for a consideration, a part of which was a sum due under a decree, to the assignee: *Held*, that such an assignment was not invalid under s. 462 of the Civil Procedure Code (Act X of 1877). Assuming that section to be applicable to the compromise of a decree, the circumstance that the compromise was voidable, would only affect the consideration for the assignment by reducing its amount. The plaintiff sued, as assignee of a mortgage, to recover the debt due from the mortgagors personally and from the property mortgaged. The assignor was a Hindu widow, acting as natural guardian of her minor son. The consideration for the assignment was a

## GUARDIAN—continued.

(2) DUTIES AND POWERS OF GUARDIANS  
—continued.

sum of Rs 68-9 due to the plaintiff under a decree obtained by him and Rs. 30-7 cash paid. The lower Courts held that, as to the Rs. 68-9 the transaction really amounted to a satisfaction or adjustment of the decree under which it was due, and that as such adjustment had not been certified to the Court it was invalid; they further held that the consideration for the assignment of the mortgage having so far failed, the assignment was without adequate consideration, and therefore they dismissed the suit. On appeal to the High Court. *Held*, that although in ordinary cases it is the rule that where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, yet that under the peculiar circumstances of this case that rule did not apply. The mortgage-deed was assigned by a widow acting as the natural guardian of a minor, and a great part of the consideration for the assignment had admittedly failed, the confirmation of the decree which formed part of the consideration not having been certified to the Court. There was on the record no admission of the assignment by the assignor. It might be that the minor in a suit by his next friend or guardian appointed under Act XX of 1864 might dispute the assignment. The defendants in order to protect themselves had a right to call on the plaintiff to prove the assignment, and a Court ought in the interests of justice to see that they were so protected. The assignment was on behalf of a minor, and the person acting as his guardian had not admitted it, and it might be that even her admission would not be binding on him, since he was not a party to the suit. It was necessary that the point should be so tried and determined as to bind the minor, and to do that it was essential that he should be made a party to the suit. The Court, therefore, reversed the decree of the lower Courts and remanded the case. MANISHANKAR PRANJIVAN v. BAI MULI.

[I. L. R. 12 Bom. 686]

8.—*Hindu law—Joint family—Release obtained from person just come of age*] The plaintiff as a joint member of the defendant's family sued to set aside a release obtained from him by the defendant and for partition, &c. The plaintiff was the son of one L and the defendant was the plaintiff's nephew and grandson of L being the son of T and elder brother of the plaintiff. The plaintiff alleged that L and his brother J were joint and had carried on a family business; that J died childless, and that on L's death in 1868 the whole family property passed into the hands of T, his eldest son, on whose death it came into the possession of the defendant as eldest male member of the family although belonging to a younger generation than the plaintiff. The plaintiff alleged that in 1882, shortly after he came of age, the defendant induced him to sign a release of all his claims upon the estate in consideration of a sum of Rs. 25,000. He prayed that this release might be set aside. The

## GUARDIAN—concluded.

(2) DUTIES AND POWERS OF GUARDIANS  
—concluded.

defendant denied the plaintiff's allegations as to the release: *Held*, that the release must be set aside. The defendant stood in the relation of a guardian to the plaintiff. Releases executed immediately after a ward comes of age are looked upon with suspicion. The circumstances must show the fullest deliberation on the part of the ward and perfect good faith on the part of the guardian. The circumstances of this release did not fulfil these requirements. There was not that absolute fairness and good faith required by the relations of the parties; and the signing of the release was an imprudent act which a prudent person would not have done with full knowledge of the circumstances. *TOOLSEYDAS LUDHA v. PREMJI TRICUNDAS*.

[I. L. R. 13 Bom. 61]

## (3) RATIFICATION.

9.—*Minor, Contract by—Ratification by acquiescence.*] A sued in 1885 to recover certain estates from B, alleging claim under his adoption which took place in 1865. In 1875 A, being still a minor, relinquished by deed his claim to the estates for Rs. 12,000; but now alleged that he thought he was relinquishing it only in favour of the defendant's predecessor in title who died in 1883, having been in possession of the estates since 1867. The plaintiff attained his majority in 1878: *Held*, that whether the cause of action arose in 1865 or 1867, it was equally barred from 1879; that the plaintiff was bound by the deed, assuming the plaintiff was a minor of 15 years of age at the date of the deed of relinquishment, it is not likely he would not have understood its effect, or that he failed to ascertain it when he attained his majority in 1878. His conduct of acquiescence moreover in the deed of relinquishment amounted to ratification of it. *VENKATACHALAM v. MAHALAKSHMAMMA*.

[I. L. R. 10 Mad. 272]

HEREDITARY OFFICES ACT (BOMBAY  
III OF 1874.)

*Jurisdiction—Vatandar kulkarni and rayat—Perquisites, right to.*] Bombay Act III of 1874 does not deprive the Civil Court of its jurisdiction to try the question whether a *vatandar kulkarni* is entitled to receive perquisites from his *rayat*. *VISHNU HARI KULKARNI v. GANU TRIMBAK*.

[I. L. R. 12 Bom. 278]

—, ss. 9 and 10.—*Effect of certificate under s. 10.*] The plaintiff sued, as purchaser at a Court sale of the interest of defendant No. 1, to redeem and recover possession of the land in dispute, alleging that it had been mortgaged by defendant No. 1 to defendant No. 2. Defendant No. 1 denied the mortgage, and that he had any

HEREDITARY OFFICES ACT (BOMBAY  
III OF 1874), ss. 9 and 10—continued.

title to the land, which he said belonged to R and formed a part of R's *deshmukhi vatan*. R having died, leaving a minor widow sued as defendant No. 4 in the suit, the estate was administered by the Collector. On the application of the minor's personal guardians, the Collector was joined as a party. The Collector had also certified to the Court, under s. 10 of Act III of 1874, that the land formed part of a *vatan*. The District Judge rejected the plaintiff's claim and ordered the sale to be set aside. On appeal by the plaintiff to the High Court *Held* following *Shankar Gopal v. Babaji Lakshman*, I. L. R. 12 Bom. 550, that the Judge ought not to have acted on the certificate by setting the sale aside. Ss. 9 and 10 of Act III of 1874 were not applicable to the case, as the first defendant, whose interest was purchased by the plaintiff, was not a *vatandar*. *BHAU BALAPA v. NANA*.

[I. L. R. 13 Bom. 343]

—, s. 10.—*Execution of decree—Transfer of vatan property from one not vatandar—Collector's certificate prohibiting delivery of decreed property—Procedure.*] The plaintiff and his brother, who were *vatandar deshpandes*, sued to redeem a certain property alleged to have been mortgaged by their undivided paternal aunt to the defendant. The defendant objected, on the ground that the plaintiffs were not the heirs of the widow, who had left a daughter. The daughter was joined as co-plaintiff, and a decree passed in her favour, and that decree was confirmed by the special Judge. The plaintiffs being dissatisfied with this decision, applied to the Collector for the issue of a certificate, under s. 10 of Act III of 1874, prohibiting the property from passing out of the family. The daughter in the meanwhile obtained possession of the property under the decree. Subsequently the certificate applied for by the plaintiffs was filed by them. The lower Court, feeling doubt as to whether the Collector could legally issue the certificate and how far it would operate, referred the case to the High Court: *Held*, that the Court should not act upon the certificate of the Collector. The effect of the decree being to transfer the property from the mortgagee, who was not a *vatandar*, to the daughter who, according to the Collector's certificate, was also not one, s. 10 of Act III of 1874 had no application. The Collector, if he thought proper, should take proceedings under s. 6, cl. (1) of the Act. *SHANKAR GOPAL v. BABAJI LAKSHMAN*.

[I. L. R. 12 Bom. 550]

—, s. 18.

*See JURISDICTION OF CIVIL COURT—OFFICES, RIGHT TO.*

[I. L. R. 13 Bom. 83]

**HEREDITARY OFFICES ACT (BOMBAY III OF 1874)—concluded.**

—, s. 40.

See JURISDICTION OF CIVIL COURT—OFFICES, RIGHT TO.

[I. L. R. 12 Bom. 614]

See RIGHT OF SUIT—OFFICE OR EMOLUMENT.

[I. L. R. 12 Bom 641]

**HIGH COURT, CONSTITUTION OF.**

*High Court N.-W. P.,—Stat. 24 and 25 Vic., c. 104, s. 7,—Letters Patent, N.-W. P., s. 2—Omission to fill up vacant appointment—Court consisting of Chief Justice and four Judges only.*] By s. 2 of the Letters Patent for the High Court it was not intended that if the Crown or the Government should omit to fill up a vacancy among the Judges under the powers conferred by s. 7 of the High Court's Act (24 and 25 Vic., c. 104), and the Court should then consist of a Chief Justice and four Judges only, the constitution of the Court should thereby be rendered illegal, and the existing Judges incompetent to exercise the functions assigned to the High Court. *LAL SING v. GHANSHAM SINGH.*

[I. L. R. 9 All. 625]

**HIGH COURT, JURISDICTION OF. Col.**

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[I. L. R. 12 Bom. 561]

**(1) HIGH COURT, BOMBAY—CIVIL**

1.—*Suit to declare an infant marriage null and void—Parsi Matrimonial Court—Act XV of 1865—Letters Patent, s. 12.*] In 1868 the plaintiff and defendant, then of the ages of seven and six years respectively, went through the ceremony of marriage in the presence of their respective parents and according to the rites of their religion. The formal consent on behalf of the plaintiff was not given by his father, but by his uncle, with whom he was living and by whom he had been adopted. Nineteen years afterwards the plaintiff filed this suit praying for a declaration that the pretended marriage was null and void, and did not create the *status* of husband and wife between the plaintiff and defendant. The defendant resisted the suit, and claimed to be the lawful wife of the plaintiff. The plaintiff and defendant never lived together as man and wife, nor was the marriage ever consummated: *Held*, that such a suit not being in the category of suits relegated to a special Court by Act XV of 1865, the jurisdiction to try it remained in the High Court, to which it had been given by s. 12 of the Letters Patent. *PERSHOTAM HORMASJI DUSTOOR v. MEHERBAI.*

[I. L. R. 13 Bom. 302]

**HIGH COURT, JURISDICTION OF—concluded.****(2) HIGH COURT, MADRAS—CRIMINAL.**

2.—*Extradition and Foreign Jurisdiction Act (XXI of 1879), sch. II—European British Subjects in Bangalore—Justices of the Peace for Mysore—Transfer of Criminal Case—Criminal Procedure Code, 1882, s. 556.*] The Civil and Military station of Bangalore is not British territory, but a part of the Mysore State, and the Code of Criminal Procedure is in force therein by reason of declarations made by the Governor-General in Council in exercise of powers conferred by the Foreign Jurisdiction and Extradition Act, 1879. Justices of the Peace for the State of Mysore are also Justices of the Peace for Bangalore, and both the Civil and Sessions Judge and the District Magistrate of Bangalore being such Justices of the Peace, are, by virtue of s. 6 of the said Act, subordinate to the High Court at Madras. The High Court therefore has jurisdiction to order the transfer of a criminal case from the Court of the District Magistrate of the Civil and Military station of Bangalore to the Court of a Presidency Magistrate at Madras. *IN RE HAYES.*

[I. L. R. 12 Mad. 39]

**(3) HIGH COURT, N.-W. P.—CIVIL.**

3.—*Stat. 24 and 25 Vic., c. 67, s. 22—Legislative power of the Governor-General in Council—Act XVII of 1886 (Jhansi and Morar Act)—“Indian territories now under the dominion of Her Majesty”—“Said territories”—28 and 29 Vic., s. 17, preamble—32 and 33 Vic., c. 98, s. 1—Construction of Statutes*] Act XVII of 1886 (Jhansi and Morar Act) is not *ultra vires* of the Governor-General in Council; and the town and fort of Jhansi are subject to the jurisdiction of the High Court for the N.-W. P. Provinces in the same manner as the rest of the Jhansi district. The Governor-General in Council has power to make laws and regulations binding on all persons within the Indian territories under the dominion of Her Majesty, no matter when such territories were acquired. His legislative powers are not limited to those territories which at the date when the Indian Councils Act (24 and 25 Vic., c. 67) received the Royal assent (*i.e.*, the 1st August 1861) were under the dominion of Her Majesty. In the preamble to the 28 and 29 Vic., c. 17, and in s. 1 of the 32 and 33 Vic., c. 98, Parliament has placed this construction upon s. 22 of the Indian Councils Act. Even if that construction was erroneous, it has been so declared by Parliament as to make its adoption obligatory. Though a mistaken opinion of the Legislature concerning the law does not make the law, yet it may be so declared as to operate in future. *The Postmaster-General of the United States v. Early*, Curtis Rep., U. S., p. 86, referred to. It must be presumed that the laws and regulations of the Governor-General in Council are known to Parliament. *Empress v. Burah*, I. L. R. 3 Calc 143, and I. L. R. 4 Calc. 183, referred to. *ABDULLA v. MOHAN GIR.*

[I. L. R. 11 All. 490]

**HINDU LAW—**

See LANDLORD AND TENANT—COMPEN-  
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[I. L. R. 10 Mad. 112]

See VENDOR AND PURCHASER—NOTICE.

[I. L. R. 12 Bom. 33]

See VENDOR AND PURCHASER—PUR-  
CHASE OF MORTGAGED PROPERTY.

[I. L. R. 12 Bom. 33]

*Sources of Hindu law.*] The sources of Hindu law described and their comparative authority discussed. The various schools of Hindu law, and their divisions and subdivisions, enumerated and classified. GANGA SAHAI v. LEKHRAJ SINGH.

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**HINDU LAW—ADOPTION.**

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OF WILL—SPECIAL CASES OF CON-  
STRUCTION—ADOPTION.

[I. L. R. 12 Bom 185, 202]

See HINDU LAW—WILL—CONSTRUCTION  
OF WILLS—SPECIAL CASES OF  
CONSTRUCTION—DIRECTION OPER-  
ATING AS GIFT.

[I. L. R. 16 I. A. 166]

[I. L. R. 17 Cal. 122]

See INFUNCTION—SPECIAL CASES—  
BREACH OF AGREEMENT.

[I. L. R. 13 Bom. 56]

**(1) AUTHORITIES ON LAW OF ADOPTION.**

1.—*Authorities on Hindu Law—Dattaka Mi-  
mansa—Kalika-purana.*] In dealing with ques-  
tions of the Hindu law of adoption, it is unsafe to  
resort to analogical arguments derived from the  
*arrogatio* or the *adoptio* of the Roman civil law,  
and where it is necessary to recur to first princi-  
ples, they should be sought for in the approved  
authorities of the Hindu law itself, and not in  
foreign systems of law. *The Collector of Masul-  
patam v. Cavalry Vencata Narrainapah*, 8 Moore's

**HINDU LAW—ADOPTION—continued.****(1) AUTHORITIES ON LAW OF ADOPTION—  
concluded.**

I. A. 524: *Bhyah Ram Singh v. Bhyah Ugur Singh*  
13 Moore's I.A. 373, and *Ramalakshmi Ammal v. Sivanantha Perumal Setkurayar*, 14 Moore's I. A. 570, referred to. The dictum of the Lords of the Privy Council in *The Collector of Madura v. Mootoo Ramalinga Sathupathy*, 12 Moore's I. A. 397, that the duty of European Judges administering the Hindu law, is not so much to inquire whether a disputed doctrine is deducible from the earliest authorities, as to ascertain whether it has been received by the particular school governing the district concerned, and has there been sanctioned by usage, does not prohibit the Court from considering the question of fact whether a particular passage of the Kalika-purana upon which an argument in the Dattaka Mimansa is based is authentic, by reference to other authoritative works of Hindu law. In that case no inflexible rule was laid down assigning supreme and infallible authority to the Dattaka Mimansa in questions connected with the law of adoption as followed by the Benares school of Hindu law. The authenticity of the text of the Kalika-purana, which lays down that a child must not be adopted whose age exceeds five years, is extremely doubtful. The interpretation given to that text in the Dattaka Mimansa was not necessarily intended to be universally applicable, and admits of a construction which would confine the application of the text to Brahmins intended for the priesthood; and various other equally plausible interpretations have been adopted by other authorities. This being so, it would be unsafe to act upon the text in question and upon the interpretation placed upon it in the Dattaka Mimansa so as to set aside an adoption which took place many years ago, which had ever since been recognized as valid, and under which the adoptee had ever since been in possession of his adoptive father's estate, upon the single ground that at the time of the adoption, the adopted son was more than five years of age. According to the Kalika-purana as interpreted by the Dattaka Mimansa of Nanda Pandita, an adoption in the Dattaka form is wholly null and void if made after the adoptee has completed the fifth year of his age. It is a mistake to hold that, according to the Dattaka Mimansa, so long as an adoption takes place while the adoptee is under six years of age, it is valid. The mistake arises from supposing that the word "*panchvarshiya*" used in paragraphs 48 and 53 of the Dattaka Mimansa necessarily indicates that the person referred to has passed the fifth anniversary of his birth. It indicates, on the contrary, that he is in his fifth year. *Thakoor Oomrao Singh v. Thakooranee Mehtab Koonwer*, 1 N. W. 103a, dissented from. GANGA SAHAI v. LEKHRAJ SINGH.

[I. L. R. 9 All 253]

**(2) REQUISITES FOR ADOPTION.****(a) AUTHORITY.**

2.—*Evidence of authority to adopt*] Whether an elder widow who had purported to adopt a son



**HINDU LAW—ADOPTION—continued.****(2) REQUISITES FOR ADOPTION—continued.****(a) AUTHORITY—concluded.**

to her deceased husband under his authority had received such authority orally or by will, was disputed by a junior widow, the Courts below differing as to the question of fact. Upon the evidence, the finding of the Subordinate Judge that no such authority had been given, was maintained. *AMMI DEVI v. VIKRAMA DEVU*.

[I. L. R. 11 Mad 486]

[L. R. 15 I A. 176]

**(b) CEREMONIES.**

3.—*Validity of adoption without ceremonies among Brahmans* [Quere—Whether an adoption is valid among Brahmans without the performance of the essential religious ceremonies. *RAVJI VINAYAKRAY JAGGANNATH SHANKARSETT v. LAKSHMIBAI*.

[I. L. R. 11 Bom. 381]

4.—*Upanayana ceremony of—Second birth—Age of adoptee.* [As understood in the Hindu law, adoption is itself a "second birth" proceeding upon the fiction of law that the adoptee is "born again" into the adoptive family. The existence of male issue being favoured mainly for the sake of the parent's beatitude in the future life, adoption is a sacrament justified under certain conditions when the natural male offspring is wanting. It is effected by a substantial adherence to ceremonies, but principally by the acts of giving and taking. Having taken place, its effect is the affiliation of the adoptee as if he had been begotten by his adoptive father, thus removing him from his natural into his adoptive family. In this manner, he is "born again" into the adoptive family by the rites of initiation. According to Manu, in the case of the three "twice-born" classes, the turning point of the "second birth," which means purification from the sin inherent in human nature, is represented by the ceremony of *upanayana* or investiture of the sacred thread hallowed by the *gayatri*, and until the performance of this ceremony the person concerned, though born of twice-born parents, remains on the same level as a Sudra. The ceremony is, moreover, the beginning of his education in the duties of his tribe, as prescribed by Manu. According to the Hindu law, as observed by the Benares school, the ceremony of *upanayana*, representing as it does the second birth of a boy and the beginning of his education in the duties of his tribe, is also the ultimate limit of time when a valid adoption in the *Dattaka* form can take place. Adoption in that form implies that the second birth has taken place in the adoptive family; and it cannot be effected after the boy's place in his natural family has become irrevocably fixed by the *upanayana* representing his second birth therein. The age of the boy is material only as determining the term at which the *upanayana* may be performed. *Kerutnarain*

**HINDU LAW—ADOPTION—continued.****(2) REQUISITES FOR ADOPTION—concluded.****(b) CEREMONIES—concluded.**

*v. Bhoobunesree*, 1 Sel. Rep. 161, and *Ramkishore Achary Chowdree v. Bhoobunmoyee Deba Chowdram*, S.D. A. Beng 1859, 229, referred to. *Dharmo Dagu v. Ram Krishna Chinnaji*, I. L. R. 10 Bom. 80, dissented from. *GANGA SAHAI v. LEKRAJ SINGH*.

[I. L. R. 9 All. 253]

5.—*Adoption among Brahmans—Datta Homam, when it may be dispensed with.* [The ceremony of Datta Homam is not essential to a valid adoption among Brahmans in Southern India, when the adoptive father and son belong to the same *gotra*. *Singamma v. Ramanuja Charlu*, 4 Mad. 165, approved and followed. *Shoshinath Ghose v. Krishnasunderi Dasi*, I. L. R. 6 Calc. 881, considered. *GOVINDAYAR v. DOBASAMI*.

[I. L. R. 11 Mad. 5]

**(3) WHO MAY ADOPT.**

6.—*Hindu widow—Consent of husband—Validity of adoption.* [Quere—Whether the ruling in *The Collector of Madura v. Mootoo Ramalinga Sathupathy*, 12 Moore's I. A. 397, applies to cases governed by the Mitakshara law in Northern India, and whether an adoption made by a widow after the death of the husband without his express consent, but with the consent of his near kindred is valid, or whether the recognition of the adopted son by the next reversioner would likewise render the adoption valid. *LALA PARBHU LAL v. MYLNE*.

[I. L. R. 14 Calc. 401]

7.—*Widow adopting to her deceased husband with consent of sapindas—Effect of estate having already vested in the widow of a son.* [A son's widow having obtained her widow's estate in the property inherited by her deceased husband from his father, the widow of that father cannot adopt a son to the latter, whether she acts under authority from her husband or as widow with the assent of *sapindas*. That the power of the father's widow to adopt a son to him is brought to an end upon the vesting of the estate in the son's widow was decided in *Bhoobun Moyee Debi v. Ram Kishore Achary Chowdhry*, 10 Moore's I. A. 179, and *Padmakumari Debi v. Court of Wards*, I. L. R. 8 Calc. 302; L. R. 8 I A. 229. *THAYAMMAL v. VENKATARAMA*.

[I. L. R. 10 Mad. 205]

8.—*Untonsured widow—Validity of adoption—Conflicting opinions of Shastras as to validity of adoption.* [In a suit to uphold the validity of an adoption made by the defendant of the plaintiff, the defendant admitted that she had performed certain ceremonies which she intended to be an adoption of the plaintiff as son of V; but she alleged that at the time of the said adoption she had not, nor had she since, undergone tonsure; and



**HINDU LAW—ADOPTION—continued.****(3) WHO MAY ADOPT—continued.**

that according to the custom of the Daivadnya community, to which she and the plaintiff belonged, a widow could not adopt until her head had undergone tonsure. She also stated that the majority of her caste had declared the said adoption to be invalid, and she submitted the question as to its validity to the Court. *Held* that the adoption of the plaintiff was a valid adoption. From the evidence it appeared that the requisite religious ceremonies had been performed. Before the defendant took part in them, *Shastris* were consulted as to whether the defendant while untounged could properly do so, and on making certain expiatory gifts she was pronounced competent. Under such circumstances the Court could not hold her to be incompetent. Even if other *Shastris* were of a different opinion, a Civil Court could not decide between conflicting opinions upon such a question of ecclesiastical etiquette. If an adoption be performed with all requisite rites, with the assistance of priests, and in accordance with the opinions of *Shastris*, the Court will uphold it, even against the opinions of other *Shastris* expressing or entertaining contrary views. **RAVJI VINAYAKRAV JUGGANNATH SHANKARETT v. LAKSHIMIBAI.**

[I. L. R. 11 Bom. 381]

9.—*Adoption during wife's pregnancy—Posthumous son, rights of, in family property—Will limiting legal share of such son.* The adoption of a son by a childless Hindu is valid, although at the time of adoption his wife is pregnant. The possibility that a son may afterwards be born to him, does not invalidate the adoption. A posthumous son takes the family property by right of survivorship, on the principle of relation back to the time of the father's death which applies in the analogous case of inheritance and partition, and the rights of such a son stand on the same footing as those of a son *in esse* at the time of the father's death. A father, therefore, can no more interfere by his will with the right of a posthumous son to his share of the family property as fixed by law, than with the right of a son *in esse* at the time of his death. An adopted son stands in the position of a natural son, subject to having his share reduced to one-fourth in the event of a natural son being subsequently born. *R* died, leaving him surviving his widow, who was then pregnant, and the defendant whom he had adopted a few days before his death. By his will, *R* directed that, in the event of a son being born to him after his death, his property should be divided equally between such son and the defendant, but otherwise all his property was to go to the defendant. Shortly after *R*'s death a son (the plaintiff) was born. The present suit was brought by the guardian of the plaintiff to recover the family property from the defendant. It was contended that the adoption of the defendant was invalid, having taken place during the pregnancy of the plaintiff's mother, and that *R*'s will, in so far as it was in prejudice of the plaintiff's right

**HINDU LAW—ADOPTION—continued.****(3) WHO MAY ADOPT—continued.**

as a son, was also invalid. *Held*, that the adoption of the defendant by *R* was valid, notwithstanding that *R*'s wife was pregnant at the time of the adoption: *Held*, also, that *R*'s will was inoperative in so far as it reduced the plaintiff's share to a moiety of the property. On the birth of the plaintiff the defendant, as the adopted son, became by Hindu law entitled only to one-fourth, the plaintiff, as the natural son taking the other three-fourths. **HANMANT RAMCHANDRA v. BHIMACHARYA.**

[I. L. R. 12 Bom. 105]

10.—*Adoption by an unmarried man* [Adoption by an unmarried man is not invalid. **GOPAL ANANT v. NARAYAN GANESH.**

[I. L. R. 12 Bom. 329]

11.—*Adoption by younger widow without consent of elder widow invalid although child selected by both widows—Rights of adoption of elder widow—Right on selection* [An adoption by a younger widow without the consent of the eldest widow, of a boy who has previously been selected by all the widows for adoption, cannot be supported against the wish of the eldest widow. A younger widow cannot adopt without the consent of the elder: *Held*, that the right of the elder widow was not merely a right of selection. Adoption of course implies selection of the child, but there is not complete adoption until the mutual acts of giving and receiving the child are accomplished, and until they take place there is necessarily a *locus penitentiae* for the elder widow of which she may avail herself, although contrary to the wishes of the other widows, by changing her mind and selecting another child. To hold that any one of the junior widows might perform the formal act of adoption of the selected child whenever it pleased her, would be tantamount to enabling her to force the hand of the elder widow, and compel her to complete the adoption which, at the most, was only *in fieri*. *B* died in 1865 without a son, leaving three widows, *viz.*, *L*, *A* and *C*, of whom *L* was the eldest and *C* the youngest. The plaintiff was unanimously selected by the three widows for adoption after the death of their husband. The unanimity continued down to May 1866; but on the 30th June 1866, *L* declared that if the plaintiff were adopted by *C* she would not consent to it. On the 1st July 1866, *C* adopted the plaintiff without the consent of *L*. On the 12th August 1869, *L* adopted the defendant. On the 10th August 1881, the plaintiff filed this suit against the defendant, alleging himself to be *B*'s adopted son and as such claiming possession of *B*'s property. He did not deny the *factum* of the defendant's alleged adoption on the 12th August 1869, which constituted (the plaintiff alleged) his cause of action. The defendant contended that he himself was the adopted son of *B*, having been adopted by *L*, the senior widow. He insisted that the plaintiff's adoption was invalid, having been carried out without the consent of *L*, the

HINDU LAW—ADOPTION—*continued*.(3) WHO MAY ADOPT—*concluded*.

senior widow. He further contended that the plaintiff's claim to the property was barred by limitation, it having been in possession of himself (the defendant) and *L* for more than twelve years before this suit was filed. *Held*, that the plaintiff was not the rightfully adopted son of *B*, and therefore was not entitled to the property in dispute. His adoption by *C*, the younger widow, without the consent of *L*, the senior widow, was invalid. *PADAJIRAV v. RAMRAV*.

[I. L. R. 13 Bom. 160]

## (4) WHO MAY BE ADOPTED.

12.—*Gotraja relationship—Limit of age within which person may be adopted.*] In a suit to obtain a declaration that alleged adoption was null and void, the plaintiff based his own title upon an alleged adoption of himself. He was related to his alleged adoptive father as father's father's brother's son's son's son. It was contended on behalf of the defendant, who was related to the plaintiff's adoptive father as brother's son's son, that the plaintiff's relationship was too remote to admit of his being validly adopted in preference to the defendant and other near relatives: *Held* that the plaintiff, by reason of his natural relationship towards his adoptive father, belonged to the same *gotra* as the latter, and although such relationship compared with that of the defendant was remote, that circumstance could not *ipso facto* vitiate his adoption. *Bhyah Ram Singh v. Bhyah Ugur Singh*, 13 Moore's I. A. 373, and *Uma Dey v. Gokoolanund Das Mahapatra*, L. R. 5 I. A. 40, referred to. According to the Hindu law, as observed by the Benares school, the ceremony of *upanayana*, representing as it does the second birth of a boy and the beginning of his education in the duties of his tribe, is also the ultimate limit of time when a valid adoption in the Dattaka form can take place. Adoption in that form implies that the second birth has taken place in the adoptive family; and it cannot be effected after the boy's place in his natural family has become irrevocably fixed by the *upanayana* representing his second birth therein. The age of the boy is material only as determining the term at which the *upanayana* may be performed. *Kerutnarain v. Bhoobunesree*, 1 Sel. Rep. 161, and *Ramkishore Acharj Chowdree v. Bhoobunmoyee Deba Chowdrain*, S. D. A. Beng. 1859, 229, referred to. *Dharma Dayu v. Ram Krishna Chinnay*, I. L. R. 10 Bom. 80, dissented from. According to the Kalika-purana as interpreted by the Dattaka Mimamsa of Nand Pandita, an adoption in the Dattaka form is wholly null and void if made after the adopted has completed the fifth year of his age. It is a mistake to hold that, according to the Dattaka Mimamsa, so long as an adoption takes place, while the adoptee is under six years of age, it is valid. The mistake arises from supposing that the word *panchvarshiya*, used in paragraphs 48 and 53 of the Dattaka Mimamsa necessarily indicates that the

HINDU LAW—ADOPTION—*continued*.(4) WHO MAY BE ADOPTED—*continued*.

person referred to has passed the fifth anniversary of his birth. It indicates on the contrary that he is in his fifth year. *Thakoor Oomrao Singh v. Thakooranee Mehtab Koonver*, 1 N. W. 103a dissented from. The authenticity of the text of the Kalika-purana, which lays down that a child must not be adopted whose age exceeds five years, is extremely doubtful. The interpretation given to that text in the Dattaka Mimamsa was not necessarily intended to be universally applicable, and admits of a construction which would confine the application of the text to Brahmins intended for the priesthood; and various other equally plausible interpretations have been adopted by other authorities. This being so, it would be unsafe to act upon the text in question and upon the interpretation placed upon it in the Dattaka Mimamsa, so as to set aside an adoption which took place many years ago, which had ever since been recognized as valid, and under which the adoptee had ever since been in possession of his adoptive father's estate, upon the single ground that at the time of the adoption the adopted son was more than five years of age. In such a case, the *onus* of proof is upon the person who alleges this adoption to be invalid. *Haimun Chull Sing v. Koomer Gunsheam Sing*, 5 W. R. P. C. 69, referred to. In a case where the validity of an adoption was in dispute and the parties to the suit were Chhatriyas: *Held*, that even if it had been established that five years was the rigid and inflexible limit of age for the validity of all adoptions among the "twice-born" classes, so as to be applicable even to Chhatriyas, in the circumstances of the case, it would be necessary to have a full investigation of the question whether, among the clan of the Chhatriyas to which the parties belonged, any such rigid rule prevailed. *GANGA SAHAI v. LEKHRAJ SINGH*.

[I. L. R. 9 All. 253]

13.—*Only son given in adoption by widow.*] A widow is competent to give in adoption whenever the husband is legally competent to give and when there is no express prohibition from him. Three principles appear to regulate the power to give in adoption—(1) the son is the joint property of the father and the mother for the purposes of a gift in adoption; (2) when there is a competition between the father and the mother, the former has the predominant interest, or a potential voice; and (3) after the father's death the property survives to the mother. The adoption of an only son is not invalid. *China Garundan v. Kumara Garundan*, 1 Mad. 54, followed. *NARAYANASAMI v. KUPPUSAMI*.

[I. L. R. 11 Mad. 43]

14.—*Widow adopting son whose mother her husband could not have legally married.*] It is a general rule of Hindu law that there can be no valid adoption unless a legal marriage is possible between the person for whom the adoption is

**HINDU LAW—ADOPTION—continued.****(4) WHO MAY BE ADOPTED—continued.**

made, and the mother of the boy, who is adopted, in her maiden state. *MINAKSHI v. RAMANADA*

[I. L. R. 11 Mad 49]

15.—*Adoption by Naikin or dancing girl—Custom of adoption of more than one daughter at a time—Rights of adopted daughter.* A, a Naikin, or dancing girl, in South Canara, affiliated prior to 1849 three girls and a boy. These four persons lived together as a joint family till 1849, when a partition of their joint property was decreed between them in equal shares. T, one of the girls, died in 1880, leaving certain property. V claiming to be the sister by adoption of T sued to recover T's estate from M, T's uterine brother: *Held*, (1) that an adoption of a daughter by a Naikin or dancing girl can be recognized by the Civil Courts and does confer rights on the girl adopted—*Mathura Naikin v. Esu Naikin* (I L. R. 4 Bom. 545) dissentient from; (2) that there being no warrant for a plurality of adoptions in the analogies of Hindu law, and no special custom having been proved V could not claim T's estate. *VENKU v. MAHALINGA*.

[I. L. R. 11 Mad. 393]

16.—*Only son—Question as to validity of adoption.* The Courts below differed as to whether the adoption, if authorised, was validly effected, the boy adopted having been the only son of his natural father. Whether this is a disqualification invalidating an adoption, is a question that has not come before Her Majesty in Council for decision. *AMMI DEVI v. VIKRAMA DEVU*.

[I. L. R. 11 Mad. 486]

[L. R. 15 I. A. 178]

17.—*Adoption of a daughter—Validity of such adoption* The adoption of a daughter by a Brahmin is invalid under the Hindu law. *GANGABAI v. ANANT*.

[I. L. R. 13 Bom. 690]

18.—*Sister's son.* The adoption of a sister's son is invalid. *SUNDAR v. PARBATI*.

[L. R. 16 I. A. 186]

[I. L. R. 12 All. 51]

**(5) SECOND, SIMULTANEOUS AND CONDITIONAL ADOPTIONS.**

19.—*Conditional Adoption—Adoption under agreement—Validity of adoption by untensured widow—Agreement at time of adoption effacing rights of adopted son.* The defendant's husband, V, died intestate in 1873, leaving his widow, (L the defendant), and a son, B, him surviving. A posthumous son, R, was subsequently born to him, who died an infant aged four months. B died in July 1877, aged seven years,

**HINDU LAW—ADOPTION—continued.****(5) SECOND, SIMULTANEOUS AND CONDITIONAL ADOPTIONS—continued.**

The plaintiff alleged that on the 18th April 1878, the defendant adopted him as the heir of her husband, V, and on the same date made an agreement with his (the plaintiff's) natural father, whereby he was deprived of the immediate rights in the estate of the said V, to which he became entitled by reason of his adoption. The agreement was in the following terms.—“Memorandum of agreement made this 18th day of April in the Christian year 1878 between G of Bombay, Hindu inhabitant, of the one part, and L, widow of V, also of Bombay, Hindu inhabitant, of the other part. Whereas the said V died intestate at Bombay on or about the 5th day of October 1873, leaving him surviving the said L, as his only widow, a son named B, who was born during his lifetime, and another son, named R, who was born after his death, as his only heirs and legal representatives him surviving. And whereas the said R died while he was an infant, and the said B died at the age of seven, leaving the said L, his mother, as his only heir and legal representative him surviving; and whereas the said L is desirous of adopting a son as heir to her said husband, and has requested the said G to allow her to adopt one of his sons, named S, who has now attained the age of eleven years, on the terms and conditions hereinafter mentioned, which the said G has agreed to do. Now these presents witness that, in pursuance of the said agreement and in consideration of the premises, the said G has agreed to give, and the said L has agreed to accept, in adoption the said S on the express terms and conditions following, that is to say:—1. That the said L shall have during her lifetime both before and after the said S has attained his majority, absolute power and control over the whole of the immoveable and moveable property, estate and effects so inherited by her as the heir and surviving legal personal representative of B, as aforesaid, and shall be at liberty to deal with and manage the same according to her own absolute discretion, as she may, in the exercise of such discretion, deem most advantageous to the estate. 2. The said L shall and will during her life provide the said S with lodging, food, clothes, medical attendance, and all other necessaries, and will generally maintain and educate him at her own expense in a manner suitable to the position of his family, and will get him married and perform the usual ceremonies on his marriage at her own expense as aforesaid in a manner suitable to the position and respectability of the said family. 3. That after the death of the said L, the said S his heirs, and legal representatives will be entitled to inherit for his and their own absolute use and benefit all the moveable and immoveable property, estate, and effects of which the said L shall be possessed at the time of her death. 4. That the terms and conditions specified and contained in cls. 1 and 2 and 3 of this

HINDU LAW—ADOPTION—*continued*.(5) SECOND, SIMULTANEOUS AND CONDITIONAL ADOPTIONS—*continued*.

agreement shall have full effect and be considered as valid and operative in every respect, any provision of law or the Hindu *Shastras* to the contrary notwithstanding." The plaintiff alleged that since he had attained majority he had always repudiated the validity of the agreement as affecting his rights in any way. The plaintiff also alleged that on the *Dassara* day of 1883 the defendant assembled her friends and relatives, and in view of the approaching majority of the plaintiff, which he attained on the 14th December 1883, announced her intention of making over to him all the estate of her deceased husband *V*; and that she thereupon renounced and waived all the benefits which she had tried to retain for herself by the agreement of the 18th April 1878, and expressed her intention to devote herself to a religious life. The plaintiff complained that recently the defendant had begun to interfere in the management of the estate, and that she had alleged that the plaintiff's adoption was invalid, on the ground that her (the defendant's) head had not been shaved at the time of the adoption, and had threatened that she would proceed to adopt a son and ruin the plaintiff. He prayed for a declaration that he was the validly adopted son of, and entitled to the property which formerly belonged to, *V*, and that the defendant was only entitled to maintenance; that the agreement of the 18th April 1878 was invalid; or, in any event, that the defendant had given to the plaintiff all rights to which she might have been entitled under the said agreement, &c. The defendant admitted that she had performed certain ceremonies which she intended to be an adoption of the plaintiff as son of *V*; but she alleged that at the time of the said adoption she had not, nor had she since, undergone tonsure; and that, according to the custom of the *Daivadnya* community, to which she and the plaintiff belonged, a widow could not adopt until her head had undergone tonsure. She also stated that the majority of her caste had declared the said adoption to be invalid, and she submitted the question, as to its validity, to the Court. With regard to the agreement of the 11th April 1878, she contended that if the adoption was valid, the plaintiff was bound by the terms and conditions contained therein, as she would not, except upon those terms and conditions, have adopted him. She further contended that on the death of her husband, *V*, his sons, *B* and *R*, became entitled to his estate, and that upon the death of *B*, who was the survivor of the said two sons, she succeeded to the estate as heirress to *B*: *Held*, that the adoption of the plaintiff was a valid adoption. From the evidence it appeared that the requisite religious ceremonies had been performed. Before the defendant took part in them, *Shastris* were consulted as to whether the defendant while untoussured could properly do so, and on making certain expiatory gifts she was pronounced competent. Under such circumstance

HINDU LAW—ADOPTION—*continued*.(5) SECOND SIMULTANEOUS AND CONDITIONAL ADOPTIONS—*concluded*.

the Court could not hold her to be incompetent. Even if other *Shastris* were of a different opinion, a Civil Court could not decide between conflicting opinions upon such a question of ecclesiastical etiquette. If an adoption be performed with all requisite rites, with the assistance of priests, and in accordance with the opinions of *Shastris*, the Court will uphold it, even against the opinions of other *Shastris* expressing or entertaining contrary views. *Held*, that the effect of the agreement of the 18th April 1878, was to give the defendant the beneficial ownership of the estate for her life, with the largest possible discretionary powers of management, subject to the duty of maintaining and educating the plaintiff: *Held*, also, following *Chitho v. Janaki*, 11 Bom. 199, that the agreement was valid and binding on the plaintiff, and that the defendant had not waived the benefits to which she was entitled under its provisions. *RAVJI VINAYAKRAV JAGGANNATH SHANKARSETT v. LAKSHMIBAI*.

[I. L. R. 11 Bom. 381]

20.—*Conditional adoption—Invalid agreement relating to estate of adopted son.*] A talukdar by his will authorized his senior widow to select and adopt a minor male child of his family to be the owner of the entire *masat*. This power having been exercised, the adoption was questioned on the ground that the widow had agreed, with the natural father of the adopted son, that she should retain the whole estate during her life. *Held*, that this had not rendered the adoption conditional, and that it did not affect the rights of the adopted son. Even if it had amounted to a condition, the analogy, such as it was, presented by the equities relating to powers of appointment under English law, suggested that the condition itself would have been void without invalidating the adoption. *BHAIYA RABIDAT SINGH v. INDAR KUNWAR*

[I. L. R. 16 Calc. 556]

[L. R. 16 I. A. 53]

21.—*Will of a Hindu in favor of his wife made on his taking a son in adoption—Adoption made on the understanding that the dispositions of the will be observed.*] A Hindu, on taking a son in adoption, executed a "settlement as to what should be done by my adopted son and my wife after my lifetime," providing that on an event, which happened, the wife should enjoy certain land for life in lieu of maintenance. In a suit by the widow of the executant against the adoptive son for possession of the land: *Held*, that the instrument was a will. On its appearing that the defendant's natural father, when he gave him in adoption, tacitly submitted to the arrangement contained in it: *Held*, that the adoptive son was bound by its provisions. *LAKSHMI v. SUBRAMANYA*.

[I. L. R. 12 Mad. 490]

**HINDU LAW—ADOPTION—continued.****(6) EFFECT OF ADOPTION.**

22.—*Divesting of estate taken by widow.* The defendant's husband, V, died intestate in 1873, leaving his widow (the defendant), and a son B, him surviving. A posthumous son, R, was subsequently born to him, who died an infant aged four months. B died in July, 1877, aged seven years. The defendant subsequently on 18th April 1878, adopted the plaintiff: *Held*, following *Jamnabai v. Ranchand*, 1 L. R. 7 Bom 225, that the defendants by adopting the plaintiff divested herself of the estate of V, to which she had succeeded on the death of B, and that the plaintiff upon his adoption became entitled to the property. *RAYJI VINAYAKRAV JAGGANNATH SHANKARSETT v. LAKSHMIBAI.*

[I. L. R. 11 Bom. 381]

23.—*Mesne profits—Decree made against a widow representing estate, enforced against a minor adopted son, through the widow as his guardian—Devolution of liability, along with estate, upon the minor, without his having been made formally a party to the decree—His similar liability in a suit for mesne profits.* A minor, who had been adopted by a widow as a son to her deceased husband, was not made a party to an appeal, which she preferred after the adoption, from a decree made against her when she represented the estate: *Held*, that, as liability under the decree made when the widow fully represented the estate devolved upon the minor on his adoption, the widow's estate being also thereupon divested, it would be right for her to continue to defend, but only as guardian of the minor. Also, that it having been for the minor's benefit that the widow, as guardian, should appeal from a decree, which had already diminished his estate, the minor was bound by the adverse decree of the Appellate Court, although he had not been made formally a party thereto. The principle of the decision in *Dhurm Dass Pandey v. Shamasondery Debia*, 3 Moore's I. A., 229, referred to, and applied in this case: *Held*, also, that the minor, by his adoptive mother as his guardian, was liable in a suit for mesne profits, brought after the decree upon title; it being made clear that the suit for mesne profits was substantially brought against the minor. *Surreshchunder Wum Chowdhry v. Jugutchunder Deb*, I L. R. 14 Cal. 204, approved. *HARI SARAN MOITRA v. BHUBANESWRI DEBI.*

[I. L. R. 16 Cal. 40]

[L. R. 15 I. A. 195]

**(7) EVIDENCE OF ADOPTION.**

24.—*Factum of adoption—Onus probandi—Custom among Chatrityas.*—The ruling of the Privy Council in *Shosinath Ghose v. Krishna Soondari Dasi*, L. R. 7 I. A. 250, has no application to a case in which there is ample evidence, both oral and documentary, to prove the *factum* of adoption. Where it was sought to set aside an adoption which took place many years ago, which had ever since been recognized as valid and under which the

**HINDU LAW ADOPTION—continued.****(7) EVIDENCE OF ADOPTION—concluded.**

adoptee had ever since been in possession of his adoptive father's estate, on the single ground that at the time of the adoption the adopted son was more than five years of age, it was held that the onus of proof was upon the person who alleges the adoption to be invalid. *Haimun Chull Singh v. Koomer Gunesheam Singh*, 5 W. R. P. C. 69, referred to. In a case where the validity of an adoption was in dispute, and the parties to the suit were Shatriyas,—*held* that even if it had been established that five years was the rigid and inflexible limit of age for the validity of all adoptions among the "twice-born" classes, so as to be applicable even to Shatriyas, in the circumstances of the case it would be necessary to have a full investigation of the question whether, among the clan of the Shatriyas to which the parties belonged, any such rigid rule prevailed. *GANGA SAHAI v. LEKHRAJ SINGH*

[I. L. R. 9 All. 253]

25.—*Nambudris — Marumakkatayam law—Adoption of an adult male—Form of adoption.*—In a suit the parties to which were Nambudri Brahmins following the Marumakkatayam law, the plaintiff sued as the adoptive son of the last member of an otherwise extinct mana for a declaration of his title to certain lands as the sole uralen of a devasom. The plaintiff was an adult at the time of his adoption and no female was adopted at the same time with the plaintiff: *Held*, on the evidence that the plaintiff was entitled to succeed. The form and evidence of adoption considered. *SABRAMANYAN v. PARAMASWARAN.*

[I. L. R. 11 Mad. 116]

26.—*Evidence of authority to adopt.*—Whether an elder widow who had purported to adopt a son to her deceased husband under his authority had received such authority orally or by will, was disputed by a junior widow, the Courts below differing as to the question of fact. Upon the evidence, the finding of the Subordinate Judge that no such authority had been given, was maintained. *AMMI DEVI v. VIKRAMA DEVU.*

[I. L. R. 11 Mad. 486]

[L. R. 15 I. A. 176]

**(8) DOCTRINE OF FACTUM VALET AS REGARDS ADOPTION.**

27.—*Applicability of maxim—Nature of adoption.*—The maxim *quod fieri non debuit factum valet* is applicable not only in the Dayabhaga school of Hindu law which prevails in lower Bengal, but also in the various subdivisions of the Mitakshara school. Its authority does not depend upon any rule of Hindu law alone, but upon the principles of justice, equity, and good conscience. There is no authority to show that it is to be applied to cases governed by the Hindu law in a manner exceeding the limits recognized by the Roman civil law in which it originated.

**HINDU LAW—ADOPTION—concluded.****(8) DOCTRINE OF FACTUM VALET, AS REGARDS ADOPTION—concluded.**

Its application in cases of adoption should be confined to questions of formalities, ceremonies, preference in the matter of selection, and similar points of moral or religious significance, which relate to what may be termed the *modus operandi* of adoption, but do not affect its essence. There may be cases where matters which, in other systems, would be regarded as merely formal, are by the express letter of the texts made matters affecting the essence of the transaction, and such texts may be sufficiently imperative to vitiate an adoption in which they have been disregarded; but unless their meaning is undoubted, the doctrine of *factum valet* should be restricted to adoptions which, having been made in substantial conformity to the law, have infringed minor points of form or selection. Adoption under the Hindu law being in the nature of a gift, it contains three elements—capacity to give, capacity to take, and capacity to be the subject of adoption—which are essential to the validity of the transactions, and, as such, are beyond the scope of the doctrine of *factum valet*. *Uma Devi v. Gokoolanund Das Mahapatra*, L. R. 5 I. A. 40; *Hanuman Tiwari v. Chirai*, I. L. R. 2 All. 164; *Singamma v. Vinjamuri Venkataharu* 4 Mad. 161; *Dharma Dugu v. Ramkrishna Chinnaji*, I. L. R. 10 Bom 80; *Lakshmappa v. Ramava*, 12 Bom 364, and *Gopal Narhar Safray v. Hanmant Ganesh Safray*, I. L. R. 3 Bom. 273, referred to. *GANGA SAHAI v. LEKHRAJ SINGH*.

[I. L. R. 9 All 253]

28.—*Adoption by younger widow without consent of elder.*—Where a younger widow had adopted without the consent of the elder widow, it was contended that the right of the elder widow was merely the right to select, and that in any case it was only a preferential right, and that consequently the doctrine of *factum valet* applied: *Held*, that the doctrine of *factum valet* cannot apply to the case of an adoption by a younger widow, for it is plain that until the elder widow waives her preferential right to adopt, her right is exclusive, and that the other widows have no authority to adopt. The rule of *factum valet* applies in cases of adoption only where "there is neither want of authority to give or to accept, nor imperative interdiction of adoption." *PADAJIRAY v. RAMRAY*.

[I. L. R. 13 Bom. 160]

**HINDU LAW—ALIENATION.**

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2. Alienation by Father	...	...	384
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*See* ATTACHMENT—SUBJECTS OF ATTACHMENT—PROPERTY AND INTEREST IN PROPERTY OF VARIOUS KINDS.

[I. L. R. 12 Bom. 366]

*See* GRANT—CONSTRUCTION OF GRANTS.

[I. L. R. 16 Calc. 71]

*See* GRANT—POWER TO GRANT.

[I. L. R. 16 Calc. 71]

**(1) RESTRAINT ON ALIENATION.**

1.—*Impartible raj estate—Power to alienate—Custom.* In regard to a *raj* estate in Gorakhpur, by custom impartible and descending by primogeniture, the family being in other respects governed by the Mitakshara law, the present Raja's alienation of part of that estate was alleged by his son to be invalid as against him: *Held*, that if there had been no custom of partibility the Raja's power over the estate would have been restricted by the law declared in Mitakshara ch. I, s. 1, v. 27; and the gift would have been void. But, there being the above custom, the question was how far the general law was superseded, and whether the right of the son to control the father's act in this respect was beyond the custom: *Held*, that in regard to impartible estate, the son's right at birth did not exist where there was no right on his part to partition; also, that inalienability depended on custom, or on the nature of the tenure. In this case, the evidence did not establish that by custom the estate was inalienable. *SARTAJ KUARI v. DEORAJ KUARI*.

[I. L. R. 10 All. 272]

[L. R. 15 I. A. 51]

**(2) ALIENATION BY FATHER.**

2.—*Joint family—Decree against the father alone—Attachment of family property in execution of such decree—Son's interest in the family property when bound by decree against the father or by sale effected by the father* [Where, in a joint Hindu family, the father disposes of family property, the son's interest is bound, unless the son can show, in proceedings taken for that purpose, that the disposal of the property by his father was made under circumstances which deprived his father of his disposing power. So also, where family property is sold under proceedings taken against the father alone, the son's interest is bound, unless the son can show that the sale was on account of an obligation to which he was not subject. The father is, in fact, the representative of the family both in transactions and in suits, subject only to the right of the sons to prevent an entire dissipation of the estate by particular instances of wrong-doing on the father's part. *JAGABHAI LALUBAI v. VIJBHUKANDAS JAGJIVANDAS*.

[I. L. R. 11 Bom. 37]



**HINDU LAW—ALIENATION—continued****(2) ALIENATION BY FATHER—continued.**

3.—*Joint family—Mortgage by father—Decree subsequently to father's death against eldest son as heir of father—Minor sons not parties—Sale in execution of family property other than that comprised in mortgage—Subsequent suit by minor sons to recover their shares—Minor sons when bound by decree against eldest son as heir of father.* One K mortgaged certain land to B and died, leaving four sons, viz., R and the three minor plaintiffs. Subsequently B brought a suit on the mortgage against K by his heir R, for the amount due, and obtained a decree, whereby it was ordered that the amount should be recovered from the mortgaged property, and, if that proved insufficient, from the other estate of the deceased. The minor sons were not made parties to that suit nor was R sued as representing the joint family. In execution of the decree, B attached and sold the whole of the joint family property, the certificate of sale showing that the right, title and interest of K, deceased, by his heir R, was attached and sold and conveyed to the purchaser. The three minor sons subsequently brought this suit to recover some of the property, contending that their shares were not bound by the sale. *Held*, on the authority of *Bhussur Lall Sahoo v. Luchmessur Singh*, L. R. 6 I. A. 233, and reversing the decree of the lower Court, that the property in question having been declared liable for the debt incurred by the father, the intention was that the estate in its entirety should be sold. The minor sons were, therefore, bound by the sale, unless they could prove that the father's debt had been incurred for an immoral and improper purpose. The case was, accordingly, sent back for trial of an issue upon that point, with a direction that the burden of proof should lie upon the plaintiffs. **JAIRAM BAJABASHET v. JOMA KONDIA.**

[I. L. R. 11 Bom, 361]

4.—*Mortgage of family property by father—Decree against father enforcing mortgage—Decree for money against father—Sale in execution of decrees—Rights of sons.* The members of a joint Hindu family brought suits in which they respectively prayed for decrees that their respective proprietary rights in certain ancestral property might be declared, and that their interests in such property, which were about to be sold in execution of two decrees against their father, might be exempted from such sale. One of these decrees was for enforcement of a hypothecation by the plaintiffs' father of the property in suit. It was admitted on behalf of the plaintiffs, in connection with this decree, that although the judgment-debtor was a person of immoral character, the creditor had no means of knowing that the monies advanced by him were likely to be applied to any other purpose than that for which they were professedly borrowed, namely, for the purpose of an indigo factory in which the family had an interest. *Held*, that the plaintiffs were not entitled to any declaration in respect of the execution-proceedings under the

W., D.

**HINDU LAW—ALIENATION—continued.****(2) ALIENATION BY FATHER—continued.**

decree for enforcement of hypothecation. The second of the decrees above referred to was a simple money-decree for the principal and interest due upon a *hundi* executed by the father in favour of the decree-holder. The suit terminating in the decree was brought against the father alone, and the debt was treated as his separate debt. *Held*, that the creditor's remedy was to have brought his suit, if he desired to obtain a decree which he could execute against the family property and not against the father's interest only, and if he could maintain such a suit, either against those members of the family against whom he desired to execute his decree or against the father as head of the family, expressly or impliedly suing him in that capacity; but that, not having taken this course, his decree was not enforceable against the plaintiffs' rights and interest in the attached property. *Muttayan Chetti v. Surali Virapundia Chinnutambiar*, I. L. R. 6 Mad. 1, distinguished; *Nanomi Babunasa v. Mudun Mohun*, I. L. R. 13 Cal. 21, and *Basa Mal v. Maharaj Singh*, I. L. R. 8 All. 205, referred to. **BALBIR SINGH v. AJUDHIA PRASAD.**

[I. L. R. 9 All. 142]

5.—*Joint Hindu family—Mortgage by father—Suit to enforce the mortgage against sons' shares—Legal necessity—Burden of proof.* As a general rule, a creditor endeavouring to enforce his claim under a hypothecation bond given by a Hindu father against the estate of a joint Hindu family in respect of money lent or advanced to the father having only a limited interest, should, if the question is raised, prove either that the money was obtained by the father for a legal necessity, or that he made such reasonable inquiries as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt, or for the other legal necessities of the family. There is a distinction between such cases as this and cases in which a decree has been obtained against the father and the property sold, or cases in which the sons come into Court to ask for relief against a sale effected by their father for an antecedent debt. Where a decree was obtained against the father, and a sale effected, the presumption is that the decree was properly made. Where a son comes into Court to ask for relief against a sale effected by his father for an antecedent debt, it is for the son to make out a case for the relief asked for. In a suit against the members of a joint Hindu family upon a bond given by their father, and in which family property was hypothecated, no evidence was given on either side as to the circumstances in which the bond was given. There was no evidence to show that any inquiry had been made by the plaintiff as to the objects for which the bond was executed by the father. *Held*, that the burden of proof was upon the plaintiff to show either that the money was obtained for a legal necessity, or that he had made reasonable inquiries and obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent



**HINDU LAW—ALIENATION—continued.****(2) ALIENATION BY FATHER—continued.**

debt or for the other legal necessities of the family, and that, no evidence having been given, the suit must be dismissed. *JAMNA v. NAIN SUKH.*

[I. L. R. 9 All. 493]

6—*Sale of joint family estate in execution of decree upon the father's debt—Exoneraton of son's share only where debt has been incurred for an immoral or illegal purpose—Burden of proving the nature of the debt* ] The sons in a joint family, under the Mitakshara, cannot set up their rights of inheritance in the family estate against their father's alienation for an antecedent debt, or against a sale in execution of a decree upon such debt although the sons may not have been parties to the decree, unless the sons can establish that the debt has been contracted for an immoral or illegal purpose. The son's position is distinct in this respect from that of other relations in the joint family, inasmuch as it is his duty to pay out of the family estate his father's debt. A decree against indebted fathers, in a family consisting of fathers and sons, charged the family estate, and the sale in execution was not merely of the right, title and interest of the debtors, but of the property being such interest. On the other hand, before the sale, notice was given on behalf of the sons that the property was ancestral and joint: *Held*, in a suit on behalf of the sons against the purchaser at the sale, to recover their shares, that it was for the plaintiffs to show affirmatively that the debts were contracted for an illegal or immoral purpose, and that to establish general extravagance against the fathers was insufficient. It was not necessary for the purchaser to show that there had been a proper inquiry as to the purpose of the loan, or to prove that the money was borrowed for family necessities. *BHAGBUT PERSHAD v. GIRJA KOER.*

[I. L. R. 15 Calc. 717]

[L. R. 15 I. A. 99]

7—*Joint family—Mortgage by a father—Decree against father on mortgage giving possession with interest and costs—Son's liability to satisfy the decree as to interest and costs.* ] The plaintiff's father mortgaged certain ancestral property for a limited term. A suit was brought on the mortgage against the father, and a decree was passed, directing the mortgaged property to be handed over to the mortgagee for a certain time, and awarding payment of interest and costs by the father. In execution of this decree, the mortgagee sought to recover the costs by sale of the property in question. Thereupon the plaintiffs sued for a declaration that the property was not liable to be sold in execution of the decree against the father, on the ground that the debts contracted by the father were for immoral purposes, and that, therefore, the estate could not be bound by the decree at all. The Court of First Instance found that the debts had not been incurred for any immoral purpose, and dismissed the suit. On appeal to the

**HINDU LAW—ALIENATION—continued.****(2) ALIENATION BY FATHER—continued.**

High Court. *Held*, that under the decree passed against the father the interest and costs became a debt upon the whole estate, from which it could not escape, unless it was clearly made out that the debt was the result of fraud or immorality. Although the father alone was primarily liable for the fulfilment of the decree, still the debt was one which was rightly chargeable to the whole estate, and the sons would be liable, just as they would have been liable if the father had compromised the suit, unless the transactions were tainted with fraud or immorality. In a united family the father is capable of acting as the representative of the family, except in the case of borrowing for fraudulent or immoral purposes. In this case he entered into litigation, which resulted in loss to himself and the family which he represented, and he could make the family responsible for any loss so incurred. The judgment-creditor could also make them liable. Although where the father desires to represent the whole estate he can do so, yet he is not necessarily bound to do so, nor is the whole estate liable where he explicitly or impliedly binds only his own portion. *NARAYANRAV DAMODAR v. JAVHERVAHU.*

[I. L. R. 12 Bom. 431]

8.—*Ancestral property—Joint family—Alienations by father—Son's liability for father's debts—Purchaser—Notice.* ] Where a Hindu governed by the Mitakshara law seeks to set aside his father's alienations of ancestral property, if the alienees are purchasers at Court-sales held in execution of decrees against the father, it is not enough for him to show that the debts, for which the decrees were passed, were contracted by the father for immoral purposes; it must also be shown that the auction-purchasers had notice that the debts were so contracted. The points to be determined in such cases are:—(1) What was the interest that was bargained for and paid for by the purchaser? Was it the father's interest only, or was it the interest of the entire family? (2) Were the debts, for which the decrees were obtained under which the property was sold, contracted for immoral purposes? and (3) Had the purchaser notice that the debts were so contracted? *Suraj Bansi Koer v. Sheo Prashad Singh*, I. R. 6 I. A. 88, I. L. R. 5 Calc. 148; and *Nanomi Babuasin v. Modun Mohun*, I. R. 13 I. A. 1; I. L. R. 13 Calc. 21, followed. The plaintiff sued in 1883 for partition of ancestral property, consisting (*inter alia*) of certain *thikans* which had been sold in execution of decrees passed against his father. The plaintiff, though an adult at the time, was not a party to the suits in which the decrees were passed against the father, nor to the execution-proceedings. In the certificates of sale granted to the different purchasers, the property sold was described as being a four-annas' share, which would be equal to the shares of the father and the son together, but this description was qualified by the statement that "the right, title, and interest

HINDU LAW—ALIENATION—*continued*.(2) ALIENATION BY FATHER—*continued*.

in the above-mentioned property of the said R (i.e., the father) was sold." There was nothing to show that the purchasers bargained for and paid for the entire family estate. Moreover, the plaintiff's possession and enjoyment of the *thekans* in question was never disturbed, though the shares had each a separate possession of distinct portions of the ancestral property. *Held*, that under the circumstances, the father's interest alone passed to the auction-purchasers KRISHNAJI LAKSHMAN & VITHAL RAVJI RENGE.

[I L. R. 12 Bom 625]

9.—*Joint family—Money-decree—Decree against father alone—Purchaser at execution-sale under such decree—How far such sale binding on the interest of the sons not parties to the suit or execution proceedings.* In the case of a joint Hindu family, whose family property is sold by the father alone by private conveyance, or where it is sold in execution of a decree obtained against him alone, the mode of determining whether the entire property or only his interest in it passes by the sale is to inquire what the parties contracted about in the case of a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance, but only a sale in execution of a money-decree. In the case of an execution-sale the mere fact that the decree was a mere money-decree against the father as distinguished from one passed in a suit for the realization of a mortgage security directing the property to be sold, is not a complete test. The plaintiff claimed certain property from the defendant, alleging that he had purchased it from a third person, who had purchased it at an auction-sale held in execution of a money-decree obtained against the first defendant alone. The first defendant was the father of the remaining defendants, and they constituted a joint Hindu family. The sons contended that only the father's interest was bound by the sale, and the lower Courts decided in their favour. On appeal, the High Court reversed the decree, and sent back the case for a fresh decision, on the ground that the lower Courts had decided the question in the case exclusively on the ground that the property had been purchased in execution of a money-decree without referring to the execution-proceedings. KAGAL GANPAYA v. MANJAPPA.

[I. L. R. 12 Bom 691]

10.—*Ancestral zemindari sold in execution of decree for money against the father, including the son's right of succession—Debt not immoral.* A sale in execution of a decree against a zemindar, for his debt, purported to comprise the whole estate in his zemindari. In a suit brought by his son against the purchaser, making the father also a party defendant, to obtain a declaration that the sale did not operate as against the son as heir, not affecting his interest in the estate, the evidence did not establish that the father's debt had been incurred by him for any immoral or illegal

HINDU LAW—ALIENATION—*continued*.(2) ALIENATION BY FATHER—*concluded*.

purpose: *Held*, that the impeachment of the debt falling, the suit failed; and that no partial interest but the whole estate had passed by the sale, the debt having been one which the son was bound to pay. *Hindu Narain Saru v. Ruder Pershah Misner* (I. L. R. 10 Calc. 626) (where the sale was only of whatever right, title, and interest the father had in property), distinguished MINAKSHI NAYUDU v. IMMUDI KANAKA RAMAYA GOUNDAN

[I. L. R. 12 Mad 142]

[L. R. 16 I. A. 1]

11.—*Money decree against father—Attachment of ancestral estate.* In execution of a money-decree, ancestral property of the joint family of the judgment-debtor was attached. His sons sued to release their interest from attachment, alleging that the judgment-debt had been incurred for immoral purposes, which was denied by the decree-holder. It was held by the lower Courts that nothing more than the father's share was liable to be attached, as the sons were not parties to the decree. *Held*, that the nature of the debt should be determined, since the creditor's power to attach and sell depends on the father's power to sell, which again depends on the nature of the debt. *Nanomi Babuvasin v. Modhum Mohun* (L. R. 13 I. A. 1; I. L. R. 13 Calc 21, discussed and followed. RAMANANDAN v. RAJAGOPALA.

[I. L. R. 12 Mad. 309]

## (3) ALIENATION BY WIDOW.

## (a) ALIENATION OF INCOME AND ACCUMULATIONS.

12.—*Inheritance to property purchased by Hindu widow out of the income of her estate.* When a widow, not spending the income of her widow's estate in the property which belonged to her husband when living, has invested such savings in property held by her without making any distinction between the original estate and the after-purchases, the *prima facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate. The authority upon this matter is found in *Isridut Koer v. Hansbutti Koerain*, I. L. R. 10 Calc. 324, L. R. 1 I. A. 150, where a widow having made no distinction between the original estate and the after-purchases, the latter were held inalienable by her for any purpose not justifying alienation of the former. SHEOLOCHUN SINGH v. SAHEB SINGH.

[I. L. R. 14 Calc. 387]

[L. R. 14 I. A. 63]

13.—*Accumulations by Hindu widow—Accumulations—Period up to which they may be dealt with—Legacy to Hindu widow.* The right of a Hindu widow to the income and accumulations of her husband's estate arising subsequently to his death is absolute, and is not affected by the fact that

**HINDU LAW—ALIENATION—continued.****(3) ALIENATION BY WIDOW—continued.****(a) ALIENATION OF INCOME AND ACCUMULATIONS—concluded.**

she may receive them in a lump sum ; but whether she receives them as they fall due or after they have accumulated in the hands of others, her right is the same. The question to be sought for in determining her right to deal with such income and accumulations of income is one of intention. If she has invested her savings in such a manner as to show an intention to augment her husband's estate, she cannot afterwards deal with such investments, except for reasons which would justify her dealing with the original estate ; but, if she has evinced no such intention, she can, at any time during her life, deal with the profits. Where she invests her income, making a distinction between the investments and the original estate, she can at any time thereafter deal with such investments, save in the case of the purchase of other property as a permanent investment. But should she invest her savings in property held by her without making any distinction between the original estate and the after-purchases, the *prima facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate. **GRISH CHUNDER ROY v. BROUGHTON.**

[I L. R. 14 Cal. 861]

**(b) ALIENATION FOR LEGAL NECESSITY OR WITH CONSENT OF HEIRS OR REVERSIONERS.**

14.—*Mortgage* ] A Hindu, governed by the Mitakshara School of Law, died on the 12th May 1867, leaving him surviving a widow B and a brother R, who was admittedly the next reversioner. In July 1867, B purported to adopt a son D to A, and subsequently in September 1867, obtained a certificate under Act XL of 1858. In 1872 B obtained a loan from the plaintiff M of Rs. 9,000, and to secure its repayment executed a mortgage of seven mouzabs in favour of M as guardian of D. The money was advanced and mortgage executed at the instigation of R and with his consent, and upon his representation that D was the duly adopted son of A, and it was admitted that the money was specifically advanced for, as well as applied towards, the payment of decrees obtained against A in his lifetime and against his estate after his death. B died in 1878. On the 14th August 1880, M instituted a suit against D upon his mortgage, and in that suit he made S a party defendant as being the purchaser of the mortgagor's interest in one of the mouzabs included in his mortgage. On the 26th June 1882, M obtained a decree declaring that he was entitled to recover the amount due by sale of the mortgaged mouzabs. In the proceedings taken in execution of that decree M was opposed by L, who was afterwards held to be a *benamidar* for S, who claimed that he had on the 8th November 1880, purchased five out of the seven mouzabs at a sale in execution of certain decrees against R. On the 29th

**HINDU LAW—ALIENATION—continued.****(3) ALIENATION BY WIDOW—continued.****(b) ALIENATION FOR LEGAL NECESSITY OR WITH CONSENT OF HEIRS OR REVERSIONERS—contd.**

February 1834, L's claim was allowed, and on the 11th August 1884, M brought this suit against L, S, R and D, and the decree-holders in the suits against R, for a declaration of his right to follow the mortgaged property in the hands of S. It was found as a fact that the adoption of D was invalid ; that the advance by M to B was justified by legal necessity ; and that L was the *benamidar* of S. It also appeared that M had himself become the purchaser of one of the mortgaged mouzabs. The lower Court gave M a decree declaring him to be entitled to recover the full amount of the mortgage money from the five mouzabs in the hands of S, L and S appealed, and M filed a cross-appeal, alleging the adoption to be valid and binding on S. It was contended that S as the representative of R was estopped from denying the validity of D's adoption, and thus having been a party to M's first suit the question as to the liability of the mouzabs to satisfy the mortgage lien was *res judicata* as against him. It was also contended that the five mouzabs should not be saddled with the whole of the mortgage-debt, but that the mouzah in the hands of M should bear its proportionate part thereof. Held, that, though B purported to execute the mortgage as guardian for D, though D was not the adopted son of A, the substance of the transaction and not the form had to be looked at, and as B had full power to alienate for legal necessity, the mortgage was still binding on the estate of A : and, further, that even if there had been no legal necessity, having regard to the fact that it was made with the consent of R, the next reversioner, it equally created a valid charge upon the property, but that the mouzah in the hands of M must bear its share of the mortgage-debt, and that the decree of the lower Court was wrong in declaring that the five mouzabs in suit were to bear the whole amount of the debt. **LALA PARBHU LAL v. MYLNE.**

[I L. R. 14 Cal. 401]

15.—*Status of widow as distinguished from that of manager—General power of widow to alienate—Liabilities of alienes* ] A widow stands in a different position from that of a manager of a joint family. The latter can act only with the consent, express or implied, of the body of co-parceners. In the widow's case, the co-parceners are reduced to herself, and the estate centres in her. She can, therefore, do what the body of co-parceners can do, subject always to the condition that she acts fairly to the expectant heirs. The rights of these heirs impose, on persons dealing with a widow, the obligation of special circumspection, failing which they may find their securities against the estate to be of no avail after the widow's death. **CHIMNAJI GOVIND GODBOLE v. DINKAR DHONDEV GODBOLE.**

[I L. R. 11 Bom. 320]

**HINDU LAW—ALIENATION—continued.****(3) ALIENATION BY WIDOW—continued.****(b) ALIENATION FOR LEGAL NECESSITY OR WITH CONSENT OF HEIRS OR REVERSIONERS—concluded.**

16.—*Adopted son's right to impeach alienation unnecessarily made by his adoptive mother before his adoption—Widow, Alienation by—Alienation from widow bound to inquire if legal necessity for alienation—Evidence—Onus of proving necessity for alienation by the widow.* The plaintiff claimed, as the adopted son of one K, to recover possession of his adoptive father's property, which had been mortgaged by his (K's) widow, R (defendant No 1), to the third defendant, B, prior to the plaintiff's adoption by her. The property had come into R's possession incumbered with a mortgage effected by her husband, and, in order to redeem that mortgage, she mortgaged the property again to one I. She subsequently paid off I's debt, amounting to Rs. 3,629, and in 1876 she mortgaged the property for Rs. 5,999 to B, who was put into possession. In 1881 she adopted the plaintiff, and in 1882 the plaintiff brought this suit to recover the property. He contended that R had no power to alienate or mortgage the ancestral immoveable property of her deceased husband, and he claimed, as the adopted son of K, to be entitled to the property free from the mortgages or other incumbrances with which R had attempted to charge it. For the defendants it was contended (*inter alia*) that the plaintiff could not impeach transactions effected by his adoptive mother prior to his adoption: *Held*, that the plaintiff, as the adopted son of K, had a right to impeach the unauthorized transactions of his adoptive mother, R, who possessed only a widow's restricted power of alienation. The plaintiff was adopted by R to her husband, who was the last owner of the ancestral property. The plaintiff at once succeeded to that property upon his adoption; and as heir of his adoptive father was entitled to object to any alienation made by R, on the principle that the restrictions upon a Hindu widow's power of alienation are inseparable from her estate, and their existence does not depend on that of heirs capable of taking on her death. *Held*, also, that the plaintiff was entitled to redeem the property on payment of such amount only as was raised by R for the purpose of meeting expenses necessarily incurred by her. *Held* further, that the onus of proving the necessity for alienation lay upon B. The Court found that there was no evidence that any sum beyond Rs. 3,629, the amount of I's mortgage, was really required by R, and accordingly directed that the mortgage account should be taken between the plaintiff and B on the footing that the principal of the mortgage-debt was Rs. 3,629 only, instead of Rs. 5,999. **LAKSHMAN BHAI KHOPKAR v. RADHABAI.**

[I. L. R. 11 Bom. 609]

**(c) WHAT CONSTITUTES LEGAL NECESSITY.**

17.—*Alienations by a widow of her husband's estate in order to pay his time-barred debts.*

**HINDU LAW—ALIENATION—concluded.****(3) ALIENATION BY WIDOW—concluded.****(c) WHAT CONSTITUTES LEGAL NECESSITY—concluded**

According to the Hindu law, a widow is competent to alienate her husband's estate for the purpose of paying his debts, even though they may be barred by the law of limitation. Her alienations for such a purpose are legal and binding on the reversionary heirs. **CHIMNAJI GOVIND GODBOLE v. DINKAR DHONDEY GODBOLE.**

[I. L. R. 11 Bom. 320]

18.—*Obligation of widowed daughter-in-law in possession of father-in-law's estate to pay his debts—Sale of part of estate by her for that purpose—Suit by reversioner to have sale declared void beyond her lifetime—Widow not availing herself of protection of the Dekkan Agriculturists Relief Act* A childless Hindu widow, having succeeded to the estate of her father-in-law, sold a portion of it in order to pay off his debts. The estate was situate in a district in the Presidency of Bombay subject to the Dekkan Agriculturists Relief Act (XVII of 1879). The plaintiff, as reversioner, sued for a declaration that the sale was void beyond the lifetime of the widow. Both the lower Courts made the declaration prayed for by the plaintiff, on the ground that there was no necessity for the sale, as the widow might have availed herself of the provisions of the Dekkan Agriculturists Relief Act. On appeal by the defendant to the High Court: *Held*, reversing the lower Courts' decree, that the sale by the widow should be upheld. She was not bound to avail herself of the relief afforded by the Dekkan Agriculturists' Relief Act any more than of the provisions of the Limitation Act. The moral obligation, which rested upon her to pay the debts of her father-in-law justified the sale. **BHAU BABAJI v. GOPALA MAHIPATI.**

[I. L. R. 11 Bom. 325]

**HINDU LAW—CUSTOM.**

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**(1) GENERALLY.**

1.—*Effect of custom when proved to exist* Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom. **SARTAJ KUARI v. DEORAJ KUARI.**

[I. L. R. 10 All. 272]

[L. R. 15 I. A. 51]

**(2) ADOPTION.**

2.—*Evidence of custom—Custom of caste—Opinion of caste expressed at meeting—Adoption by untensured widow—Validity of adoption.* For the purpose of proving that by the custom and

HINDU LAW—CUSTOM—*continued*.(2) ADOPTION—*concluded*.

in the opinion of the Daivadnya caste an adoption by an untensured widow was invalid, evidence was tendered to the following effect.—

(1) that there had been many instances of adoption in the caste, and in every such case the adopting mother had undergone tonsure, and that there had been no instance the other way ; (2) that the caste was divided in opinion as to the validity of the adoption, but that at a meeting of the caste it was declared by a large majority that the adoption was invalid. The Court refused to allow such evidence to be called, holding that it would merely prove what the Court, in the absence of evidence to the contrary, would assume to be the case, *viz*, that the widows of the caste usually or invariably followed the dictates of the Hindu ceremonial or religious law, which ordains that widows shall shave their heads, and that it would prove nothing more ; and with regard to the opinion of the caste, that such opinion, even if expressed by a majority at a caste meeting, as it would not of course be binding upon the Court, ought not to affect its judgment. *RAVJI VINAYAKRAV JAGGANNATH SHANKARSETT v. LAKSHMIBAI*.

[I. L. R. 11 Bom. 381]

3.—*Dancing girl caste—Plurality of adoptions—Immoral or illegal purpose of adoption.* As a matter of private law, the class of dancing women being recognised by Hindu law as a separate class having a legal status, the usage of that class in the absence of positive legislation to the contrary regulates rights of status and of inheritance, adoption, and survivorship. A dancing woman adopted two daughters, of whom the latter was adopted in the year 1851. It was found that the custom obtaining among dancing women in Southern India permits plurality of adoptions. *Held*, on second appeal, that the daughter subsequently adopted succeeded to the adoptive mother in preference to the son of the daughter previously adopted. *MUTTUKANNU v. PARAMASAMI*.

[I. L. R. 12 Mad. 214]

## (3) CASTE.

4.—*Expulsion of member of caste under mistake of fact and without notice.* In a suit relating to the management of the common property of the members of a Hindu caste, the plaintiff's right to sue was denied on the ground that, having violated the rules of the caste, he had been expelled from it. *Held*, (1) that it was open to the Court to determine whether or not the alleged expulsion from caste was valid ; (2) that if the plaintiff had not in fact violated the rules of the caste, but was expelled under the *bonâ fide* but mistaken belief that he had committed a caste offence, the expulsion was illegal and could not affect his rights. *Per KERNAN, J.* : A custom or usage of a caste to expel a member in his absence without notice

HINDU LAW—CUSTOM—*concluded*.(3) CASTE—*concluded*.

given or opportunity of explanation offered is not a valid custom. *KRISHNASAMI CHETTI v. VIRASAMI CHETTI*.

[I. L. R. 10 Mad. 133]

## (4) FAMILY, MANAGEMENT OF.

5.—*Aliyasantana law—Yajaman—The rights of the senior member of the family being a female.* The senior member of an Aliyasantana family, if a female, is *primâ facie* entitled to the yajaman-ship ; and, in the absence of a special family custom or a binding family arrangement to the contrary, the management of the family affairs by another member is to be presumed to be by the sufferance of the yajaman for the time being. *MAHALINGA v. MARIYAMMA*.

[I. L. R. 12 Mad. 462]

## (5) IMPARTIBILITY.

6.—*Impartible estate—Right of possessor of impartible estate to alienate.* There is no such coparcenary in an estate impartible by custom, as, under the law of Mitakshara governing the descent of ordinary property, attaches to a son on his birth. The son's right at birth, under the Mitakshara, is so connected with the right to share in and to obtain partition of the estate, that it does not exist independently of the latter right. Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom. In regard to a *raj* estate in Gorakhpur, by custom impartible and descending by primogeniture, the family being in other respects governed by the Mitakshara law, the present Raja's alienation of part of that estate was alleged by his son to be invalid as against him : *Held*, that if there had been no custom of impartibility, the Raja's power over the estate would have been restricted by the law declared in Mitakshara, ch. I, s. 1. v. 27 ; and the gift would have been void. But, there being the above custom, the question was how far the general law was superseded, and whether the right of the son to control the father's act in this respect was beyond the custom. *Held*, that in regard to impartible estate, the son's right at birth did not exist where there was no right on his part to partition, also that inalienability depended on custom, or on the nature of the tenure. In this case, the evidence did not establish that by custom the estate was inalienable. *SARTAJ KUARI v. DEORAJ KUARI*.

[I. L. R. 10 All. 272]

[I. L. R. 15 I. A. 51]

## HINDU LAW—DEBTS.

See CIVIL PROCEDURE CODE, 1882, s. 214

—QUESTIONS IN EXECUTION OF DECREE.

[I. L. R. 11 Mad. 413]

**HINDU LAW—DEBTS—concluded.**

1.—*Brahmans—Nambudris—Mussads—Hindu law, how far applicable—Liability of sons for father's debt.*] The principle of Hindu law, which imposes a duty on a son to pay his father's debt, contracted for purposes neither illegal nor immoral, is not applicable to the Malabar Brahmans called Nambudris and Mussads. *NILAKANDAN v. MADHAVAN.*

[I. L. R. 10 Mad. 9]

2.—*Son's estate liable for debt of deceased father contracted as surety—Contract Act, s 131.*] In a suit brought to recover money from the estate of a deceased Hindu in the hands of his son on a surety bond executed by the father. *Held*, that the estate of the son was liable according to the principles of Hindu law, and that the question was not affected by the provisions of the Contract Act. *SITARAMAYYA v. VENKATRAMANNA.*

[I. L. R. 11 Mad. 373]

3.—*Suit against sons of Hindu debtor on a bond executed by father, not cognizable by Small Cause Court—Hindu law—Liability of son for debt of living father.*] In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt: *Held*, by the Divisional Bench, that the decree against the sons was bad. *NARASINGA v. SUBBA.*

[I. L. R. 12 Mad. 139]

4.—*Son's liability for father's debts—Decree against legal representatives of a deceased debtor—Assets.*] Where a suit is brought against the sons and legal representatives of a deceased Hindu for debts contracted by the latter, the Court ought to pass a decree, although the deceased debtor may have left no assets. *Bapaji v. Umedbhai*, 8 Bom. A. C. 245, followed. *LALLU v. TRIBHUVAN MOTIRAM.*

[I. L. R. 13 Bom. 653]

**HINDU LAW—ENDOWMENT.**

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See **HINDU LAW—INHERITANCE—RELIGIOUS PERSONS—MOHUNTS.**

[I. L. R. 9 All. 1]

**(1) CREATION OF ENDOWMENT.**

1.—*Public charity—Trust—Public charitable or religious trust—Offerings made to an idol—Liability of persons in possession of an idol's property—Account.*] A trust for a Hindu idol and temple is to be regarded in India as one created "for public charitable purposes" within the meaning of

**HINDU LAW—ENDOWMENT—continued****(1) CREATION OF ENDOWMENT—concluded.**

s 539 of the Code of Civil Procedure (Act X of 1877). The Hindu law recognises not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious or charitable institution may, according to his law, express his purpose and endow it, and the ruler will give effect to the bounty, or at least protect it. A trust is not required for this purpose as it is by English law. Those who take charge of gifts made to a religious or charitable institution—whether such gifts consist of cash, jewels, or land—incur thereby a responsibility for their due application to the purposes of the institution. They are answerable as trustees would be, even though they have not consciously accepted a trust; and a remedy may be sought against them for maladministration by a suit open to any one interested as under the Roman system in a like case by means of a *popularis actio*. *MANOHAR GANESH TAMBEKAR v. LAKHMIRAM GOVINDRAM.*

[I. L. R. 12 Bom. 247]

2.—*Gift to Hindu temple—Trust.*] The defendants made a gift of land to a Hindu temple for the purpose of defraying the expenses appertaining to the idol. The temple was built and the gift made in 1870. The defendants obtained from the Revenue authorities mutation of names in the idol's favour and an acknowledgment of the person whom they nominated as agent or manager: *Held* by the Full Bench that the gift made by the defendants constituted a trust for the purpose of the temple. *Per* EDGE, C. J., and TYRRELL, J.—That the defendants before the Court did not constitute themselves trustees in any sense. *RAGHUBAR DIAL v. KESHO RAMANUJ DAS.*

[I. L. R. 10 All. 18]

**(2) SUCCESSION IN MANAGEMENT.**

3.—*Succession to office and property of deceased mohunt—Custom of institution.*] In determining the right of succession to the property left by the deceased head of a religious institution, the only law to be observed is to be found in custom and practice, which must be proved by evidence. On the death of a mohunt the right to succeed to his landed and other property was contested between two goshains. *Held*, that the claimant in order to succeed must prove the custom of the math entitling him to recover the office and the property appertaining to it. The evidence showed the custom to be that the title to succeed to the office and property was dependent on the successor's having been the *chela* approved and nominated as such by the late mohunt and also after the death of the latter installed or confirmed as mohunt by the other goshains of the sect: *Held*, that a claimant who failed to prove his installation or confirmation was not entitled to a decree for the office and property against a person alleging himself to have



HINDU LAW—ENDOWMENT—*continued*.(2) SUCCESSION IN MANAGEMENT—*contd.*

been a *chela* who, whether with or without title, was in possession. *GENDA PURI v. CHATAR PURI*.

[I. L. R. 9 All. 1

[L. R. 13 I. A. 100

4.—*Religious institution—Succession in religious houses and among ascetics.*] This was a suit brought in 1881 by the head of an *adhinam* for declaration that a math was subject to his control: that he was entitled to appoint a manager; that the present head of the math was not duly appointed and his nomination by his predecessor was invalid; and for delivery of possession of the moveable and immovable properties of the math to a nominee of the plaintiff. The claim extended also to religious establishments at Benares and elsewhere connected with the math. The math was founded by a member of the *adhinam*. Many previous heads of the math had agreed to be "slaves" of the head of the *adhinam*, but for over 60 years the head of the *adhinam* had exercised no management over the endowments belonging to the math; and in a suit (compromised) of the year 1854 the present pretensions of the head of the *adhinam* had been denied *in toto*. The defendant had succeeded in 1880 to the management of the math under the will of his predecessor, dated the same year, and was not a disciple of the *adhinam*: *Held*, (1) that the math was affiliated to the *adhinam*, but the head of the *adhinam* is not entitled to appoint to the office of head of the math and was not entitled to an order for delivery of the property of the math to himself or to his appointee; (2) that on the evidence as to the usage in the establishments in question, the head of the math was entitled to appoint his successor, but his election was limited to members of the *adhinam*; and the head of the *adhinam* was entitled to enforce this rule though he was bound to invest a disciple properly nominated by the head of the math, (3) that the defendant not being a disciple of the *adhinam*, his appointment was invalid and the head of the *adhinam* was entitled to see that a competent member of the *adhinam* was appointed in his stead. *GIYANA SAMBANDHA PANDARAN SANNADHI v. KANDASAMI TAMBIRAN*.

[I. L. R. 10 Mad. 375

5.—*Construction of will—Right of shebaitship of a family deb-sheba under a will.*] A testator, who died leaving widows and a daughter, and also three surviving brothers, bequeathed all the residue, after certain legacies, of his acquired estate to maintain the worship of a family deity, appointing his three brothers and his eldest widow to be shebait, and providing that "the family of us five brothers shall be supported from the *prosad*, 'offerings to the deity.' One or other of the brothers then for some years managed the estate as shebait, and the survivor

HINDU LAW—ENDOWMENT—*continued*.(2) SUCCESSION IN MANAGEMENT—*conold*.

of them was succeeded by his son, one of the defendants in the present suit, which was brought by the testator's only daughter as heiress to his estate claiming that the Court should determine "those provisions which were valid and lawful, and those which were invalid and illegal." She claimed possession and an account, and also to be the shebait. *Held* that the plaintiff's claim to a preferential title to this office depended on a sentence in the will constituting, as construed by the Courts below, to be shebait the senior in age of the heirs of the original shebait, the defendant now holding the office coming within this provision according to the judgments of both Courts. As to this no reason had been shown in appeal for a different conclusion. *KAMINI DEBI v. ASUTOSH MUKERJI ASUTOSH MUKERJI v. KAMINI DEBI*.

[I. L. R. 16 Calc. 103

[L. R. 16 I. A. 159

6.—*Heirs of founder—Title by primogeniture.*] According to Hindu law, when the worship of a Thakoor has been founded the shebaitship is held to be vested in the heirs of the founder in default of evidence that he has disposed of it otherwise, or that there has been some usage, course of dealing or circumstances to show a different mode of devolution. *Held* in this case that the plaintiff as representative by primogeniture of the founder of the Ballav Acharjee community was entitled, in preference to a cadet of the same family, to the shebaitship of a certain consecrated picture or idol, and as incident thereto, to the things which have been offered to the idol. It appearing that a temple had been granted to the idol on condition that the defendant should be shebait. *Held* that the plaintiff could not recover possession of such temple, though it had been in part created after the grant by the subscription of the worshippers, no evidence having been given that the subscribers did not know of the condition, or had paid their money with any reference to the question of shebaitship. *GOSSAMEE SREE GREED-HAREEJEE v. RUMAN LALLJEE GOSSAMEE*.

[L. R. 16 I. A. 137

[I. L. R. 17 Calc. 3

(3) DISMISSAL OF MANAGER OF  
ENDOWMENT.

7.—*Trustee of property dedicated to idol—Primogeniture—Tekait Maharaj, office of—Deposition from office by Sovereign Prince—Effect of order of deposition.*] By the custom of primogeniture obtaining in his family, the plaintiff succeeded to the office of Tekait Maharaj, and came into possession of all the property dedicated to the family idol of Shri Nathji. He resided at Nathdwar within the territories of the Rana of Udepur in Mewar. Part of the dedicated property was at Poona. The first four defendants managed this portion of the



**HINDU LAW—ENDOWMENT—concluded.****(3) DISMISSAL OF MANAGER OF  
ENDOWMENT—concluded.**

property for the plaintiff. They collected the rents and transmitted them to him from time to time. In 1876 the Rana deposed the plaintiff for alleged misconduct, deported him from his territories, and proclaimed the plaintiff's son (defendant No. 5) as Tekait Maharaj. The defendant having refused to pay over the rents and to deliver the Poona property to the plaintiff, the plaintiff brought the present suit to recover possession. The plaintiff's son was made a co-defendant on his own application. The defendants denied the plaintiff's right to the property on the ground that he had been deposed and banished by the Rana, and the fifth defendant (the plaintiff's son) claimed to be Tekait Maharaj, and as such to be entitled to all the Devasthan property. The lower Court made a decree in favour of the plaintiff. On appeal by the defendants to High Court *Held*, that the plaintiff was entitled to the property in dispute. The order of the Rana could not be regarded as a foreign judgment between the parties. That order, whatever its effect might be within the territories of the Rana, could not affect the property situated in Poona beyond his jurisdiction. It had descended to the plaintiff on the death of his father in virtue of the custom of primogeniture obtaining in his family. Whether he took it as owner or as trustee for the idol and shrine was immaterial, for in either case he had a right to possession. If he took it as owner he had not in law lost his right as such in consequence of the Rana's act. If he held merely as a trustee he had not yet been removed from his office by any competent tribunal. **NANABHAI v. SHRIMAN GOSWAMI GIRDHARJI.**

[I. L. R. 12 Bom. 331]

**(4) ALIENATION OF ENDOWED PROPERTY.**

**8.—Charitable Endowment—Trust property sold in execution—Rights of heirs of the creator of the trust against execution purchaser.]** A trust-deed of certain property executed by a member of a Hindu family provided that neither he nor his heirs should incur or alienate it, but that in case of necessity his heirs might maintain themselves out of the income while administering the trusts of a certain charity. The provisions of the trust were not proved to have been observed by the settlor or his family, and the settlor on one occasion disclaimed the trust. The trust property was attached and sold in execution of personal decrees passed against the settlor and another member of his family. The widow of the latter, after the death of the settlor, sued to recover the land from the execution purchaser as heir to the settlor: *Held*, the plaintiff was not entitled to recover the land. **Rupa Jagshet v. Krishnaji Gound** (I. L. R. 9 Bom. 169), distinguished. **SUPPAMMAL v. THE COLLECTOR OF TANJORE.**

[I. L. R. 12 Mad. 387]

**HINDU LAW—FAMILY DWELLING-  
HOUSE.**

**1.—Co-parcener's widow—Right of co-parcener's widow to live in the dwelling-house—Disagreement between widows, no ground for the eviction of either.]** Under the general rule of Hindu law prevailing in the Bombay Presidency, a co-parcener's widow is, in the absence of any special circumstances, entitled to reside in the family dwelling-house. The plaintiff sued to recover possession of a portion of the family dwelling-house in the actual possession and enjoyment of the defendant, who was the childless widow of his undivided brother. The plaintiff had offered her a residence in another house on condition of her vacating the part of the house in dispute. Pending the suit the plaintiff died, and was subsequently represented by his widow. Both the lower Courts awarded the plaintiff's claim, on the ground of disputes between the two widows and also on the ground of the inconvenience and unhealthiness of the part of the house in the defendant's possession. The plaintiff had not suggested these points in his plaint, nor had the defendant complained of the unhealthiness of the premises. On appeal by the defendant to the High Court *Held*, reversing the decrees of the lower Courts, that the defendant had a right, as a co-parcener's widow, to live in the family house, and that there were no special circumstances exempting the case from the general rule of Hindu law—the mere fact of disputes existing between the defendant and the plaintiff's widow not justifying the eviction of the defendant. **BAI DEVKORE v. SANMUKHRAM.**

[I. L. R. 13 Bom. 101]

**2.—Right of a widow to reside in the family dwelling-house—Sale of dwelling-house in execution of a decree obtained against the managing members of family on a debt incurred for family purposes.]** A house, being ancestral property of a Hindu family, was sold in execution of a decree by which the decree-amount was constituted a charge on such property. The debt sued on had been incurred for the benefit of the family by the co-parceners for the time being, but since the death of such co-parceners' father *Held*, the widow of the latter, who resided in the said house during her husband's lifetime was not entitled as against a purchaser for value in good faith under such decree (but with notice that she resided and during her husband's life had resided in that house, and still claimed to reside there) to continue to reside for life in such portion of the house sold as she resided in subsequent to her husband's death—**Venkatammal v. Andiyappa** (I. L. R. 6 Mad. 130), distinguished. **RAMANADAN v. RANGAMMAL**

[I. L. R. 12 Mad. 260]

**HINDU LAW—GIFT—**

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HINDU LAW—GIFT—*continued*.

## (1) REQUISITES FOR GIFT.

1.—*Delivery of possession—Transfer of Property Act, s 123—Immovable and movable property.*] Assuming that delivery of possession was essential under the Hindu law to complete a gift of immovable property, that law has been abrogated by s. 123 of the Transfer of Property Act. The first para. of that section means that a gift of immovable property can be effected by the execution of a registered instrument only, nothing more being necessary. *Semble*. The same is the case under that section with regard to moveable property, provided that a registered deed (and not the alternative mode of delivery) be adopted as the mode of transfer. *DHARMODAS DAS v. NISTARINI DAS*.

[I. L. R. 14 Calc. 446]

## (2) POWER TO MAKE AND ACCEPT GIFTS.

2.—*Gift of ancestral property by father to stranger—Suit by minor son to recover.*] Where a Hindu made a gift of certain land, which he had purchased with the income of ancestral property, and a suit was brought to recover the land on behalf of his minor son, who was born seven months after the date of the gift: *Held* that the gift was invalid as against the plaintiff and that he was entitled to recover the land from the donee. *RAMANNA v VENKATA*.

[I. L. R. 11 Mad. 246]

3.—*Joint Hindu family—Maintenance—Gift to widow by member of joint Hindu family—Construction—Gift presumed to be of life-estate only.*] Disputes having arisen between the sole surviving members of a joint Hindu family and his brother's widow, an amicable arrangement was come to, and certain deeds were executed by both parties, under which the widow was placed in possession of a certain house. On the part of the brother-in-law it was recited that, with a view to permanently settling the matters in dispute, he had received in cash from the widow the value of his share in the house, that she had been put in possession of the house and was in sole proprietary possession thereof; and that he had no connection whatever with it. Subsequently, the widow executed a deed-of-gift purporting to convey to the donee an absolute proprietary title to the house. After her death, the brother-in-law brought a suit against the donee to recover possession of the house, on the ground that the deed-of-gift could not convey to him more than the life-interest of the widow donor. *Held* that the deed-of-gift must be construed with reference to the nature of the general rights of the donor at the time of execution, as a Hindu widow in a joint Hindu family, entitled only to maintenance. *Rabuttu Dossee v. Shubehunder Mullick*, 6 Moore's I. A. 1, and *Dinonath Mukerji v. Gopal Churn Mukerji*, 8 C. L. R. 57, referred to: *Held* also, having regard to the rules of the Hindu law regarding the possession by widows of joint family property in lieu of maintenance, and to the

HINDU LAW—GIFT—*continued*.(2) POWER TO MAKE AND ACCEPT GIFTS—*concluded*.

experience of the Courts in connection with such matters, that it was for the donee to establish clearly and specifically that the donor, at the time when she executed the deed-of-gift, had any such absolute right of ownership as would entitle her to alienate the property for any interest beyond a life-estate. *Held* further, that there was nothing in the deeds under which the donor obtained possession of the property, which placed beyond doubt the intention of the parties that she should be entitled to the absolute ownership of the property; and that her estate therefore could at best be regarded as a life estate, and the deed-of-gift as binding upon the plaintiff during her lifetime, but not further. *GANPAT RAO v RAM CHANDRA*.

[I. L. R. 11 All. 296]

## (3) CONSTRUCTION OF GIFTS BY WILL OR DEED.

4.—*Construction of settlement—Successive interests—Contingent gift to a class—Member of the class in existence on failure of prior interest—Rule in the Tagore case.*] A *harar* executed to the father of S a minor grandson of the executant, after reciting that the executant had appointed S to perpetuate his family and had handed over certain property to the father, provided that the property should be delivered to S on his attaining majority and proceeded as follows:—"If the said S shall have descendants, neither you nor male descendants nor any one else shall have any interest in any of the property herein-mentioned. If the said S happen to be without descendants, the male offspring of my daughter, K, your wife, shall enjoy the property equally, but no other shall have any interest therein; such is the *swatantra harar* executed with my free will and pleasure." S attained his majority, but died without issue. His elder brother sued for possession of the property under the above clause: *Held*, that since the plaintiff was a person capable of taking subject to the life-interest, at the time when the gift was made, he was entitled to succeed. *Semble*: If the gift to the plaintiff had failed the property would have reverted to the heirs of the settlor on S's death without issue. *Ram Lall Sett v. Kant Lall Sett*, I. L. R. 12 Calc. 663, followed. *MANJAMMA v. PADMANABHAYYA*.

[I. L. R. 12 Mad. 393]

5.—*Gift to a class—Vested and contingent interest.*] A will, made by a Hindu, contained the following clause: "I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall invest the same in lands. . . shall enjoy the produce. . . and shall transmit the *corpus* intact to her male descendants." Within a month after the testator's death his eldest daughter was delivered of a son, who died in a few months. She died subsequently, leaving the plaintiff her husband but no male issue her surviving. The plaintiff

**HINDU LAW—GIFT—concluded.****(3) CONSTRUCTION OF GIFTS BY WILL OR DEED—concluded.**

sued as heir of his son to recover the amount of the above bequest: *Held*, that as the daughter's son never acquired a vested interest in the bequest, the plaintiff's suit must be dismissed. **SRI-NIVASA v. DANDAYUDAPANI.**

[I. L. R. 12 Mad. 411]

6—*Inheritance in a village community in Oudh—Wajib-ul-arz modifying the Mitakshara law—Hindu widow's power of alienation—Operation of gift by her to two donees, one of whom could not take.* A clause in the wajib-ul-arz of a village in Oudh authorized any co-parcener not having male issue, or his widow, to make a gift of his share in the village to a daughter, or a daughter's son; the intention apparent from this, and from a further provision as to the descendants of a sharer's daughter being to modify the law otherwise prevailing, viz., the Mitakshara, and authorize the introduction of a daughter, or her son, and their descendants male or female, in priority to brothers or nephews of the sharer. *Held*, that such introduction was authorized, and that the inheritance, where the widow had made a gift of it in favour of a daughter, was transmitted to the daughter's daughter, the gift being of more than the donor would have taken as a widow. The gift was to the daughter and to her husband jointly. *Held* that the gift being invalid as to the husband, the daughter took the whole estate given on the general principle of gifts to two persons jointly, where they failed as to one of them, operating entirely for the benefit of the other who could take, declared in *Humphrey v. Tayleur* (Ambler, 138) which, not depending on any peculiarity of English law, was applicable here. **NANDI SINGH v. SITA RAM.**

[I. L. R. 16 Calc. 677]

[L. R. 16 I. A. 44]

**HINDU LAW—GUARDIAN.**

*See HINDU LAW—MARRIAGE—RIGHT TO GIVE IN MARRIAGE AND CONSENT.*

[I. L. R. 12 Bom. 480]

1—*Right of Guardianship—Right of father to give his daughter in marriage—Conduct of father forfeiting such right—Suit by a father to restrain his wife from giving their daughter in marriage without his consent.* The plaintiff and *R* the second defendant, were husband and wife belonging to the Prabhu caste, and lived together in the house of the first defendant, who was *R*'s father, until the year 1880. In 1877 a daughter *S* had been born to them. In 1880 the plaintiff was convicted of theft, and sentenced to two years' imprisonment. At the end of his term of imprisonment he did not return to live with his father-in-law, but went to reside in his own father's house, where in 1881 he requested his wife *R* to join him

**HINDU LAW—GUARDIAN—concluded.**

with their daughter. *R* refused, and she and *S* continued to live in the house of the first defendant, her father. The plaintiff then married a second wife. In November, 1885, *S* having attained nine years of age—an age at which it is customary for Prabhus to seek husbands for their daughters—demanded his daughter *S* from the defendants, who however refused to deliver the girl to the plaintiff. In May 1886, the plaintiff filed this suit against the defendants, complaining that they were about to have his daughter *S* married to her cousin without his (the plaintiff's) consent. He prayed that he might be declared entitled to the custody of his daughter, and for an injunction against her marriage without his consent. On filing this suit he obtained a rule nisi for an injunction against the defendants: *Held*, that, pending the hearing of this suit, he was entitled to the injunction asked for. **NANABHAI GANPATRAV DHAIRYAVAN v. JANARDHAN VASUDEV.**

[I. L. R. 12 Bom. 110]

2—*Right to guardianship of Hindu widow—Grant of certificate of administration under Act XL of 1858.* The relations of her deceased husband are entitled to be the guardians of a Hindu widow in preference to her paternal relations. A certificate of administration, under Act XL of 1858, was therefore granted to one of the former in preference to the latter. **KHUPDIRAM MOOKERJEE v. BONWARI LAL ROY.**

[I. L. R. 16 Calc. 584]

**HINDU LAW—INHERITANCE.**

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**HINDU LAW—INHERITANCE—continued.**

See HINDU LAW—PARTITION—SHARES  
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[I. L. R. 15 Cal. 292]

See HINDU LAW—PRESUMPTION OF  
DEATH.

[I. L. R. 11 Bom. 433]

**(1) AUTHORITIES ON LAW OF INHERITANCE.**

1.—*Commentaries and Text-Books—Mitakshara—Mayukha—Usage.*] The commentaries and text-books embody, in many instances, the rules formed and enforced by custom, but custom, even on Hindu principles, may and must have power without their aid. They do not govern the usage of the country, save by a reflex process; it is the usage which adopts them, and they are law only because of this adoption, in the sense and within limits according to which their rules are accepted. Not merely the reception, but the exact extent of the reception, of any law book is governed by usage. In the Maratha country the Mitakshara is the principal authority upon Hindu law; but in doubtful cases it may properly be construed by the light of the Mayukha, the usage of the country having adopted the latter as well as the former. This course was followed in *Vinayak Anandray v Lakshmi Bai*, 1 Bom 118, where a different construction of the Mitakshara was allowed to prevail in Bombay from that which had been adopted for Bengal. *BHAGIRTHIBAI v. KAHNUJIRAV.*

[I. L. R. 11 Bom 285]

**(2) LAW GOVERNING PARTICULAR CASES**

2.—*Usage of the country.*] No statute law exists regulating the devolution of property amongst Hindus. The law therefore to be applied in cases of inheritance is the usage of the country in which the suit arises. see Bombay Reg. II of 1827, s 26. The commentaries and text-books embody, in many instances the rules, formed and enforced by custom, but custom, even on Hindu principles, may and must have power without their aid. They do not govern the usage of the country, save by a reflex process, it is the usage which adopts them, and they are law only because of this adoption in the sense and within the limits according to which their rules are accepted. Not merely the reception, but the exact extent of the reception, of any law book is governed by usage. *BHAGIRTHIBAI v. KAHNUJIRAV.*

[I. L. R. 11 Bom 285]

**(3) SPECIAL LAWS.****(a) NAMBUDRIS.**

3.—*Law governing Nambudri Brahmans.*] Nambudri Brahmans are governed by Hindu law, as modified by special customs adopted by them since their settlement in Malabar. *VASUDEVAN v. THE SECRETARY OF STATE FOR INDIA.*

[I. L. R. 11 Mad. 157]

**HINDU LAW—INHERITANCE—continued.****(4) GENERAL RULES AS TO SUCCESSION.**

4.—*Spiritual benefit rendered by heir*] *Per* MAHMOOD, J.—There is no difference between the Mitakshara and the Bengal Schools of Hindu law regarding the principle that the right of inheritance is based on the spiritual benefit which the heir, by taking the estate, renders to the soul of the deceased proprietor. There is a difference between the two schools only on a matter of detail relating to questions of preference between various competing classes of heirs. *JANKI v. NAND RAM*

[I. L. R. 11 All. 194]

**(5) SPECIAL HEIRS.****(a) MALES.**

5.—*Affiliated son (ullatam)—Burden of proof.*] *N*, a Hindu, who had admittedly been taken as *ullatam* into the family of his father-in-law died, leaving property which he had acquired by virtue of his *ullatam* marriage. He was succeeded by his son, who died without issue leaving only a sister surviving him. In a suit by the brother of *N*, who was the managing member of his family, to recover the property from the sister of the last holder. *Held*, that as an *ullatam* can succeed to property in his natural family his natural relatives can succeed to his property, and as the paternal uncle is preferable as an heir to the sister, the plaintiff was *prima facie* entitled to recover, notwithstanding the admission, and that it was for the defendant to establish any special circumstances to rebut his claim. *RAMAKRISHNA v. SUBBARAKA.*

[I. L. R. 12 Mad. 442]

6.—*Brother's daughter's son—Dayabhaga School—Great grandson of paternal grandfather.*] A brother's daughter's son does not succeed in preference to a great grandson of the paternal grandfather of the deceased. *HURIDAS BUNDOPADHYA v. BAMA CHURN CHATTOPADHYA.*

[I. L. R. 15 Cal. 780]

7.—*Cousin—Bandhu—Paternal great aunt's grandson*] According to the Hindu Law of Succession in force in the Madras Presidency, the grandson of a paternal great aunt of the deceased inherits to him as a *bandhu*. *SETHURAMA v. PONNAMMAL.*

[I. L. R. 12 Mad. 155]

8.—*Daughter's son's son—Great grand-daughter's—Bandhu*] *N*, the daughter of *J*, inherited his property under Hindu law. *N* had a son, who predeceased her, leaving a son *K*. *Held* that *K*, being a *bandhu*, was entitled to the property of *J* on the death of *N* in preference to the daughters of *N*. *KRISHNAYYA v. PICHAMMA.*

[I. L. R. 11 Mad. 287]

## HINDU LAW—INHERITANCE—continued.

## (5) SPECIAL HEIRS—concluded.

## (a) MALES—concluded.

9.—*Sister's son—Mitakshara* ] According to the Mitakshara, a sister's son, who is a *buddhu* and not a *sapinda* similar to a daughter's son, cannot inherit until the direct male line down to and including the last *samonadaka*, i.e., fourteen degrees of the direct male line, has been exhausted. *Koner Golab Singh v. Rao Kurun Singh*, 10 B. L. R. 1; *Bhyah Ram Singh v. Bhyah Ugur Singh*, 13 Moore's I. A. 373; and *Lakshmanammal v. Tirucengada*, 1 L. R. 5 Mad. 241, referred to NARAINI KUAR v. CHANDI DIN.

[I. L. R. 9 All. 467]

10.—*Uncle—Paternal uncle—Illatam—Burden of proof* ] N, a Hindu, who had admittedly been taken as *illatam* into the family of his father-in-law died leaving property which he had acquired by virtue of his *illatam* marriage. He was succeeded by his son, who died, without issue, leaving only a sister surviving him. In a suit by the brother of N, who was the managing member of his family, to recover the property from the sister of the last holder. Held, that as an *illatam* succeeds to property in his natural family (*Balarani v. Pera*, 1 L. R. 6 Mad. 267), so his natural relatives can succeed to his property, and a paternal uncle being a preferable heir to a sister, the plaintiff was *prima facie* entitled to recover, notwithstanding the admission, and that it was for the defendant to establish any special circumstances to rebut his claim. RAMAKRISHNA v. SUBBAKKA.

[I. L. R. 12 Mad. 442]

## (b) FEMALES.

11.—*General Rules—Law of inheritance in Bombay Presidency—Female taking absolute estate* ] In Bombay, if not in other provinces in India, a female may take by inheritance, from a male, an absolute as opposed to a life-estate, and one excluding any interest of the next heir, as such, of the *propositus*. BHAGIRTHIBAI v. KAHNUJIRAV.

[I. L. R. 11 Bom. 285]

12.—*Daughter—Law of inheritance in Presidency of Bombay—Daughter, interest of, in Bombay, in property inherited from her parents.* ] Under the Hindu law as prevailing in the Presidency of Bombay, a daughter inheriting from a mother or a father takes an absolute estate; which passes on her death to her own heirs, and not to those of the preceding owner. BHAGIRTHIBAI v. KAHNUJIRAV.

[I. L. R. 11 Bom. 285]

13.—*Daughter-in-law—Mayukha—Property given to a woman by a stranger—Devolution of such property—Daughter's daughters not entitled to it—Son's widow preferred as gotraja sapinda* ] By the law of inheritance laid down in the

## HINDU LAW—INHERITANCE—continued.

## (5) SPECIAL HEIRS—concluded.

## (b) FEMALES—concluded.

Mayukha a house given to a married woman by a stranger to the family and her own earnings devolve on her death as if she had been a male. The daughter-in-law of the deceased owner succeeds, therefore, in preference to the daughters of a deceased daughter. BAI NARMADA v. BHAGWANTRAI.

[I. L. R. 12 Bom. 505]

14.—*Sister—Rule of inheritance affected by manner of life—Maraver prostitutes—Act XXI of 1850* ] A married Maraver woman deserted her husband and lived in adultery with another man to whom she bore four children. Of those children, the two daughters associated together leading the life of prostitutes, and the two sons separated themselves from their sisters and observed caste usage. The elder daughter died leaving property in land. Held that the sister succeeded to the deceased in preference to the brother. SIVASANGU v. MINAL.

[I. L. R. 12 Mad. 277]

15.—*Step-mother—Step-mother preferable to widow of half-brother* ] As between the widows of specified heirs who are *gotraja sapindas*, the step-mother, being the widow of the father who is higher on the list than the half-brother, is preferable to the widow of the half-brother. RAKHMABAI v. TUKARAM.

[I. L. R. 11 Bom. 47]

16.—*Widow—Brother's widow—Survivorship—Benares School of Law* ] According to the law and usage of the Benares School of Hindu Law a brother's widow has no place in the line of heirs; nor is she entitled to succeed by right of survivorship. *Bhuganee Dabee v. Gopaljee*, 1 S. D. A. N. W. P. (1862), 306, not followed; *Ananda Bibee v. Nornit Lal*, 1 L. R. 9 Calc. 315, followed in principle. JOGDAMBA KOER v. SECRETARY OF STATE FOR INDIA.

[I. L. R. 16 Calc. 367]

## (6) ILLEGITIMATE CHILDREN.

17.—*Rights of an illegitimate son of a Sudra—Position of legitimate, adoptive and illegitimate sons and daughter's sons compared.* ] A, the son of a deceased zemindar, sued B and C, his widow and brother, for possession of the zemindari, which was impartible. A was found to be an illegitimate son of the late zemindar. Held that he could not exclude his father's coparcener or widow from succession to the impartible zemindari. *Krishnayyan v. Muttusami*, 1 L. R. 7 Mad. 407, and *Kulanthi Natchear v. Ramamani* (unreported), in which it was ruled that a widow's claim to inherit would exclude that of an illegitimate son, approved and followed. *Sadu v. Baiza*, 1 L. R. 4 Bom. 37, and *Jogendra Bhupati v.*

**HINDU LAW—INHERITANCE—continued.****(6) ILLEGITIMATE CHILDREN—concluded.**

*Nityanundman Singh*, I L. R. 11 Cal. 702. distinguished. *PARYATHI v. THIRUMALAI*.

[I L. R. 10 Mad. 334

18.—*Determination of caste—Children of mixed marriages—Status of son of Kshatriya by Sudra woman.* Although the illegitimate children of members of the regenerate classes are excluded from inheritance by the Mitakshara, the absence of legal marriage is no bar to the determination of their caste with reference to the law applied to Anulomajas (children born of mixed marriages). The illegitimate son of a Kshatriya by a Sudra woman is not a Sudra but of a higher caste called Ugra. *BRINDAVANA v. RADHAMANI*.

[I L. R. 12 Mad. 72

**(7) IMPARTIBLE PROPERTY.**

19.—*Son's right at birth—Right of coparcenary—Custom* ] There is no such coparcenary in an estate impartible by custom, as under the law of the Mitakshara governing the descent of ordinary property, attaches to a son on his birth. The son's right at birth, under the Mitakshara, is so connected with the right to share in, and to obtain partition of the estate, that it does not exist independently of the latter right. *SARTAJ KUARI v. DEORAJ KUARI*.

[I. L. R. 10 All. 272

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**(8) RELIGIOUS PERSONS.**

20.—*Gurus—Gosari—Succession to the estate of a Gosari in the Dekkan—A Gosari's right to nominate his successor by a written instrument* ] A guru in the Dekkan has a right to nominate his successor from amongst his *chelas* (disciples) by a written declaration. *TRIMBAKPURI GURU SITALPURI v. GANGABAI*.

[I. L. R. 11 Bom. 514

21.—*Mohunt—Succession to the office and property of a deceased Mohunt—Custom of the math or institution.* ] In determining the right of succession to the property left by the deceased head of a religious institution, the only law to be observed is to be found in custom and practice, which must be proved by evidence. On the death of a *Mohunt* the right to succeed to his landed and other property was contested between two *goshains*. *Held* that the claimant, in order to succeed, must prove the custom of the math entitling him to recover the office and the property appertaining to it. The evidence showed the custom to be that the title to succeed to the office and property was dependent on the successor's having been the *chela*, approved and nominated as such by the late *Mohunt*, and also, after the death of the latter, installed or confirmed as *Mohunt*, by the other *goshains* of the sect: *Held* that a claimant who failed to prove his installation or confirmation, was not entitled to a decree for the office and

**HINDU LAW—INHERITANCE—concluded.****(8) RELIGIOUS PERSONS—concluded**

property against a person alleging himself to have been a *chela*, who, whether with or without title was in possession. *GENDA PURI v. CHATAR PURI*

[I. L. R. 9 All. 1

[L. R. 13 I. A. 100

**(9) DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF INHERITANCE.****(a) OUTCASTS.**

22.—*Act XXI of 1850—Suit by person born a Muhammadan as reversioner in a Hindu family.* ] Act XXI of 1850 does not apply only to a person who has himself or herself renounced his or her religion or been excluded from caste. The latter part of s. 1 protects any person from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste. This applies to a case where a person born a Muhammadan, his father having renounced the Hindu religion, claims by right of inheritance under the Hindu law a share in his father's family. *BHAGWANT SING v. KALLU*.

[I. L. R. 11 All. 100

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[I. L. R. 13 Bom. 61

**(1) PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY.****(a) GENERALLY.**

1.—*Ancestral property—Burden of proof where property alleged to be ancestral—Property derived by a son from his mother where it originally formed part of his father's estate.* ] Where a Hindu by will leaves property to another which is afterwards alleged to be ancestral by members of the testator's family, the burden of proving it to be ancestral rests on the plaintiffs. There is no presumption of Hindu law as to its character. *NANABHAI GANPATRAV DHAIKYAVAN v. ACHRATBAI*.

[I L. R. 12 Bom. 122

## HINDU LAW—JOINT FAMILY—continued.

## (1) PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—continued.

## (a) GENERALLY—concluded.

2.—*Evidence—Person claiming a share. Onus of proof as to—Presumption as to property of member of joint family* ] The plaintiff as a joint member of the defendant's family sued to set aside a release obtained from him by the defendant and for partition, &c. The plaintiff was the son of one L, and the defendant was the plaintiff's nephew and grandson of L, being the son of T, an elder brother of the plaintiff. The plaintiff alleged that L and his brother J were joint and had carried on a family business; that J died childless, and that on L's death in 1868 the whole family property passed into the hands of T, his eldest son, on whose death it came into the possession of the defendant as eldest male member of the family, although belonging to a younger generation than the plaintiff. The defendant denied that any part of the property in his hands was ancestral property. He alleged that the property of L was self-acquired, and that L had, by his will, devised the whole of his property, except Rs. 25,000, to his son T (the defendant's father) on whose death it had come to the defendant. Held that there was no evidence to prove that the property left by L at his death was joint property. It might be that L was joint with his brother J, but it did not follow that they possessed joint property. Although presumably every Hindu family is joint in food, worship, and estate, there is no presumption that every family possesses property. Unless there is an admitted nucleus of family property, the onus of proof of the existence of joint property lies on the claimant. The plaintiff alleging that there was joint property was bound to make out his case, which he had failed to do. *TOOLSEYDAS LUDHA v. PREMJI TRICUMDAS*.

[I. L. R. 13 Bom. 61]

## (b) EVIDENCE OF SEPARATION.

3.—*Definement of shares in ancestral property* ] A four-anna ancestral share in a zemindari village was owned by two brothers, in which the share of H son of one of the brothers was one-half, the remaining half being the share of the plaintiffs the descendants of the other brother. In the village records there had been a definement of shares followed by entries of separate interests in the Revenue records and since 1264 Fasli the two plaintiffs had each been recorded as the owner of a one-anna share and H of a two-anna share thereof. The entire four-anna share had been in the possession of mortgagees from the year 1844 excepting the *sir* lands of which H held separately his own share, viz., 10 bighas. On the 7th July 1883, H executed a deed of gift of his two-anna share in favour of the defendants, and caused mutation of names to be made in their favour, surrendering to them at the same time possession of the *sir* land. H died on 31st January 1884, leaving neither son, widow, nor daughter, and the plaintiffs were his heirs-at-law. They brought

## HINDU LAW—JOINT FAMILY—continued.

## (1) PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—concluded.

## (b) EVIDENCE OF SEPARATION—concluded.

this suit to set aside the deed of gift and for possession of the *sir* land from the defendants. The suit was dismissed by the Court of First Instance, and on appeal the District Judge affirmed the decree, holding that the four-anna share was not joint and undivided property between the co-sharers, and that H was in separate possession of the two-anna share of which the defendants were the donees. On second appeal it was contended, that inasmuch as since 1844 there could have been no separate enjoyment of the four-anna share which was in the possession of the mortgagees, the evidence afforded by separate registration could not prove actual separation. *Ambika Dat v. Sukhmani Kuar*, I. L. R. 1 All. 437, was cited in support of the contention. Held, that from evidence of definement of shares followed by entries of separate interests in the Revenue records, if there be nothing to explain it, separation as to estate may be inferred. Joint family property in the hands of mortgagees may be separated in estate, although there could be no separate enjoyment of the shares so separated. *Ambika Dat v. Sukhmani Kuar*, I. L. R. 1 All. 437, discussed. *RAM LAL v. DEBI DAT*.

[I. L. R. 10 All. 490]

## (2) NATURE OF AND INTEREST IN PROPERTY

## (a) ANCESTRAL PROPERTY.

4.—*Burden of proof where property alleged to be ancestral—Property derived by a son from his mother where it originally formed part of his father's estate.* ] Where a Hindu by will leaves property to another which is afterwards alleged to be ancestral by members of the testator's family, the burden of proving it to be ancestral rests on the plaintiffs. There is no presumption of Hindu law as to its character. *P. M.*, a Hindu, died in 1831, having by his will bequeathed all his estate to his wife P and his three minor sons A, B, and C, and directed as follows:—"In the event of my wife's demise previous to my sons attaining their full age of twenty-one years, to entitle them to claim their respective shares of whatever may be left after marrying, &c., then I direct my surviving executors will secure my property and divide the whole among such sons or the survivors, of them." Subsequently to the testator's death, his widow P managed his estate, and probate of his will was granted to her alone in January, 1832. In 1836 she bought the V. property for Rs. 2801. There was no evidence to show out of what funds this property was bought, but the deed of sale stated that it was assigned to "P, widow and administratrix of the late P. M., her heirs, executors, administrators, and assigns." In 1845 the eldest son A separated from the family, and gave a release to his mother P. In 1854 she purchased the X property for Rs. 8,452, the conveyance being to "P her heirs,



HINDU LAW—JOINT FAMILY—*continued*.(2) NATURE OF AND INTEREST IN PROPERTY—*continued*.(a) ANCESTRAL PROPERTY—*continued*

executors, administrators, and assigns." In this deed, also, she was described as "the widow and administratrix of *P M*, deceased." In the same year, *viz.*, 1854, the second son *B* separated, and gave *P* a release. The third son *C* (the third defendant), continued to live with his mother *P* until 1871, in which year she died intestate. *C* then entered into possession of all the property which she had or managed in her lifetime including the *V* and *X* properties. In 1879 he mortgaged these properties to the first two defendants for Rs. 12,500. His sons (the plaintiffs), now alleged those properties to be ancestral, and complained that he and the mortgagees were acting in collusion; that he had charged the properties unnecessarily, and that he and the mortgagees were about to sell them at an undervalue for the purpose of defeating their (the plaintiffs') rights. They, therefore, filed this suit, and prayed (*inter alia*) that the claims of the mortgagees, after being ascertained, might be paid off. The defendants denied that the properties in question were ancestral property in the hands of *C* (the third defendant), or that the plaintiffs as, his sons, had any interest therein. *Held*, that the interest which the third defendant *C* derived from his mother *P* in the mortgaged premises was ancestral property, in respect of which the plaintiff had no present right of interference. The Court ordered that on payment of the mortgage-debt the properties should be reconveyed to the third defendant, and, in the event of their being sold, that the whole of the surplus proceeds should be paid to him. The original property was to be regarded, as in 1831, the self-acquired property of *P M*, a *d* as having passed under his will. In the absence of any evidence with regard to it, there was no presumption as to its character; and the plaintiffs, who alleged it to be ancestral, were bound to prove that fact. On *P M*'s death, his sons *A*, *B*, and *C* took whatever they became entitled to, under their father's will, as their self-acquired property, but in co-parcenary according to Hindu law, and not as joint tenants according to English law. As to *P* she took under the will an equal interest with her sons in the testator's estate, liable to be defeated in the event of her death before the sons attained the age of twenty-one years, when they might claim their shares. On the sons claiming their shares, one share would be left with *P*, and that share subject to her incapacity as a Hindu widow to deal with immovable property given her by her husband, would then become hers absolutely. *A* and *B* having separated, *P* and *C* continued to treat themselves as a joint family, and when *P* died in 1871, her share in the joint property lapsed for the benefit of *C*. That share, whether he took it by inheritance or by survivorship, having originally formed part of his father's estate, became ancestral in his hands. *NANABHAI GANPATRAY DHAIKYAN v. ACHUTRAI*.

[I. L. R. 12 Bom. 122]

HINDU LAW—JOINT FAMILY—*continued*.(2) NATURE OF AND INTEREST IN PROPERTY—*concluded*.(a) ANCESTRAL PROPERTY—*concluded*

5—[*Wealth amassed in trade—Proof of ancestral quality of property*] Where wealth amassed by an individual in trade is said to be ancestral in the hands of that individual, it is not enough to show that he inherited some property; it must be shown that the property inherited contributed in a material degree to the wealth so amassed. *AHMEDBOHY HUBIBBOHY v. CASSUMBOHY AHMEDBOHY*.

[I. L. R. 13 Bom. 534]

6—[*Legal obligation of heir to fulfil moral obligations of last proprietor*.] In a Hindu family governed by the Mitakshara law, and living joint in food and worship, there was no joint or ancestral property, but the father possessed certain separate and self-acquired property. He had two sons, one of whom predeceased him, leaving a widow. He died intestate, leaving a son and a widow. The widow of the son who had predeceased his father, was, at the time of her husband's death, a minor: she had never cohabited with him or resided with his family or received from them any maintenance, but had always resided with and been maintained by her own father. After her father-in-law's death, she sued her brother-in-law and her father-in-law's widow for maintenance, which she claimed to have charged upon the immoveable property which had belonged to the father-in-law during his lifetime, and which was now in the hands of the defendants. *Held* (MAHMOOD, J., expressing no opinion on this point) that the property in suit, though inherited by the defendants, could not, so far as the plaintiff's right were concerned, be correctly described as 'ancestral property' in the defendants' hands from which she would be entitled to maintenance; inasmuch as, during the father's lifetime, it was not in any sense ancestral, and the sons had no coparcenary interest in it, but merely the contingent interest of taking it on their father's death intestate, and, in the case of the plaintiff's husband, such interest, by reason of his predeceasing his father, never became vested. *Adhubai v. Chursandas Nathu*, I. L. R. 11 Bom. 199, dissented from on this point. *Savitribai v. Laxmibai*, I. L. R. 2 Bom. 573, referred to. *JANKI v. NAND RAM*.

[I. L. R. 11 All. 194]

## (b) ACQUIRED PROPERTY.

7.—[*Onus of Proof*.] *A*, a Hindu, took up some abandoned waste land and brought it into cultivation:—*Held*, that the true test as to whether the land was his self-acquired property or not, is whether it was brought under cultivation by family or self-acquired funds, and the *onus probandi* lay upon those who alleged the latter. *SURBAYYA v. SURAYYA*.

[I. L. R. 10 Mad. 251]

**HINDU LAW—JOINT FAMILY—continued.****(3) NATURE OF JOINT FAMILY.**

8.—*Suit for share of Profits—Suit for Partition—Account, right to.*] A member of a joint Hindu family cannot sue for a share of the profits of the joint family estate as he has no definite share until partition. He may sue for a partition of such estate unless by a family usage or special law it is impartible, and then is entitled to an account. *PIRTHI LAL v. JOWAHIR SINGH.*

[I. L. R. 14 Calc 493]

[L. R. 14 I A 37]

See *SHANKAR BAKSH v. HARDES BAKSH.*

[I. L. R. 16 Calc. 397]

[L. R. 16 I A 71]

**(4) POWERS OF ALIENATION BY MEMBERS.****(a) MANAGER.**

9.—*Sale of family property by manager when binding on an adult member of family absent at time of sale—Consent to such sale.*] B and C were half-brothers and members of an undivided family. C left his native place, and, in his absence, B carried on the family business, and managed the family affairs. In order to raise money for the business, and to provide for the marriage expenses of C's sisters, B sold to the plaintiff a house which was part of the family property. On B's death, C returned to his village, and refused to give up possession of the house to the plaintiff, who accordingly filed this suit. It was contended that B could not sell the house so as to bind C, without his express assent: *Held*, confirming the decree of the lower Appellate Court, that the sale was binding on C, who under the circumstances must be presumed to have intended that B should continue as *de jure* and *de facto* manager to exercise such powers as the family necessities required. *CHHOTIRAM v. NARAYANDAS.*

[I. L. R. 11 Bom, 605]

**(b) FATHER.**

10.—*Mortgage by a father -- Decree against father on mortgage giving possession with interest and costs—Son's liability to satisfy the decree as to interest and costs.*] The plaintiff's father mortgaged certain ancestral property for a limited term. A suit was brought on the mortgage against the father, and a decree was passed, directing the mortgaged property to be handed over to the mortgagee for a certain time, and awarding payment of interest and costs by the father. In execution of this decree, the mortgagee sought to recover the costs by sale of the property in question. Thereupon the plaintiffs sued for a declaration that the property was not liable to be sold in execution of the decree against the father, on the ground that the debts contracted by the father were for immoral purposes, and that, therefore, the estate could not be bound by the decree at all. The Court of First Instance found that the debts had not been incurred for any immoral purpose,

W., D.

**HINDU LAW—JOINT FAMILY—continued.****(4) POWERS OF ALIENATION BY MEMBERS—concluded****(b) FATHER—concluded.**

and dismissed the suit. On appeal to the High Court *Held*, that under the decree passed against the father the interest and costs became a debt upon the whole estate, from which it could not escape, unless it was clearly made out that the debt was the result of fraud or immorality. Although the father alone was primarily liable for the fulfilment of the decree, still the debt was one which was rightly chargeable to the whole estate, and the sons would be liable, just as they would have been liable if the father had compromised the suit, unless the transaction were tainted with fraud or immorality. In a united family the father is capable of acting as the representative of the family, except in the case of borrowing for fraudulent or immoral purposes. In this case he entered into litigation, which resulted in loss to himself and the family which he represented, and he could make the family responsible for any loss so incurred. The judgment-creditor could also make them liable. Although where the father desires to represent the whole estate he can do so, yet he is not necessarily bound to do so, nor is the whole estate liable where he explicitly or impliedly binds only his own portion. *NARAYANRAY DAMODAR v. JAVHERRAHU.*

[I. L. R. 12 Bom, 431]

**(c) OTHER MEMBERS.**

11.—*Release by a co-parcener of his rights in favour of another co-parcener.*] In a joint Hindu family, consisting of four brothers, A, B, C, and D, A and B obtained their shares by a partition suit. In the plaint they stated that they relinquished their shares of the moveable property in favour of C. In a suit by C against D to recover his share C claimed three-fourths of the moveable property. D contended that the release by A and B in favour of C could not, according to Hindu law, add to the share of C as a co-parcener. *Held*, that C was entitled to the share claimed. *PEDDAYA v. RAMALINGAM.*

[I. L. R. 11 Mad. 406]

12.—*Alienation by one of members—Sale by co-parcener. Effect of—Mitakshara law*] A sale by one member of a joint family held to be bad under the Mitakshara law, as being an appropriation by him, without any partition, of joint family property. *CHUNDER COOMAR v. HURBUN SAHAI.*

[I. L. R. 16 Calc. 137]

**(5) SALE OF JOINT FAMILY PROPERTY IN EXECUTION OF DECREE, AND RIGHTS OF PURCHASERS.**

13.—*Judgment-debtor's share in joint ancestral estate—Mitakshara law—Execution of decree by sale of such share—Rights of co-sharers not being parties to the decree or execution proceedings—Sale certificate.*] The question was whether the whole estate belonging to a joint family, living under

HINDU LAW—JOINT FAMILY—*continued*.(5) SALE OF JOINT FAMILY PROPERTY IN EXECUTION OF DECREE, AND RIGHTS OF PURCHASERS—*continued*.

the Mitakshara, including the shares of sons or the share of their father alone, passed to the purchaser at a sale in execution of a decree against the father alone upon a mortgage by him of his right: *Held*, that, as the mortgage and decree, as well as the sale certificate, expressed only the father's right, the *prima facie* conclusion was that the purchaser took only the father's share, a conclusion which other circumstances—the omission on the part of the creditor to make the sons parties and the price paid—not only did not counteract but supported. The enquiry in recent cases regarding the liability of the estate of co-sharers in respect of transfers made by, or execution against, the head of the family has been this, *viz.*, what, if there was a conveyance, the parties contracted about, or what, if there was only a sale in execution, the purchaser had reason to think he was buying. Each case must depend on its own circumstances. *Upooroop Tewary v. Lalla Bandhjee Sukay*, I. L. R. 6 Cal. 749, distinguished. *SIM-BHUNATH PANDE v. GOLAP SINGH*.

[I. L. R. 14 Cal. 572]

[L. R. 14 I. A. 77]

14.—*Civil Procedure Code, Act VIII of 1859, s. 264—Execution of decree against a member of an undivided family by sale of his personal interest in the family estate, which was an impartible zemindari; such interest, by reason of his death before the sale, consisting only of the rents and profits then uncollected.* On a sale of the right, title and interest in an impartible zemindari in execution of decrees against the zemindar, the head of an undivided family, the question was whether (a) only his own personal interest, or (b) the whole title to the zemindari, including the interest of a son and successor, passed to the purchaser. The proclamation of sale purported to relate to (a) only; and between the dates of proclamation and the auction-sale the zemindar died. On the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that it could sell, and that under the circumstances it could sell, and was bound to sell, (b); because, the debts, the subject of the decrees under execution, not having been incurred by the late zemindar for any immoral purpose, the entire zemindari formed assets for their payment in the hands of his son: *Held*, that the question of what the Court could, or should, have sold had not arisen. All that required decision was what the Court had sold. If (a) only was put up for sale, then that interest only could have been purchased. Two Courts having concurred in finding that (a) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser. *PETTAHI CHETTIAR v. SANGILI VIRA PANDIA CHINNA-TAMBIAR*.

[I. L. R. 10 Mad. 241]

[L. R. 14 I. A. 84]

HINDU LAW—JOINT FAMILY—*continued*.(5) SALE OF JOINT FAMILY PROPERTY IN EXECUTION OF DECREE, AND RIGHTS OF PURCHASERS—*continued*.

15.—*Decree against an undivided brother—Mortgage of joint property.* A, an undivided member of a Hindu family, mortgaged part of the family property by way of conditional-sale to B, to secure a loan. B having sued A personally for the amount due, A admitted the mortgage and said he would surrender the property in discharge of the debt, and a decree was passed accordingly. A's undivided brothers intervened in execution: *Held*, that the decree, not being passed against the joint family or its representative, and not describing the property, which it directed to be delivered to the plaintiff by way of absolute sale, to be family property, could not be executed against the family property. *GURUVAPPA v. THIMMA*.

[I. L. R. 10 Mad. 316]

16.—*Decree against the father alone—Attachment of family property in execution of such decree—Son's interest in the family property when bound by decree against the father or by sale effected by the father.* Where, in a joint Hindu family, the father disposes of family property, the son's interest is bound, unless the son can show in proceedings taken for that purpose, that the disposal of the property by his father was made under circumstances which deprived his father of his disposing power. So also, where family property is sold under proceedings taken against the father alone, the son's interest is bound, unless the son can show that the sale was on account of an obligation to which he was not subject. The father is, in fact, the representative of the family both in transactions and in suits, subject only to the right of the sons to prevent an entire dissipation of the estate by particular instances of wrong-doing on the father's part. *JAGABHAI LALUBHAI v. VIJBHUKANDAS JAGJIVANDAS*.

[I. L. R. 11 Bom. 37]

17.—*Purchaser at a sale in execution of a decree directing sale of the whole right, title, and interest of grandfather—Assignment by grandsons of the same property subsequently to such sale, effect of.* In 1858, S mortgaged certain ancestral property to the first defendant for a term of nine years. In 1864, S being then dead, the defendant sued R, the son of S, to recover the money-debt, and obtained a decree against the estate of the deceased. The land in question was thereupon attached and sold on the 13th August 1873, subject to defendant's mortgage lien, and was purchased for the defendant by his cousin. The certificate of sale was drawn up in accordance with the decree and recited that the purchaser bought the whole right, title, and interest of S. On the 3rd August, 1882, the plaintiff purchased from R's sons the share of R, in S's estate. The plaintiff sued the defendant to redeem the property. The Court of First Instance rejected his claim. On appeal,

**HINDU LAW—JOINT FAMILY—continued.****(5) SALE OF JOINT FAMILY PROPERTY IN EXECUTION OF DECREE, AND RIGHTS OF PURCHASERS—continued.**

the lower Appellate Court reversed that decree, and remanded the case for retrial. Against this order of remand, the defendant appealed to the High Court: *Held*, restoring the decree of the Court of First Instance, that the language of the decree showed that the intention was to make the land itself liable for the debt, and not merely S's interest. By his purchase the defendant was to be regarded as having bargained for and purchased the entire interest in the land. *Nanomi Babuasa v. Modhun Mohun*, I. L. R. 13 Calc. 21, followed. *SAKARAM SHET v. SITA-RAM SHET*.

[I. L. R. 11 Bom. 42]

18.—*Mortgage by father—Decree subsequently to fathers' death against eldest son as heir of father—Minor sons not parties—Sale in execution of family property other than that comprised in mortgage—Subsequent suit by minor sons to recover their shares—Minor sons when bound by decree against eldest son as heir of father.* One K mortgaged certain land to B, and died, leaving four sons, *viz.*, R, and the three minor plaintiffs. Subsequently, B, brought a suit on the mortgage against K by his heir, R, for the amount due, and obtained a decree, whereby it was ordered that the amount should be recovered from the mortgaged property, and, if that proved insufficient, from the other estate of the deceased. The minor sons were not made parties to that suit, nor was R sued as representing the joint family. In execution of the decree, B attached and sold the whole of the joint family property, the certificate of sale showing that the right, title, and interest of K, deceased, by his heir R, was attached and sold and conveyed to the purchaser. The three minor sons subsequently brought this suit to recover some of the property, contending that their shares were not bound by the sale: *Held*, on the authority of *Bissessur Lall Sahoo v. Luchmessur Singh*, I. L. R. 6 I. A. 233 and, reversing the decree of the lower Court, that the property in question having been declared liable for the debt incurred by the father, the intention was that the estate in its entirety should be sold. The minor sons were, therefore, bound by the sale, unless they could prove that the father's debt had been incurred for an immoral and improper purpose. The case was, accordingly, sent back for trial of an issue upon that point, with a direction that the burden of proof should lie upon the plaintiffs. *JAIRAM BAJABASHET v. JOMA KONDIA*.

[I. L. R. 11 Bom. 361]

19.—*Manager, decree against—Sale in execution of such decree passing his interest only—Effect of sale on shares of the co-parceners not parties to the suit.* A sale under a decree obtained against the manager of a Hindu family only passes

**HINDU LAW—JOINT FAMILY—continued.****(5) SALE OF JOINT FAMILY PROPERTY IN EXECUTION OF DECREE, AND RIGHTS OF PURCHASERS—continued.**

the right, title, and interest of those who are parties to the suit. Accordingly, where, in execution of a decree obtained against two of the brothers of the plaintiff as managers in a suit to which the plaintiff was not a party, the house, which was the family property, was sold: *Held*, the sale was void as against the plaintiff's shares in the house. *Maruti Narayan v. Lilachand*, I. L. R. 6 Bom. 564, followed. *LAKSHMAN VENKATESH v. KASHINATH*.

[I. L. R. 11 Bom. 700]

20.—*Mortgage of family property by father—Decree against father enforcing mortgage—Decree for money against father—Sale in execution of decree—Rights of sons.* The members of a joint Hindu family brought suits in which they respectively prayed for decrees that their respective proprietary rights in certain ancestral property might be declared, and that their interests in such property, which were about to be sold in execution of two decrees against their father, might be exempted from such sale. One of these decrees was for enforcement of a hypothecation by the plaintiff's father of the property in suit. It was admitted on behalf of the plaintiffs, in connection with this decree, that although the judgment-debtor was a person of immoral character, the creditor had no means of knowing that the monies advanced by him were likely to be applied to any other purpose than that for which they were professedly borrowed, namely, for the purpose of an indigo factory in which the family had an interest. *Held*, that the plaintiffs were not entitled to any declaration in respect of the execution-proceedings under the decree for enforcement of hypothecation. The second of the decrees above referred to was a simple money, decree for the principal and interest due upon a *hund* executed by the father in favour of the decree-holder. The suit terminating in that decree was brought against the father alone, and the debt was treated as his separate debt: *Held* that the creditor's remedy was to have brought his suit, if he desired to obtain a decree which he could execute against the family property and not against the father's interest only, and if he could maintain such suit, either against those members of the family against whom he desired to execute his decree, or against the father as head of the family, expressly or impliedly suing him in that capacity; but that, not having taken this course, his decree was not enforceable against the plaintiff's rights and interests in the attached property. *Muttayan Chettiar v. Sangili Virapandia Chinnatambiar*, I. L. R. 6 Mad. 1, distinguished. *Nanomi Babuasa v. Modhun Mohun*, I. L. R. 13 Calc. 21, and *Basa Mal v. Maharajah Singh*, I. L. R. 8 All. 205, referred to. *BALBIR SINGH v. AJUDHIA PRASAD*.

[I. L. R. 9 All. 142]

**HINDU LAW—JOINT FAMILY—continued.****(5) SALE OF JOINT FAMILY PROPERTY IN EXECUTION OF DECREE, AND RIGHTS OF PURCHASERS—continued.**

21.—*Fraudulent hypothecation by father—Suit upon the personal obligation against the father only—Money-decree, sale in execution of—Sale certificate referring to right and interest of father only in joint family property—Suit by sons for declaration of right to their shares—Form of decree.* If a person in possession of property which originally belonged to the members of a joint Hindu family, of whom the father was one, can produce as his document of title only a sale-certificate showing him to have bought, in execution of a money-decree against the father only, the right, title, and interest of the father, then he has bought nothing more than such interest, and he is liable to be compelled to restore to the other members of the joint family their interests, which had not, upon the face of the sale-certificate, passed by the sale. The father and manager of a joint Hindu family executed a deed whereby he hypothecated certain zemindari property, covenanting to put the mortgagee in proprietary possession thereof if the debt should not be paid on a certain date. This transaction afterwards turned out to be fraudulent on his part, as he had no interest in this property, and the obligors then sued him to recover the debt upon the personal obligation, and obtained a money-decree, in execution whereof the right, title, and interest of the judgment-debtor in certain joint family property was notified for sale, and a sale took place at which, upon the face of the sale-certificate, only that right, title, and interest was sold. The auction-purchasers having obtained possession, asserted a right to the whole of the joint family estate, upon the ground that, as the judgment-debtor was father of the family, the decree must be assumed to have been passed against him in his capacity as *karta*, and that the other members of the family were therefore bound by the decree and sale. The other members brought a suit to recover possession of their shares. *Held* that inasmuch as, upon the terms of the sale-certificate, nothing more passed to the defendants at the sale than the right, title, and interest of the father, the plaintiffs were entitled to maintain the suit, and to have a decree declaring them entitled to the whole property, subject to a declaration that the defendants, as auction-purchasers of the father's share might come in and claim a partition of that share out of the joint estate. *Per* MAHMOOD, J., that the plaintiffs were entitled to succeed on the further ground that the debt for which the decree against the father was passed was immoral within the meaning of Hindu law. *Simbhunath Pande v. Gopal Singh*, I. L. R. 14 Calc. 572; I. R. 14 I. A. 77; *Deendyal v. Judddeep Narain Singh*, L. R. 4 I. A. 247; I. L. R. 3 Calc. 198, and *Hurday Narain Sahu v. Suder Perkash Misser*, L. R. 11 I. A. 26; I. L. R. 10 Calc. 626, referred to. RAM SAHAI v. KEWAL SINGH

[I. L. R. 9 All. 672]

**HINDU LAW—JOINT FAMILY—continued.****(5) SALE OF JOINT FAMILY PROPERTY IN EXECUTION OF DECREE AND RIGHTS OF PURCHASERS—continued.**

22.—*Mitakshara Law—Sale of joint family property in execution of decree, as the result of a mortgage by managing member—Liability of shares of members of family not parties to the decree.* Although some of the members of a joint family had not been made parties to a suit upon a mortgage effected by the managing members, the entire family estate was bound by the act of the latter, and passed at the sale in execution of a decree upon the mortgage. Whether the shares of all were bound depended on the authority of those who executed the mortgage. This authority they had to raise money to pay a debt owed by the family as joint members of an ancestral trading firm. The managing members of a joint trading family, having purported to mortgage the family estate, to pay a debt due by the firm, were sued upon it by the mortgagee, who afterwards purchased the property at the execution-sale. In a suit brought by the latter against the other members of the family to obtain a declaration that he had purchased the entire family estate, the defendants, without showing that the mortgage did not validly bind the family estate, contended that not having been made parties to the suit, they were not affected by the decree, and their shares had not passed at the sale in execution. *Held*, that, as the defence was substantially on the latter ground only, though there was every opportunity given to the defendants to raise the former ground also, the suit need not be remanded; and that the whole estate had passed to the purchaser. *Nanomi Babuassu v. Modhun Mohun*, I. L. R. 13 Calc. 21; L. R. 12 I. A., 1, referred to and followed; *Pussid Narain Singh v. Honooman Sahay*, I. L. R. 5 Calc. 845, referred to and approved. DAULAT RAM v. MEHR CHAND.

[I. L. R. 15 Calc. 70]

[L. R. 14 I. A. 187]

23.—*Sale of joint family estate in execution of decree upon the father's debt—Exoneration of son's share only where debt has been incurred for an immoral or illegal purpose—Burden of proving the nature of the debt.* The sons in a joint family under the Mitakshara, cannot set up their rights of inheritance in the family estate against their father's alienation for an antecedent debt, or against a sale in execution of a decree upon such debt, although the sons may not have been parties to the decree, unless the sons can establish that the debt has been contracted for an immoral or illegal purpose. The son's position is distinct in this respect from that of other relations in the joint family, inasmuch as it is his duty to pay, out of the family estate, his father's debt. A decree against indebted fathers, in a family consisting of fathers and sons, charged the family estate, and the sale in execution was not merely of the right, title, and interest of the debtors, but of the property being such interest. On the

**HINDU LAW—JOINT FAMILY—continued.****(5) SALE OF JOINT FAMILY PROPERTY IN EXECUTION OF DECREE, AND RIGHTS OF PURCHASERS—continued.**

other hand, before the sale, notice was given on behalf of the sons that the property was ancestral and joint. *Held*, in a suit on behalf of the sons against the purchaser at the sale to recover their shares, that it was for the plaintiffs to show affirmatively that the debts were contracted for an illegal or immoral purpose, and that to establish general extravagance against the fathers was insufficient. It was not necessary for the purchaser to show that there had been a proper inquiry as to the purpose of the loan, or to prove that the money was borrowed for family necessities. **BHAGBUT PERSHAD SING v. GIRJA KOER,**

[I L. R. 15 Calc. 717]

[L. R. 15 I. A. 99]

24.—*Decree against father—Sale of ancestral estate in execution of money decree—Son's rights and liabilities*.] A purchased the half share of the judgment-debtors in certain immovable family property, at a Court-sale held in execution of money-decrees against B and his brother, who were members of an undivided Hindu family B's undivided son sued A—B and the remaining members of his family, being also joined as defendants—to recover a share in the land, alleging that his interest was not bound by the sale but he did not prove that the debt for which the decrees were passed was immoral, and it appeared that A had bargained and paid for the entire estate. The plaintiff was a minor at the time of the sale, and B was not the managing member of the family: *Held*, that the Court-sale was binding on the plaintiff's share—**Nanomi Babuasin v. Modhun Mohun**, L. R. 13 I. A. 1; I. L. R. 13 Calc. 21, discussed and followed. **KUNHALI BEARI v. KESHAVA SHANBAGA.**

[I. L. R. 11 Mad. 64]

25.—*Decree on mortgage for ancestral debt of family—Minor.*] In a suit by a minor to set aside a sale in execution of a decree on a mortgage for a debt of his father's. *Held*, on the merits, that the debt for which the decree was passed being a family and ancestral debt was binding upon the whole family including the plaintiff who was therefore not entitled to disturb the execution-purchaser. **DAJI HIMAT v. DHIRAJRAM SADARAM.**

[I. L. R. 12 Bom. 18]

26.—*Ancestral property—Alienations by father—Son's liability for father's debts—Purchaser—Notice.*] Where a Hindu governed by the Mitakshara law seeks to set aside his father's alienations of ancestral property, if the alienees are purchasers at Court-sales held in execution of decrees against the father. It is not enough for him to show that the debts, for which the decrees were passed, were contracted by the father for immoral purposes; it must also be shown that the auction-purchasers had notice that the debts were so

**HINDU LAW—JOINT FAMILY—continued****(5) SALE OF JOINT FAMILY PROPERTY IN EXECUTION OF DECREE, AND RIGHTS OF PURCHASERS—continued**

contracted. The points to be determined in such case are—(1) What was the interest that was bargained for and paid for by the purchaser? Was it the father's interest only, or was it the interest of the entire family? (2) Were the debts, for which the decrees were obtained under which the property was sold, contracted for immoral purposes? and (3) Had the purchaser notice that the debts were so contracted? **Surya Bunsu Koer v. Sheo Prosad Singh**, L. R. 6 I. A. 88; I. L. R. 5 Calc. 148; and **Nanomi Babuasin v. Modhun Mohun**, L. R. 13 I. A. 1; I. L. R. 13 Calc. 21, followed. The plaintiff sued in 1883 for partition of ancestral property, consisting (*inter alia*) of certain *thirkans* which had been sold in execution of decrees passed against his father. The plaintiff though an adult at the time, was not a party to the suits in which the decrees were passed against the father, nor to the execution-proceeding. In the certificates of sale granted to the different purchasers, the property sold was described as being a four-*annas*' share, which would be equal to the shares of the father and the son together, but this description was qualified by the statement that "the right, title and interest in the above-mentioned property of the said R (*i.e.*, the father) was sold." There was nothing to show that the purchasers bargained for and paid for the entire family estate. Moreover, the plaintiff's possession and enjoyment of the *thirkans* in question was never disturbed, though the shares had each a separate possession of distinct portions of the ancestral property: *Held*, that under the circumstances the father's interest alone passed to the auction-purchasers. **KRISHNAJI LAKSHMAN v. VITHAL RAVJI RENGE.**

[I L. R. 12 Bom. 625]

27.—*Ancestral zemindari sold in execution of decree for money against the father, including the son's right of succession—Debt not immoral.*] A sale in execution of a decree against the zemindar for his debt purported to comprise the whole estate in his zemindari. In a suit brought by his son against the purchaser, making the father also a party defendant, to obtain a declaration that the sale did not operate as against the son as heir, not affecting his interest in the estate, the evidence did not establish that the father's debt had been incurred by him for any immoral or illegal purpose. *Held*, that the impeachment of the debt failing, the suit failed; and that no partial interest but the whole estate had passed by the sale, the debt having been one which the son was bound to pay: **Hardi Narain Sahu v. Ruder Perhash Misser**, I. L. R. 10 Calc. 626, (where the sale was only of whatever right, title, and interest the father had in property), distinguished. **MINAKSHI NAYUDU v. IMMUDI KANAKA RAMAYA GOUNDAN.**

[I. L. R. 12 Mad. 142; L. R. 16 I. A. 1]



**HINDU LAW—JOINT FAMILY—continued.****(5) SALE OF JOINT FAMILY PROPERTY IN EXECUTION OF DECREE, AND RIGHTS OF PURCHASERS—continued.**

28.—*Money-decree—Decree against father alone—Purchaser at execution-sale under such decree—How far such sale binding on the interest of the sons not parties to the suit or execution-proceedings.* In the case of a joint Hindu family whose family property is sold by the father alone by private conveyance, or where it is sold in execution of a decree obtained against him alone, the mode of determining whether the entire property or only his interest in it passes by the sale, is to inquire what the parties contracted about in the case of a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance, but only a sale in execution of a money-decree. In the case of an execution-sale the mere fact that the decree was a mere money-decree against the father as distinguished from one passed in a suit for the realization of a mortgage security directing the property to be sold, is not a complete test. The plaintiff claimed certain property from the defendant, alleging that he had purchased it from a third person who had purchased it at an auction-sale held in execution of a money-decree obtained against the first defendant alone. The first defendant was the father of the remaining defendants, and they constituted a joint Hindu family. The sons contended that only the father's interest was bound by the sale; and the lower Courts decided in their favour. On appeal, the High Court reversed the decree, and sent back the case for a fresh decision, on the ground that the lower Courts had decided the question in the case exclusively on the ground that the property had been purchased in execution of a money-decree without referring to the execution-proceedings. *KAGAL GANPAYA v. MANJAPPA*.

[I. L. R. 12 Bom. 691]

29.—*Money-decree against deceased member—Execution after judgment-debtor's death against joint family property not allowed* The mere obtaining of a simple money-decree against a member of a joint Hindu family without any steps being taken during his lifetime to obtain attachment under or execution of the decree, does not entitle the decree-holder, after the judgment-debtor's death and a subsequent partition, to bring to sale in execution of the decree the interest which the judgment-debtor had in the joint family property. *Suraj Bansi Koer v. Sheo Pershad Singh*, I. L. R. 5 Calc. 148; *Rai Balkrishen v. Rai Sita Ram*, I. L. R. 7 All 781, and *Balbhadar v. Bisheshwar*, I. L. R. 8 All. 495, referred to. *JAGANNATH PRASAD v. SITA RAM*.

[I. L. R. 11 All. 302]

30.—*Money-decree against father—Attachment of ancestral estate.* In execution of a money-decree ancestral property of the joint family of the judgment-debtor was attached. His sons sued

**HINDU LAW—JOINT FAMILY—concluded.****(5) SALE OF JOINT FAMILY PROPERTY IN EXECUTION OF DECREE, AND RIGHTS OF PURCHASERS—concluded.**

to release their interest from attachment, alleging that the judgment-debt had been incurred for immoral purposes, which was denied by the decree-holder. It was held by the lower Courts that nothing more than the father's share was liable to be attached, as the sons were not parties to the decree: *Held*, that the nature of the debt should be determined, since the creditor's power to attach and sell depends on the father's power to sell, which again depends on the nature of the debt. *Nanomi Babusai v. Modhun Mohun*, L. R. 13 I. A 1; I. L. R. 13 Calc. 21, discussed and followed. *RAMANADAN v. RAJAGOPALA*.

[I. L. R. 12 Mad. 309]

**HINDU LAW—MAINTENANCE**

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See EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES.

[I. L. R. 11 Bom. 528]

See LIMITATION ACT, 1859, s. 1, cl. 13.

[I. L. R. 12 Mad. 347]

See HINDU LAW—PARTITION—SHARES ON PARTITION—MOTHER.

[I. L. R. 16 Calc. 758]

**(1) RIGHT TO MAINTENANCE.****(a) CONCUBINE.**

1.—*Incontinence of a co-parcener's concubine disentitling her to maintenance.* Continued continence is under the Hindu law, a condition precedent to a deceased co-parcener's concubine claiming maintenance. *YASHVANTRAY v. KASHI-BAI*

[I. L. R. 12 Bom. 26]

**(b) SISTER-IN-LAW.**

2.—*Suit by sister-in-law against brother-in-law—Joint family—Death of plaintiff's husband prior to his father's death and therefore before devolution of estate, which was self-acquired by his father—Amount of maintenance claimable by a sister-in-law—Separate maintenance.* The plaintiff was the widow of one P, who was the son of one N. N, had three sons, viz., M, P, and the defendant, C, and all lived together as a joint family. The plaintiff was married to P about thirty years previously to this suit, she being then eleven years of age. P died when he was fourteen years old, before the plaintiff had attained puberty, and



**HINDU LAW—MAINTENANCE—continued.****(1) RIGHT TO MAINTENANCE—continued.****(b) SISTER-IN-LAW—continued.**

while she was still living with her parents. After her husband's death she went to the house of her father-in-law, *N*, and was residing there at the time of his death. He died intestate in 1881, leaving moveable and immoveable property of the value of Rs. 1,50,000, all of which was admittedly self-acquired property. His widow (*L*) and two sons *viz.*, *M* and the defendant, *C*, survived him. *M* died in 1883. After *N*'s death, the plaintiff continued for a time to reside in the family house with *C*. Disputes, however, arose, and she left the house, and went to reside with her brother. She now sued her brother-in-law, *C*, for maintenance, alleging that she had been obliged to leave his house in consequence of ill-treatment. She claimed Rs. 1,000 per month by way of maintenance, and also prayed for the delivery of certain ornaments belonging to her, which she said were in the defendant's possession. The defendant denied possession of the plaintiff's ornaments; and, as to her claim for maintenance, he contended that all the property of his father, *N*, was self-acquired, and that, as such, the plaintiff's husband, *P*, had never any interest in it, having predeceased *N*, and that she was therefore not entitled to maintenance out of it. He stated, however, that he was willing to maintain her if she would return to his house, and live with his family. *Held*, that the plaintiff being, as *P*'s widow, a member of her husband's undivided family, was entitled to maintenance from the defendant. Upon *N*'s death, intestate, his property devolved upon his sons (*M* and *C*) as ancestral property for the benefit of the undivided family, of which he (*N*) was in his lifetime the head; or, in other words, subject to the incidents to which ancestral property is liable. If one of such sons had been disqualified from inheriting by reason of idiocy, &c., he, though a member of the undivided family, would only be entitled to maintenance. The plaintiff, by reason of her sex was disqualified from inheriting in competition with males, but none the less was she entitled to maintenance out of the ancestral estate which had devolved upon the males, with whom she constituted an undivided family. Where a widowed sister-in-law claims maintenance from a brother-in-law, the only question for the Court to consider is, whether the brother-in-law has ancestral property in his hands: *Held*, also, that the plaintiff being legally entitled to claim maintenance from the defendant, she was entitled to separate maintenance, and that the defendant could not insist upon her living in his house. The property left by *N* at his death was of the value of Rs. 1,50,000: *Held*, that an allowance of Rs. 40 per month should be paid to the plaintiff by the defendant as maintenance. If *P* (the plaintiff's husband), had survived his father, *N*, the share of *N*'s property, (deducting one-fourth for *L*, the widow of *N*), which would have devolved on him would have been a little less than Rs. 40,000, or Rs. 1,600 per annum at 4 per

**HINDU LAW—MAINTENANCE—continued.****(1) RIGHT TO MAINTENANCE—continued.****(b) SISTER-IN-LAW—concluded.**

cent.,—that is, Rs. 133 per month. The plaintiff could not be allowed more than the interest on that sum. By analogy to the case of a deserted wife's claim for maintenance against her husband the plaintiff ought not to be allowed less than one-third of such interest, her husband having left no sons. *ADHIBAI v CURSANDAS NATHU*.

[I. L. R. 11 Bom. 199]

**(c) SON.**

3.—*Self-acquired property*.] A Hindu is under no obligation to maintain his adult son out of his self-acquired property. *AMMAKANNU v. APPU*.

[I. L. R. 11 Mad. 91]

**(d) SON'S WIDOW.**

4.—*Maintenance of son's widow—Self-acquired property*.] A Hindu is under no obligation to maintain his adult son or son's widow out of his self-acquired property. Thus a daughter-in-law can enforce no claim for maintenance against the self-acquired property of her father-in-law which has passed to his grandson, unless the father-in-law showed by conduct or otherwise an unequivocal intention that it should be taken subject to the obligation of providing for his support. *AMMAKANNU v. APPU*.

[I. L. R. 11 Mad. 91]

5.—*Suit by sister-in-law against brother-in-law—Death of plaintiff's husband prior to his father's death and therefore before devolution of father's self-acquired estate*.—"Ancestral property"—*Legal obligation of heir to fulfil moral obligations of last proprietor*.] In a Hindu family governed by the Mitakshara law, and living joint in food and worship, there was no joint or ancestral property, but the father possessed certain separate and self-acquired property. He had two sons, one of whom predeceased him, leaving a widow. He died intestate, leaving a son and a widow. The widow of the son who had predeceased his father, was, at the time of her husband's death, a minor. She had never cohabited with him or resided with his family or received from them any maintenance, but had always resided with and been maintained by her own father. After her father-in-law's death, she sued her brother-in-law and her father-in-law's widow for maintenance, which she claimed to have charged upon the immoveable property which had belonged to the father-in-law during his lifetime, and which was now in the hands of the defendants. *Held* (MAHMOOD, J., expressing no opinion on this point) that the property in suit, though inherited by the defendants, could not, so far as the plaintiff's rights were concerned, be correctly described as "ancestral property" in the defendants' hands, from which she would be entitled to maintenance; inasmuch as, during the father's lifetime, it was not in any

**HINDU LAW—MAINTENANCE—continued.****(1) RIGHT TO MAINTENANCE—continued****(d) SON'S WIDOW—concluded.**

sense ancestral, and the sons had no co-parcenary interest in it, but merely the contingent interest of taking it on their father's death intestate, and, in the case of the plaintiff's husband such interest by reason of his predeceasing his father, never became vested. *Adhibai v. Cursandas Nathu*, I L R 11 Bom 199, dissented from on this point. *Savistriai v. Laxmibai*, I. L. R. 2 Bom 573, referred to: *Held*, however, that the father was under a moral, though not a legal, obligation not only to maintain his widowed daughter-in-law during his lifetime, but also to make provision out of his self-acquired property for her maintenance after his death; and that such moral obligation in the father became by reason of his self-acquired property having come by inheritance into the hands of his surviving son, a legal obligation enforceable by suit against that son (who took the estate not for his own benefit but for the spiritual benefit of the last proprietor) and against the property in question. *Adhibai v. Cursandas Nathu*, I. L. R. 11 Bom 199; *Gangu Bai v. Sitaram*, I. L. R. 1 All. 170, *Kalu v. Kashibai*, I. L. R. 7 Bom. 127; *Khetramani Dasi v. Kashi Nath Das*, 2 B L. R. A. C. 15; *Rajjmoney Dasse v. Shishunder Mullick*, 2 Hyde, 103, and *Tulsha v. Gopal Rai*, I. L. R. 6 All. 632, referred to. **JANKI v. NAND RAM.**

[I. L. R. 11 All 194]

**(e) WIDOW.**

**6.—Execution of decree for maintenance of widow—Liability of ancestral estate.** Maintenance decreed to a co-parcener's widow by reason of her exclusion from succession in a joint family cannot be regarded as a charge on the family estate, or the decree treated as a decree against the managing member of the family for the time being. **MUTTA v. VIRAMMAL.**

[I. L. R. 10 Mad. 283]

**7.—Widow's right to separate maintenance—Widow directed by the husband to be maintained in the family house—Just cause for not living in family house—Imputation of unchastity.** A Hindu widow, who is directed by her husband to be maintained in the family house, is not entitled to maintenance if she resides elsewhere without a just cause. *P*, a Brahmin, resided at Kava and died there in 1874, while his wife (the plaintiff) was living with her parents at Dabhoi. By his will he devised the greater part of his property to his nephew *M*, and bequeathed a house and certain other property to his wife "if she came to live at Kava." In 1883 the plaintiff sued *M* and his brother for arrears of maintenance, alleging that they were in possession of her deceased husband's property, and therefore were liable for her maintenance. The defendants pleaded that the plaintiff led an immoral life, and had therefore forfeited her right to maintenance. They further contended that she was not

**HINDU LAW—MAINTENANCE—concluded.****(1) RIGHT TO MAINTENANCE—concluded.****(c) WIDOW—concluded.**

entitled to maintenance, unless and until she came to reside at Kava, as directed by her husband's will. The Assistant Judge found that there was no evidence of plaintiff's unchastity, and that under the circumstances she could not live happily at Kava, where she had no relation except the defendants, who had endeavoured to blacken her character. He awarded the plaintiff's claim. *Held*, by the High Court confirming the decree, that the plaintiff had "a just cause" for not living with the defendants. **MULJI BHAISHANKAR v. BAI UJAM.**

[I. L. R. 13 Bom 218]

**8.—Notice by possession of widow of her right to maintenance—Sale of family property to discharge previous mortgage.** Immoveable property of a joint Hindu family was sold by a member of the family and his two sons to the plaintiff, and the purchase-money was expended in redeeming a mortgage. The character of the mortgage debt was not shown. In a suit by the plaintiff for possession it appeared that the property in question had been in the exclusive possession of another member of the family, and after his death in that of his widow, for more than 26 years; and that neither of them had concurred in the sale to the plaintiff; it was also found that the widow was entitled to possession on account of maintenance. *Held*, that the separate possession of the widow was notice to the plaintiff of her interest in the land, and that he was not entitled to defeat it. **IMAM v. BALAMMA.**

[I. L. R. 12 Mad 334]

**HINDU LAW—MARRIAGE.**

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**(1) RIGHT TO GIVE IN MARRIAGE, AND CONSENT.**

**1.—Marriage of a girl without her father's consent—Husband and Wife—Suit by the father to declare such marriage void—Factum valet.** The plaintiff, a Hindu father, sued for a declaration that the marriage of his daughter, which had been celebrated by his wife without his consent, was null and void. It appeared that the plaintiff had for about eight years voluntarily given up residence with his wife and daughters, and that he had several times been requested by his wife to get their daughter, aged eleven years, married, but had neglected to do so. The plaintiff's wife, accordingly, having procured a suitable husband for their daughter, informed the plaintiff of the intended marriage; but the plaintiff instead of approving the course taken by his wife, filed a suit, and obtained an injunc-

**HINDU LAW—MARRIAGE—continued.****(1) RIGHT TO GIVE IN MARRIAGE. AND  
CONSENT—continued.**

tion restraining his wife from celebrating the marriage. The marriage nevertheless was solemnized with due ceremonies. The Court of First Instance declared the marriage void. The defendant appealed, and the lower Appellate Court reversed the lower Court's decree. On appeal by the plaintiff to the High Court, *Held*, confirming the decree of the lower Appellate Court, that the marriage should be supported, under the circumstances of the case, on the principle of *factum valet*, there being no express authority in the Hindu law-texts, making the consent of the parents and guardians of a girl a condition precedent to the validity of a marriage. The plaintiff having been informed of his wife's intention to marry their daughter, made no *bonâ fide* attempt to marry her, and after entirely foregoing his claim to all control over his daughter for many years, merely attempted to assert his right without any regard to her interests, and with the sole object of annoying the mother, from whom he had been long separated with his own consent. *Quære*, whether Civil Courts would set aside a marriage if a clear case was established of fraud, by both the parties intermarrying, on the rights of the father as guardian of his daughter for the purposes of marriage. **KHUSHALCHAND LALCHAND v. BAI MANI.**

[I. L. R. 11 Bom. 247]

**2.—Custody—Guardianship—Right of father to give his daughter in marriage—Conduct of father forfeiting such right—Suit by a father to restrain his wife from giving their daughter in marriage without his consent.** The plaintiff and *R*, the second defendant, were husband and wife belonging to the Prabhu caste, and lived together in the house of the first defendant, who was *R*'s father, until the year 1880. In 1877 a daughter *S* had been born to them. In 1880 the plaintiff was convicted of theft, and sentenced to two years' imprisonment. At the end of his term of imprisonment he did not return to live with his father-in-law, but went to reside in his own father's house, where in 1884 he requested his wife *R* to join him with their daughter *S*. *R* refused, and she and *S* continued to live in the house of the first defendant, her father. The plaintiff then married a second wife. In November, 1885, *S* having attained nine years of age—an age at which it is customary for Prabhus to seek husbands for their daughters—demanded his daughter *S* from the defendants, who, however, refused to deliver the girl to the plaintiff. In May, 1886, the plaintiff filed this suit against the defendants, complaining that they were about to have his daughter *S* married to her cousin without his (the plaintiff's) consent. He prayed that he might be declared entitled to the custody of his daughter, and for an injunction against her marriage without his consent. On filing this suit he obtained a rule nisi

**HINDU LAW—MARRIAGE—continued.****(1) RIGHT TO GIVE IN MARRIAGE, AND  
CONSENT—continued.**

for an injunction against the defendants. *Held*, that, pending the hearing of this suit, he was entitled to the injunction asked for. **NANABHAI GANPATRAV DHAIRYAVAN v. JANARDHAN VASUDEV.**

[I. L. R. 12 Bom. 110]

**3.—Guardianship—Paternal relatives—Their authority to give a girl in marriage—Civil Court's jurisdiction to interfere with this authority.** The general authority, failing the father of the paternal relatives to dispose of a girl in marriage, is recognized by the Hindu law as a part of the guardianship which is correlative as a right and a duty to her dependence both as a female and as an infant. But those who seek the aid of the Civil Courts, in order to give effect to this authority, may not impropely be put upon terms which may appear necessary in order to prevent the authority from being abused to the injury of the infant. Where a father or mother is the guardian, the intervention of a law Court can seldom be necessary or desirable. In the case of very gross misconduct and disregard of paternal duty, the Court may interfere even in the case of a father. A Hindu died, leaving a widow and an infant daughter named *B*. After his death, his widow was forced, through the unkindness of her mother-in-law, to seek refuge at her parents' house. There she died about eighteen months after her husband's death. The orphan *B* was then brought up by her maternal uncles, *S* and *G*. When *B* became ten or eleven years old, her paternal uncle and paternal grandmother sought, under Act IX of 1861, to take possession of the minor *B* from the custody of her maternal uncles. This application was resisted by *S* and *G*, on the ground that the petitioners had no right to give the girl in marriage, and that their object was to marry the girl to an old Bhatia in Bombay for a large sum of money. The Court found that several Bhatia girls of Dharangaon, where the parties resided, had of late been married to old Bhatias in Bombay, the girl's relatives receiving large sums of money. And as the girl had never lived with the petitioners, the Court ordered that she should, for the present, continue to live with her maternal uncles until the petitioners found a suitable husband for her, to be approved by the Court. Of the persons selected by the petitioners, one was approved by the Court. He was a resident of Vaizapur, a town in the Nizam's dominions. The Court passed an order authorizing the petitioners to give the girl in marriage to this person, and directing the girl to be made over into the petitioner's custody a month before the day fixed for the marriage. Against this order *S* and *G* appealed to the High Court: *Held*, that the petitioners, as paternal relatives of the girl, had, under the Hindu law, a preferential right to dispose of the girl in marriage; but as they

**HINDU LAW—MARRIAGE—continued.****(1) RIGHT TO GIVE IN MARRIAGE, AND CONSENT—concluded.**

had never taken care of the girl, it was necessary in the interests of the minor, to put them upon terms to prevent the possibility of their abusing their authority to the minor's prejudice: *Held*, also, that the girl should not be married to a person living in foreign territory, as the effect of marriage with such a person would be to place the minor beyond the protection of the Court in British India: *Held*, also, that the girl ought not to be forced into marrying a person whom she did not like. *SHRIDHAR v. HIRALAL VITHAL*.

[I. L. R. 12 Bom. 480]

**(2) BETROTHAL.**

4.—*Breach of promise of marriage—Reciprocal contingent contract—Damages—Upariyaman—Halai Bhutia caste.*] The plaintiffs alleged that by a written agreement dated the 18th March 1882, the first defendant and her deceased son, *L*, agreed, that the second defendant, *K*, who was the daughter of the first defendant, should be given in marriage to the second plaintiff, who was the son of plaintiff No. 1; and that the betrothal of these two persons took place accordingly. The agreement was executed by the said *L*, as eldest male member of his family, in the name of his deceased father. In pursuance of this agreement, the plaintiffs paid to the first defendant Rs. 700 as "*upariyaman*," and they presented *K* with ornaments and clothes of considerable value. The plaintiffs complained that the first defendant subsequently refused to carry out the contract of marriage, and had married her daughter, *K*, (defendant No. 2), to another person. They claimed in this suit to recover the ornaments and clothes, together with the Rs. 700 paid to the first defendant as "*upariyaman*" and Rs. 10,000 as damages. The first defendant was sued both in her personal capacity and as heir and legal representative of her son, *L*. The first defendant pleaded that neither she nor the second defendant were bound by the betrothal agreement, as they were not parties to it; that the contract had been a contingent contract, inasmuch as her son, *L*, had agreed to give *K*, (defendant No. 2), in marriage to the second plaintiff only on condition that he (*L*) should obtain in marriage *U*, the daughter of the third plaintiff, and that *L* and *U* were accordingly betrothed; that *L* had died in 1884, and that the contract had been thereby determined; that she had been willing to renew it, and had proposed that a younger son of hers, (*J*), should be accepted as the husband of *U*, but that the plaintiffs had declined this offer. In proof of her allegation that the contract was a reciprocal contingent contract, the first defendant relied upon the following clause in the agreement:—"At the time when the marriages are to take place the marriages of the two girls are to be performed together. When you shall give your daughter in marriage, I also am at the same time to give

**HINDU LAW—MARRIAGE—concluded.****(2) BETROTHAL—concluded.**

my daughter in marriage." *Held*, that the agreement of betrothal was not a reciprocal contingent contract; and that the first defendant had committed a breach of the agreement by not giving her daughter, *K* in marriage to the second plaintiff; and that the plaintiffs were entitled to recover from the first defendant the value of the ornaments and the Rs. 700 paid by the plaintiffs as "*upariyaman*," together with Rs. 600 damages for the breach of contract. The second defendant being a minor was held not liable, and the suit as against her was dismissed. *MULJI THAKERSEY v. GOMTI*.

[I. L. R. 11 Bom. 412]

**(3) CEREMONIES.**

5.—*Gandharva marriage, necessary ceremonies for.* In order to constitute a valid marriage in Gandharva form, nuptial rites are essential. *BRINDAVANA v. RADHAMANI*.

[I. L. R. 12 Mad. 72]

**(4) VALIDITY OR OTHERWISE OF MARRIAGE.**

6.—*Sudras—Inter-marriage between persons of different sections of the Sudra caste, Validity of.* There is nothing in Hindu law prohibiting marriages between persons belonging to different sections or sub-divisions of the Sudra caste. *Narain Dhar v. Rakhal Gair*, I. L. R. 1 Calc 1; *Inderun Valungypoonby Taver v. Ramasawmy Tulaver*, 13 Moore's I. A. 141; and *Ramamani Ammal v. Kulanthar Natchiar*, 14 Moore's I. A. 346, referred to. *UPOMA KUCHAIN v. BHOLARAM DHUBI*.

[I. L. R. 15 Calc. 708]

**HINDU LAW—PARTITION**

Col.

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**(1) REQUISITES FOR PARTITION.**

1.—*Effect of deed as creating or not creating partition.* *A*, the son of a deceased zemindar, sued *B* and *C*, his widow and brother, for possession of the zemindari, which was impartible. In order to prove that *C* was divided from the late zemindar, *A* filed and proved a deed of partition executed by them in respect of their moveable property and of a house, which concluded as follows:—"There shall be connection only by

**HINDU LAW—PARTITION—continued.****(1) REQUISITES FOR PARTITION—continued.**

relationship, but there shall be no pecuniary connection between us." *Held*, that the deed effected only a partial partition, and that the last clause must be referred to the coparceners' right in partible property described in the instrument, and did not operate as a release, of any right of succession to impartible property. **PARVATHI v. THIRUMALAI.**

[I. L. R. 10 Mad 384]

**2.—Evidence of separation—Definment of shares in ancestral property.]** A four-anna ancestral share in a zemindari village was owned by two brothers in which the share of *H* son of one of the brothers was one-half, the remaining half being the share of the plaintiffs, the descendants of the other brother. In the village records there had been a definment of shares followed by entries of separate interest in the revenue records and since 1264 Fasli the two plaintiffs had each been recorded as the owner of a one-anna share and *H* of a two-anna share thereof. The entire four-anna share had been in the possession of mortgagees from the year 1844 excepting the *sur* lands of which *H* held separately his own share, *viz.*, 10 bighas. On the 7th July 1883, *H* executed a deed of gift of his two-anna share in favour of the defendants, and caused mutation of names to be made in their favour surrendering to them at the same time possession of the *sur* land. *H* died on 21st January 1884, leaving neither son, widow, nor daughter, and the plaintiffs were his heirs-at-law. They brought this suit to set aside the deed of gift and for possession of the *sur* land from the defendants. The suit was dismissed by the Court of First Instance, and on appeal the District Judge affirmed the decree, holding that the four-anna share was not joint and undivided property between the co-sharers, and that *H* was in separate possession of the two-anna share of which the defendants were the donees. On second appeal it was contended, that inasmuch as since 1844 there could have been no separate enjoyment of the four-anna share which was in the possession of the mortgagees, the evidence afforded by separate registration could not prove actual separation: *Held*, that from evidence of definment of shares followed by entries of separate interests in the revenue records, if there be nothing to explain it, separation as to estate may be inferred. Joint family property in the hands of mortgagees may be separated in estate, although there could be no separated enjoyment of the shares so separated. **Ambika Dat v. Sukhmani Kuar**, I. L. R. 1 All. 437, discussed. **RAM LAL v. DABI DAT.**

[I. L. R. 10 All. 490]

**3.—Effect of agreement to divide.]** To constitute a partition, there need not be an actual partition by metes and bounds. An agreement to divide is sufficient to constitute partition. Two brothers drew up a memorandum of partition

**HINDU LAW—PARTITION—continued.****(1) REQUISITES FOR PARTITION—concluded.**

whereby they agreed to divide the family property in equal shares, and provided that if at any future time their sons did not agree and there were any partition, they should exercise ownership in accordance with this document; neither was to take more than was mentioned in the document. *Held*, that this agreement constituted a partition between the brothers, and was binding on their descendants. **ANANTA BALACHAAYA v. DAMODHAR MAKUND.**

[I. L. R. 13 Bom. 25]

**(2) PROPERTY LIABLE (OR OTHERWISE) TO PARTITION.**

**4.—Impartible estate—Zemindari.]** In 1803 *G* being in possession of the zemindari of *M*, the permanent settlement was made with him and a *sanad* was granted to him as prescribed by Reg. XXV of 1802. In 1827 *C*, the only son of *G*, being in possession of the zemindari, got into debt and the zemindari was sold in execution of a decree and bought by Government. In 1835 the zemindari was granted to *A*, the son of *C*, by Government and a *sanad* issued in the usual term as prescribed by Reg. XXV of 1802. *A* died in 1864 leaving four sons, the three plaintiffs and *C*, his eldest son. *C* died in 1869 leaving an only son *J*, the defendant. In 1869 the Court of Wards took charge of the estate on behalf of the infant defendant and allowed his uncle, plaintiff No. 1, to receive the rents of the zemindari as renter. *J* and his three uncles lived in the same house and participated in the joint family property until 1872, when the plaintiffs claimed to have the zemindari divided. By an agreement between the plaintiffs and the Court of Wards all the moveable and immoveable property, except the zemindari taluk, was divided into four shares and distributed in 1878 between the plaintiffs and defendants. In 1884 the plaintiffs sued for partition of the zemindari, alleging that their cause of action arose in 1872, when the Court of Wards denied their right to a partition of the zemindari taluk. The defendant pleaded that the estate was not partible: *Held* distinguishing the *Hunsapore case* (12 Moore's I. A. 1) and the *Shikargunga case* (I. L. R. 3 Mad. 290), and following the principle laid down in the *Nuzvid case* (I. L. R. 2 Mad. 128) that the zemindari was partible. **JAGANATHA v. RAMABHADRA.**

[I. L. R. 11 Mad. 380]

**(3) PARTITION OF PORTION OF PROPERTY.**

**5.—Partition of a portion of joint family property—Suit for partition of a portion only of joint family property.]** A suit will not lie for partition of a portion only of joint family property. **JOGENDRA NATH MUKERJI v. JUGOBUNDHU MUKERJI.**

[I. L. R. 14 Calc. 122]

HINDU LAW—PARTITION—*continued*.

## (1) RIGHT TO PARTITION.

## (a) GENERALLY.

6.—*Inheritance of talukdari estate in Oude—Sanad recognizing primogeniture, effect of as to existing rights of inheritance—Shares held by members of family—Mesne profits on specific and definite shares.* The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have partition. Although in a suit for the partition of joint family estate, where the head of the joint family does not account for the profits, under the ordinary Hindu law, mesne profits are not recoverable, it is not so where the family has been living under a clear agreement that the members are entitled, not as an ordinary Hindu family, but in specific and definite shares. If the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as the right to partition. A talukdari estate which before and after annexation, was subject to the common Hindu law of Oude, *viz.*, the Mitakshara, was restored after the general confiscation of 1858, to the family, which received a *sanad* recognizing the shares of its members. At the same time, a grant was made to the head of the family as talukdar of two other villages, and to him afterwards in 1861 was issued a primogeniture *sanad* of the above talukdari estate. The *sanad* could not prevail against the family rights of inheritance; and effect was given to family arrangements with the same result as regards the two villages. On the contention that the family, by the effect of the *sanads*, was to have one head and sole manager in the talukdar, who, being accountable to the junior members for their shares of the profits, was alone to hold the entire estate by primogeniture. Held, that this kind of managership was entirely unknown to the common Hindu law of Oude, and that apparently, the Oude Estate Act, 1869, did not contemplate any such thing. At all events there must be clear arrangements, such as were not found here, to establish and prove its existence. Partition was accordingly decreed to the members of the family suing for it. *Perthi Pal Singh v. Jawahr Singh*, L. R. 14 I. A. 37; I. L. R. 14 Calc. 493, as to the right to partition of a talukdari estate, referred to and followed also the same case in regard to profits, where the members of a family are entitled to specific and definite shares not as members of an ordinary joint family. *SHANKAR BAKSH v. HARDEO BAKSH*.

[I. L. R. 16 Calc. 397]

[L. R. 16 I. A. 71]

## (b) ILLEGITIMATE CHILDREN.

7.—*Sudras—Illegitimate son.* Among Sudras an illegitimate son is entitled to maintain a suit for partition of the family property against his father's legitimate sons; and if his interest is endangered by reason of the property being left under the management of the latter, partition

HINDU LAW—PARTITION—*continued*.(4) RIGHT TO PARTITION—*concluded*.(b) ILLEGITIMATE CHILDREN—*concluded*.

can be claimed during his minority *THANGAM PILLAI v. SUPPA PILLAI*.

[I. L. R. 12 Mad. 401]

## (c) WIDOW.

8.—*Widow in possession of husband's estate jointly—Title under adoption or will.* Where Hindu widows are in lawful possession of the property of their deceased husband, they have an estate or interest therein in respect of their possession notwithstanding that, under an adoption or will by the deceased a preferable title thereto may exist. Such estate being joint is also partible, and either widow may maintain a suit for possession. *SUNDAR v. PARBATHI*.

[L. R. 16 I. A. 186; I. L. R. 12 All. 51]

## (5) SHARES ON PARTITION.

## (a) MOTHER.

9.—*Bengal School of Law—Partition by sons—Mother's share on partition—Succession to share given to a mother on partition.* Under the Bengal School of Law the share which a mother takes on partition among her sons is not taken from her husband's estate either by inheritance or by way of survivorship in continuation of any pre-existing interest, but is taken from her sons in lieu of, or by way of provision for, that maintenance for which they and their estates are already bound; and on her death that share goes back to her sons from whom she received it. *SOROLAH DOSSEE v. BHOOBUN MOHUN NEOGHY*. *UNNOPOORNAH DOSSEE v. BHOOBUN MOHUN NEOGHY*.

[I. L. R. 15 Calc. 292]

10.—*Maintenance of Hindu widow where there are sons by different mothers, how chargeable.* When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of, or by way of provision for, the maintenance for which the partitioned estate is already bound. According to Jimutavahana, referred to by Jaganatha (Colebrooke), commenting on v. 89 of Chap. 2, Book V, it is a settled rule that a widow shall receive from sons, who were born of her, an equal share with them; and she cannot receive a share from the children of another wife. So long as the estate remains joint and undivided, the maintenance of widows is a charge on the whole; but where a partition takes place, among sons of different mothers, each widow is entitled to maintenance only out of the share or shares, allotted to the son or sons of whom she is the mother. *Jeeomony Dossee v. Attaram Ghose* (Macnaghten's Cons. H. L., p. 64), referred to and approved. *HEMAN-GINI DAS v. KEDARNATH KUNDU CHOWDHRY*.

[I. L. R. 16 Calc. 758]

[L. R. 16 I. A. 115]



**HINDU LAW—PARTITION—concluded.****(6) AGREEMENTS NOT TO PARTITION, AND RESTRAINT ON PARTITION.**

11.—*Land dedicated to family idol—Land excluded from partition of family property and declared inalienable—Subsequent purchase from Escheat Department of Government—Suit in execution of decree* ] By a partition-deed by the six members of a Hindu family it was provided that part of the land of the family should be set apart for the maintenance of the family idol and should be inalienable and the rest of the land was divided equally. Subsequently the Government claimed the dedicated land as an escheat, and sold it to the members of the family jointly, of whom one built a house on part of it—less than one-sixth—with the consent of the others. The house and its site was sold in execution of a decree against the builder: *Held*, that the other members of the family were not entitled to have the house removed or the sale cancelled. **MALLAN—PURUSHOTHAMA.**

[I. L. R. 12 Mad. 287]

**HINDU LAW—PRESUMPTION OF DEATH.**

*Inheritance—Missing person—Claim after seven years—Co-owners—Absent co-owner—Claim to his share of property a question of evidence, not of succession—Evidence Act I of 1872, s. 108* ] *D. G.* and *B.* were co-owners of certain *khots* villages. *B.* disappeared and was unheard of for more than seven years. In his absence, *D.* received his (*B.*'s) share of the rents and profits. *G.* claimed to be entitled to a moiety of *B.*'s share therein, and brought this suit against *D.*: *Held* that *G.* was entitled to such moiety. *B.*, having been absent and unheard of for more than seven years, might be presumed to be dead, under s. 108 of the Evidence Act I of 1872; and *G.*, as one of his two survivors, was entitled to a moiety of his property. Where the right of a party claiming to succeed to the property of another is based on the allegation that the latter has not been heard of for more than seven years, the question to be decided is one of evidence, and not a part of the substantive law of inheritance. *Parmoshar Rai v. Bisheshar Singh*, I. L. R. 1 All. 53, concurred in. **DHONDO BHIKAJI v. GANESH BHIKAJI.**

[I. L. R. 11 Bom. 433]

**HINDU LAW—REVERSIONERS. Col.**

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**(1) POWERS OF REVERSIONERS TO RESTRAIN WASTE AND SET ASIDE ALIENATIONS.**

1.—*Hindu widow—Alienation—Suit by reversioner to set aside alienation—Nearest reversioner—Collusion* ] The only person who can maintain

**HINDU LAW—REVERSIONERS—concluded.****(1) POWERS OF REVERSIONERS TO RESTRAIN WASTE AND SET ASIDE ALIENATIONS—concluded.**

a suit to have an alienation by the widow of a childless Hindu declared inoperative beyond the widow's own life interest is the nearest reversioner who, if he survived the widow, would inherit, unless it is shown or found that he refused without sufficient cause to sue, or precluded himself by his own act from suing, or colluded with the widow, in which case only can the more remote reversioners maintain such a suit. *Anand Koer v. Court of Wards*, I. L. R. 8 I. A. 14, I. L. R. 6 Calc. 764, and *Raghunath v. Thakuri*, I. L. R. 4 All. 16, referred to. *Ramphal Rai v. Tula Kuari*, I. L. R. 6 All. 116, and *Madun Mohan v. Puran Mal*, I. L. R. 6 All. 288, distinguished. **JHULA v. KANTA PRASAD**

[I. L. R. 9 All. 441]

**(2) CONVEYANCE BY WIDOW WITH REVERSIONER'S CONSENT.**

2.—*Gift by Hindu widow of her own interest and that of consenting reversioner.* ] A Hindu widow in possession can, with the consent of a reversioner, make a valid gift which will operate so far as the interest of the widow and that of the consenting reversioner are concerned. *Rany Srimuty Dibeah v. Rany Koond Luta*, 4 Moore's I. A. 292; *Koer Goolab Sing. v. Raw Kurn Singh*, 14 Moore's I. A. 176; *Sia Dass v. Gur Sahai*, I. L. R. 3 All. 362; and *Raj Bullab Sen v. Oomesh Chunder Roy*, I. L. R. 5 Calc. 44, referred to. *Ramphal Rai v. Tula Kuari*, I. L. R. 6 All. 116, distinguished. **RAMADHIN v. MATHURA SINGH.**

[I. L. R. 10 All. 407]

**HINDU LAW—STRIDHAN**

3.—*Mayukha—Inheritance—Property given to a woman by a stranger—Devolution of such property—Daughter's daughter's not entitled to it—Son's widow preferred as gotraja sapinda.* ] By the law of inheritance laid down in the Mayukha a house given to a married woman by a stranger to the family and her own earnings devolve on her death as if she had been a male. The daughter-in-law of the deceased owner succeeds, therefore, in preference to the daughters of a deceased daughter. **BAI NARMADA v. BHAGWANTRAI**

[I. L. R. 12 Bom. 505]

2.—*Shares in villages held by wife of former proprietor—Mitakshara* ] A share in a pattidari village given by a Hindu proprietor to his wife may become her *stridhan*, within the contemplation of the Mitakshara, s. 11, cl. 1, enabling her to make a valid gift of it. **THAKRO v. GANGA PRASAD.**

[I. L. R. 10 All. 197]

[L. R. 15 I. A. 29]



**HINDU LAW—USURY.**

*Interest recoverable at any one time, amount of—Damdupat, Rule of—Act XXVIII of 1855—High Court, Ordinary Original Civil Jurisdiction.]* The rule of Hindu law, known in Bombay as the rule of *Damdapat*, that no greater arrear of interest can be recovered at any one time than what will amount to the principal sum, is neither a mere moral precept nor limited in its application to other than stipulated interest, and as a part of the Hindu law of contract is, in the absence of any legislative enactment to the contrary, the law as between Hindus in the High Court in its Ordinary Original Civil Jurisdiction. Act XXVIII of 1855 deals exclusively with the rate of interest which may be allowed, and there is nothing in that Act inconsistent with the rule of *Damdapat*. *Nathobhai Panachand v. Mulchand Hirachund*, 5 Bom. A. C. 196, distinguished. *NOBIN CHUNDER BANNERJEE v. ROMESH CHUNDER GHOSE*.

[I. L. R. 14 Calc. 781]

**HINDU LAW—WIDOW.**

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See DECLARATORY DECREE, SUIT FOR—  
REVERSIONERS.

[I. L. R. 11 All. 253]

See HINDU LAW—FAMILY DWELLING  
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[I. L. R. 13 Bom. 101]

See MORTGAGE—REDEMPTION—REDEMPTION OF PORTION OF PROPERTY.

[I. L. R. 11 Mad. 304]

**(1) INTEREST IN ESTATE OF HUSBAND.****(a) BY INHERITANCE.**

1.—*Accumulations.*] The right of a Hindu widow to the income and accumulations of her husband's estate arising subsequently to his death is absolute, and is not affected by the fact that she may receive them in a lump sum; but whether she receives them as they fall due, or after they have accumulated in the hands of others her right is the same. *GRISH CHUNDER ROY v. BROUGHTON*.

[I. L. R. 14 Calc. 861]

2.—*Interest of Hindu widows in possession—Partible estate.*] Where Hindu widows are in lawful possession of the property of their deceased husband, they have an estate or interest therein, in respect of their possession, notwithstanding that under an adoption or a will by the deceased,

**HINDU LAW—WIDOW—continued.****(1) INTEREST IN ESTATE OF HUSBAND—continued.****(a) BY INHERITANCE—concluded**

a preferable title thereto may exist. Such estate being joint is also partible and either widow may maintain a suit for partition. *SUNDAR v. PARBATI*.

[L. R. 16 I. A. 186]

[I. L. R. 12 All. 51]

**(b) BY DEED, GIFT, OR WILL.**

3.—*Joint tenancy—Tenancy-in-common—Appointment of persons "to be the heirs," of testator—Widow's estate in property devised to her by her husband's will.*] *B*, a Hindu, died in 1876, leaving by his will all his property to his widow *H*, and his adopted son *N*, "as his heirs," with a direction that they should maintain themselves out of the income, and pay one *D*, Rs. 1,000 a year for managing it. *N* died intestate in 1880 in *H*'s lifetime, and *H* then claimed the whole estate, contending that, under the will, she and *N* had been joint tenants, and that on his death she took his share by survivorship. *N* left a widow, the plaintiff *L*. *Held*, that, under the will, *H* took only a widow's estate in half the property, and that (subject to her right, as a Hindu widow, to a widow's estate in a half share) the entire property vested absolutely in *N*. On *N*'s death the property (subject as aforesaid) vested in the plaintiff *L*, as his widow and heir, for a widow's estate, and she became entitled to joint possession with the defendant *H*. A widow taking under her husband's will takes only a widow's estate in the property bequeathed to her, unless the will contains express words giving her a larger estate. *HIRABAI v. LAKSHMIBAI*.

[I. L. R. 11 Bom. 573]

Affirming on appeal the decision in *LAKSHMIBAI v. HIRABAI*.

[I. L. R. 11 Bom. 69]

4.—*Gift of immoveable property by husband—Life interest—Heritable interest—Alienable interest.*] The plaintiff, alleging himself to be joint in estate with *A*, his grand-uncle, sued to set aside an absolute gift of the house in suit made by *A* in favour of his wife, as also the subsequent sale of the house by the wife to the defendant. The lower Appellate Court, finding that *A* was separate in estate from plaintiff and the sole and exclusive owner of the house, held the gift to the wife and the sale by her to defendant valid and dismissed the suit. On appeal plaintiff contended that he was the heir of the donee and that under the deed of gift she had no power to alienate: *Held* that, from the wording of the deed of gift it appeared that the husband intended to give and did give to his wife an inheritable estate in and power of alienation over the property the subject of the gift, and therefore the sale by the wife was

## HINDU LAW—WIDOW—continued.

(1) INTEREST IN ESTATE OF HUSBAND—  
concluded

## (b) BY DEED, GIFT, OR WILL—concluded.

valid. *Koonjbehari Dhur v. Prem Chand Dutt*, I. L. R. 5 Calc. 684, referred to. *KANHIA v MAHIN LAL*.

[I. L. R. 10 All. 495]

## (2) POWER OF WIDOW.

## (a) POWER OF DISPOSITION OR ALIENATION.

5.—*Grant by widow of jungleburi tenure—Power to bind reversioners.*] The question whether a *jungleburi* tenure granted by a Hindu widow is binding on reversioners depends on the circumstances of the land: *Quære*.—Whether such a tenure granted in respect of a *chur* where no legal necessity on behalf of the widow is shewn could under any circumstances be binding on thereversioners. *DROBOMOYI GUPTA v. DAVIS*.

[I. L. R. 14 Calc. 323]

6.—*Accumulations by Hindu widow—Accumulations, period up to which they may be dealt with—Legacy to Hindu widow.*] The right of a Hindu widow to the income and accumulations of her husband's estate arising subsequently to his death is absolute, and is not affected by the fact that she may receive them in a lump sum; but whether she receives them as they fall due or after they have accumulated in the hands of others her right is the same. The question to be sought for in determining her right to deal with such income and accumulations of income is one of intention. If she has invested her savings in such a manner as to show an intention to augment her husband's estate she cannot afterwards deal with such investments, except for reasons which would justify her dealing with the original estate; but, if she has evinced no such intention, she can, at any time during her life, deal with the profits. Where she invests her income, making a distinction between the investments and the original estate, she can at any time thereafter deal with such investments, save in the case of the purchase of other property as a permanent investment. But should she invest her savings in property held by her without making any distinction between the original estate and the after purchases, the *prima facie* presumption is that it has been her intention to keep the estate one and entire, and that the after purchases are an increment to the original estate. *GRISH CHUNDER ROY v. BROUGHTON*.

[I. L. R. 14 Calc. 861]

7.—*Alienations by a widow of her husband's estate in order to pay his time-barred debts—Widow's status as distinguished from that of a manager—Liability of alienees—Rights of reversioners*] According to the Hindu law, a widow is competent to alienate her husband's estate for the purpose of paying his debts, even though they may be barred by the law of limitation.

## HINDU LAW—WIDOW—continued.

## (2) POWER OF WIDOW—continued.

(a) POWER OF DISPOSITION OR ALIENATION—  
continued.

Her alienations for such a purpose are legal and binding on the reversionary heirs. A widow stands in a different position from that of a manager of a joint family. The latter can act only with the consent, express or implied, of the body of co-parceners. In the widow's case, the co-parceners are reduced to herself, and the estate centres in her. She can, therefore, do what the body of co-parceners can do, subject always to the condition that she acts fairly to the expectant heirs. The rights of these heirs impose, on persons dealing with a widow, the obligation of special circumspection, failing which they may find their securities against the estate to be of no avail after the widow's death. *CHIMNAJI GOVIND GODBOLE v. DINKAR DHONDEV GODBOLE*.

[I. L. R. 11 Bom. 320]

8.—*Gift by Hindu widow of her own interest and that of consenting reversioner*] A Hindu widow in possession can, with the consent of a reversioner, make a valid gift, which will operate, so far as the interest of the widow and that of the consenting reversioner are concerned. *Rany Srimuty Dibeak v. Rany Koond Luta*, 4 Moore's I. A. 292; *Kooer Goolab Singh v. Rao Kurun Singh*, 14 Moore's I. A. 176; *Sia Dasi v. Gur Sahai* I. L. R. 3 All. 362; and *Raj Bullubh Sen v. Oomesh Chunder Roop*, I. L. R. 5 Calc. 44, referred to. *Ramphal Rai v. Tula Kwari*, I. L. R. 6 All. 116, distinguished. *RAMADHIN v. MATHURA SINGH*.

[I. L. R. 10 All. 407]

9.—*Adopted son's right to impeach alienation unnecessarily made by his adoptive mother before his adoption—Widow, alienation by—Alienee from widow bound to require of legal necessity for alienation—Evidence—Onus of proving necessity for alienation by the widow*] The plaintiff claimed, as the adopted son of one *K*, to recover possession of his adoptive father's property, which had been mortgaged by his (*K*'s) widow *R* (defendant No. 1), to the third defendant, *B*, prior to the plaintiff's adoption by her. The property had come into *R*'s possession incumbered with a mortgage effected by her husband, and, in order to redeem that mortgage, she mortgaged the property again to one *Y*. She subsequently paid off *Y*'s debt, amounting to Rs. 3,629, and in 1876 she mortgaged the property for Rs. 5,999 to *B*, who was put into possession. In 1881, she adopted the plaintiff, and in 1882 the plaintiff brought this suit to recover the property. He contended that *R* had no power to alienate or mortgage the ancestral immoveable property of her deceased husband, and he claimed, as the adopted son of *K*, to be entitled to the property free from the mortgages or other incumbrances with which *R* had attempted to charge it. For the defendants it was contended (*inter alia*) that the plaintiff could

HINDU LAW—WIDOW—*continued*.(2) POWER OF WIDOW—*continued*.(a) POWER OF DISPOSITION OR ALIENATION—*continued*.

not impeach transactions effected by his adoptive mother prior to his adoption : *Held*, that the plaintiff, as the adopted son of *K*, had a right to impeach the unauthorized transactions of his adoptive mother, *R*, who possessed only a widow's restricted power of alienation. The plaintiff was adopted by *R* to her husband, who was the last owner of the ancestral property. The plaintiff at once succeeded to that property upon his adoption ; and as heir of his adoptive father was entitled to object to any alienation made by *R*, on the principle that the restrictions upon a Hindu widow's power of alienation are inseparable from her estate, and their existence does not depend on that of heirs capable of taking on her death : *Held* also, that the plaintiff was entitled to redeem the property on payment of such amount only as was raised by *R* for the purpose of meeting expenses necessarily incurred by her. *Held* further, that the onus of proving the necessity for alienation lay upon *B*. The Court found that there was no evidence that any sum beyond Rs. 3,629, the amount of *F*'s mortgage, was really required by *R*, and, accordingly directed that the mortgage account should be taken between the plaintiff and *B* on the footing that the principal of the mortgage-debt was Rs. 3,629 only, instead of Rs. 5,999. *LAKSHMAN BHAI KHOPKAR v. RADHABAI*.

[I. L. R. 11 Bom. 609]

10.—*Accumulations—Period up to which accumulations may be dealt with—Intention to accumulate.*] Under the will of *N C M* the testator left his estate to his brother, provided that, within a term of eight years, no son should be born to such brother, capable of being adopted as a son of the testator, in accordance with certain conditions made in the will. These conditions failed, and on the expiration of the term of eight years, the estate vested in the brother. The will made no provision for disposal of the rents and profits of the estate during the period the succession thereto was in abeyance. Disputes having arisen between the widow of the testator and his brother, as to the right to such rents and profits, the brother eventually agreed to pay, and did pay, over to the widow a large sum by way of settlement of these disputes, for which sum the widow executed a release. The widow invested the sum so received in Government Securities, and twenty years afterwards created, with this fund, a trust in favor of one *G C R*, and appointed *B* trustee thereof. On the death of the widow, the daughters of the testator tried to set aside this trust, claiming the funds as a portion of their father's estate with which the widow had no right to deal : *Held* that, as the accumulations were handed over to the widow by the person entitled to the reversion after the estate had vested in him, and a release had been entered into between them,

HINDU LAW—WIDOW—*continued*.POWER OF WIDOW—*continued*.(a) POWER OF DISPOSITION OR ALIENATION—*concluded*.

no presumption arose that the fund in question had been accumulated by the widow for the benefit of other heirs of the testator, and that there being no such presumption, the facts of the case must be looked at to ascertain the intention of the parties regarding this fund : *Held*, as to this, that the conduct of the widow evidenced no intention to accumulate the sum received by her for the benefit of any person but herself, or that she ever intended to give up the power of disposing, expending, or dealing with it in any way. *SOWDAMINI DASSI v. BROUGHTON*

[I. L. R. 16 Calc. 574]

## (3) DECREES AGAINST WIDOW, AS REPRESENTING THE ESTATE, OF PERSONALLY.

11.—*Personal decree against person having life interest—Decree for arrears of rent—Execution of decree.*] A decree for arrears of rent was obtained by *H* against *R*, a daughter in possession for a life estate of property inherited from her father *R*. On the death of *B*, this property was taken by her two sons as heirs of her father *R*. The decree was for arrears which had accrued during the lifetime of *B*, and the sons had been substituted for *B* as judgment-debtors. On an application for execution of the decree : *Held*, on the principle laid down in *Barjun Doohey v. Brij Bhookun Lall Awasthi*, I. L. R. 2 I. A 275 ; I. L. R. 1 Calc. 138, that the debt was a personal debt payment of which could be enforced only against the property left by *B*. The decree, therefore, could not be executed against the property inherited by the sons from *R*. *Hurry Mohun Rai v. Gonesh Chunder Doss*, I. L. R. 10 Calc. 823, distinguished. *KRISTO GOBIND MAJUMDAR v. HEM CHUNDER CHOWDERY. KRISHNA GOPAL MAJUMDAR v. HEM CHUNDER CHOWDERY*.

[I. L. R. 16 Calc 511]

## (4) DISQUALIFICATIONS.

## (a) RE-MARRIAGE.

12.—*Re-marriage, Effect of—Act XV of 1856, s. 2—Suit by reversioner to establish his title to property sold in execution of decree obtained against widow as representing husband's estate.*] In a suit brought by the plaintiff as the nearest heir of *O T*, who died intestate in 1873, to set aside a sale of immoveable property belonging to the estate of *O T* which had been sold in execution of a decree obtained by the defendant *J* against *B V*, the widow of *O T*, who had married again, and whose husband was the brother of the purchaser at the execution-sale, the Court found on the evidence that the suit against *B V* was collusive, and that the sale in execution was in fraud of the plaintiff's right. He was, therefore, entitled to a decree declaring that he was not bound by the sale of the 3rd November 1875, in the suit brought by *J* against *B V* as

**HINDU LAW—WIDOW—concluded.****(4) DISQUALIFICATIONS—concluded.****(a) RE-MARRIAGE—concluded.**

representative of her deceased husband, *O T.* Held that whether the plaintiff was entitled to immediate possession of the property in the suit, depended on the question whether *B V's* life-estate was defeasible on her re-marriage. She belonged to a caste in which re-marriage was permitted. The following issue was accordingly sent to the lower Court for trial:—"Whether, by the usage of the country, the rights and interests of *B V* by inheritance in her deceased husband's property, the subject of this suit, ceased and determined on re-marriage in 1876, as if she had then died" *PAREKH RANCHOR v BAI VAKHAT.*

[I. L. R. 11 Bom. 119]

13—*Act XV of 1856, s. 2.—Re-marriage of widow, who could have re-married before the Act was passed* ] *Act XV of 1856* was not intended to place under disability or liability persons who could marry a second time before the Act was passed. It was intended to enable widows to re-marry, who could not previously have done so, and s. 2 applies to such persons only. Held therefore that a widow belonging to the sweeper caste in which there is not, and in 1856 was not, any obstacle by law or custom against the re-marriage of widows, did not by marrying again forfeit her interest in the property left by her first husband; and that the reversioners could not prevent the sale of such interest in execution of a decree for enforcement of hypothecation. *HAR SARAN DAS v. NANDI.*

[I. L. R. 11 All. 330]

**HINDU LAW—WIDOW.**

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See HINDU LAW — ENDOWMENT — SUCCESSION IN MANAGEMENT.

[I. L. R. 16 Calc. 103]

See MALABAR LAW—WILL.

**(1) POWER OF DISPOSITION.****(a) DISHERISON.**

1.—*Nuncupative will—Disinheritance of an undivided son* ] Under Hindu law, a father has

W., D.

**HINDU LAW—WILL—continued.****(1) POWER OF DISPOSITION—concluded.****(a) DISHERISON—concluded.**

power by a nuncupative will to dispose of self-acquired immoveable property as he pleases and to the complete disinheriting of an undivided son. *SUBBAYYA v. SURAYYA.*

[I. L. R. 10 Mad. 251]

**(1) NUNCUPATIVE WILLS.**

2.—*Disinheritance of an undivided son.* ] Under Hindu law a father has power by a nuncupative will to dispose of self-acquired immoveable property as he pleases and to the complete disinheriting of an undivided son. *SUBBAYYA v. SURAYYA.*

[I. L. R. 10 Mad. 251]

3.—*Construction of a varaspatra* ] In 1847 *A*, a Hindu widow, executed in favour of *B* a *varaspatra* (a deed of heirship) in the following terms:—"My husband has died. We have no issue, and you are a son of my husband's cousin. Taking this into consideration, my husband expressed his wish, when he was on the point of death, that all the houses and shops situate in Poona, except the house at Benares, should be given to you, and that you should be made owner of all money-dealings connected with Poona. I, therefore, in obeying his command pass this deed of heirship to you, and make you owner of all the property mentioned above like our son. You, therefore, enjoy the property in your name joyfully." Held that the *varaspatra* was evidence of a nuncupative will by *A's* husband in favour of *B*. Such a will by a Hindu would be quite effectual, except in cases governed by the Hindu Will's Act (XXI of 1870). *HARI CHINTAMAN DIKSHIT v. MORO LAKSHMAN.*

[I. L. R. 11 Bom. 89]

**(3) TESTAMENTARY INSTRUMENTS.**

4.—*Will of a Hindu in favour of his wife made on his taking a son in adoption.* ] A Hindu, on taking a son in adoption, executed a "settlement as to what should be done by my adopted son and my wife after my lifetime," providing that on an event, which happened, the wife should enjoy certain land for life in lieu of maintenance. In a suit by the widow of the executant against the adoptive son for possession of the land: Held, that the instrument was a will. *LAKSHMI v. SUBBAMANYA.*

[I. L. R. 12 Mad. 490]

**(4) CONSTRUCTION OF WILLS.****(a) SPECIAL CASES OF CONSTRUCTION**

5.—*Adoption—Adoption directed to be made, not by testator's widow, but by the widow of his deceased son—Adoption of testator's nephew directed by will—Bequest of property to such nephew—Persona designata.* ] *A*, a Hindu testator, by his will dated the day before his death, declared that it was his wish to adopt his nephew *X*

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HINDU LAW—WILL—*continued*.(4) CONSTRUCTION OF WILLS.—*continued*.(a) SPECIAL CASES OF CONSTRUCTION.—*continued*.

as his son, but that, if he should be unable to do so in his lifetime, his daughter-in-law, *L* (the widow of a deceased son *H*), was "to take the said *K* in adoption." His will then continued: "His adoption ceremony is to be performed. My property, which may remain as a residue after all the things mentioned in my will have been done, I give to this lad as his inheritance, and I appoint him as my heir." A subsequent clause of the will directed as follows:—"In the twenty-eighth clause above it has been directed (that a son) should be adopted. In accordance therewith, after the said *K* shall have been adopted, should he die without (leaving) any descendants, then *Choru L* is duly to adopt, out of my father *J A*'s descendants, any lad who may be found fit. And if the said *L* should not be living at that time, then (any) lad (begotten) of the loins of my father, *J A*, who may appear to my executors to be fit, is duly to be appointed my heir. And to him my property, as mentioned above, is duly to be given in inheritance. And his adoption ceremony is to be performed. And the outlays on the occasion of his marriage also are duly to be made as written above." *Held*, that the direction by the testator to his daughter-in-law to adopt a son was a direction to her to adopt a son to herself and her deceased husband and not to adopt a son to the testator; the former being the only adoption which she was by Hindu law competent to perform: *Held*, also, that, unless *K* was adopted as directed by the will, he was not entitled to the testator's property. His adoption was a condition precedent to his inheritance. **KARSANDAS NATHA v. LADKAVAHU.**

[I. L. R. 12 Bom. 185]

6.—*Adoption—Adoption directed by will—Request of property by will to the boy named for adoption by testator—Conditional gift on adoption—Conditions proposed by natural father before consenting to give his son in adoption*] *G T*, a Hindu of the Bhatia caste, died on the 6th September 1867, having by his will, dated the same day, directed that, in case no son was born to him his widow *S* (the plaintiff) should adopt the son of his nephew, who was to be "made his adopted son." The following was the material part of the will:—"15. During my lifetime, or subsequently to my decease, should a child (begotten) by me not be born of the womb of my wife *S*, then I direct and order and appoint as follows:—There is my nephew *D*. He has now one son to whom he has not as yet given a name. My wife *S* is to take that son in adoption after my decease, and he is to be made my adopted son. And after what is mentioned in (this) my testamentary writing has been done accordingly, I give (him), as an inheritance, all the residue of my property left at the time, and I appoint him as my heir. This lad is to perpetuate (my) own name as (if he

HINDU LAW—WILL—*continued*.(4) CONSTRUCTION OF WILLS.—*continued*.(a) SPECIAL CASES OF CONSTRUCTION.—*continued*.

were) the son of my loins, and (he) is to pay as much respect to my wife *S* as (if she were) his own mother; and agreeably to her directions he is to act righteously. And my wife is to have this lad married, as (though he were her) own son, and upon his marriage, Rs. 20,000 are to be expended out of my property. And during the lifetime of my wife, should this lad die without coming of age, then my wife is duly to take in adoption such other (or second) son of *D* as may be (living) at the time, and he is duly to be treated as my son. (All) are duly to act towards him, in all respects agreeably to what is written above, and he is to obey my wife *S*. If by the will of Providence it should so happen that there may be no other son of *D*, then I appoint my nephew *D* as the heir of my property. And to him I give as an inheritance all the residue of my property left at the time. (It is given) in the following manner." In 1870 this suit was filed by the plaintiffs (the widow and executrix of testator), for the purpose of having the will construed. The plaintiff (*inter alia*) complained that the defendant *D* had refused to give his infant son in adoption to the plaintiff, and had named him *S D*, and had no other son. In his written statement, filed in 1871, the defendant *D* denied that he had refused to give his said son in adoption. In a subsequent written statement filed on the 4th March 1872, he informed the Court that a second son (*N*) had since been born to him, and he submitted to the Court what were the rights and interests of such sons under the will. A decree was made in the suit in March 1872. In January 1878, the plaintiff presented a petition to the Court, stating that *S D* having been born on the 29th April 1867, was of the age of ten years and nine months: that, according to the custom of the testator's caste, the period during which he could be adopted would terminate on his attaining the age of eleven years, *viz.*, in April 1878; that she was ready and willing to adopt him, and had offered to do so, but that his father (the first defendant), had refused to give him in adoption. She prayed (*inter alia*) that it might be declared that, in the event of the first defendant failing to give the said *S D* in adoption, the first defendant and his two sons took no benefit under the said will. The first defendant filed a counter petition in which he stated that he was always willing to give his son *S D* to be adopted by the plaintiff on certain conditions, but that she had refused to consent to them, or to anything which would in the least interfere with her authority as a mother over the boy when adopted. He stated that the plaintiff was an adherent of a sect which held certain pernicious and immoral doctrines, to which he was much opposed, and which had been abhorred by the testator; and that unless certain conditions which he suggested, were imposed upon the plaintiff, the moral character of his son, if adopted, would be in danger of fatal injury: *Held*, that the infant sons of the first defendant took nothing

HINDU LAW—WILL—*continued.*(4) CONSTRUCTION OF WILLS—*continued.*(a) SPECIAL CASES OF CONSTRUCTION—*contd.*

under the will, unless adopted: *Held*, also, that the plaintiff was under no obligation to take the infant *S D* in adoption on the conditions proposed by the first defendant, his natural father. *SHAMAYAHOO v. DWARKADAS VASANJJI.*

[I. L. R. 12 Bom. 202]

7.—*Charitable gifts—Void gifts—Gifts void for uncertainty* ] A testator by his will directed that his executors should "get a Shiva's temple erected at a reasonable cost in a suitable place within the compound of the brick-built baitakhana house inclusive of the building and garden thereto," in which he had constantly resided: *Held*, that the direction was not void for uncertainty, and that under the circumstances 3 per cent of the testator's moveable estate was a proper sum to allow for the cost of erecting the temple: *Held*, also, that a direction to the executors to "perform all the acts properly and *bonâ fide*, to the best of their respective information and judgment, and according to the provisions of this will," did not give the trustees an absolute discretion to fix the amount proper to be expended on the erection of the temple. The testator further declared that "the said executors or any of" his "heirs and representatives" should "not be able to make any kind of gift, sale, or alienation, or create any incumbrance on the" said baitakhana house "and none of" his "heirs" should "be able to claim it in his own right; but that the executors" should "be competent to allow" the testator's "brother *I L R* and" his sister's son *S D R* to use the said baitakhana and rooms, &c.: *Held*, that this clause did not operate to dedicate the baitakhana house to the idol Shiva, nor to vest it in the executors, but that on the death of the testator it descended to his heir-at-law, freed from any prohibition against alienation. The testator further directed that his executors should "keep in deposit Government Promissory Notes of Rs. 9,500 (nine and half thousand rupees) for the preservation and suitable repairs of" the baitakhana "house in proper time, and for the daily and periodical worship of the said god Shiva, for his sheba (worship) and for the repairs of the temple," the expenses of these acts to be defrayed out of interest of the Rs. 9,500: *Held*, that (there having been no dedication of the baitakhana house to the idol) the sum of Rs. 9,500 must be apportioned, one moiety going to the heir-at-law, to whom the baitakhana house had descended, and the other to the executors for the repairs of the temple and the worship of the idol. The testator further declared that, "if after the performance of all the above acts there remains any money or moveable property as surplus, then the executors shall be able to spend the same in proper and just acts for" the testator's "benefit." *Held* that the direction contained in this clause was void for uncertainty: *Held*, also, that such direc-

HINDU LAW—WILL—*continued.*(4) CONSTRUCTION OF WILLS—*continued.*(a) SPECIAL CASES OF CONSTRUCTION—*contd.*

tion did not amount to a valid precatory trust. *Mussoorie Bank v. Raynor*, L. R. 9 I. A. 79; I. L. R. 4 All. 500, cited. Where Government Securities in certain specified amounts are bequeathed by will, the interest thereon which has accrued due before the testator's death does not pass to the legatees. *GOKOOL NATH GUHA v. ISSUR LOCHUN ROY v. GOKOOL NATH GUHA: SHAM DAS ROY v. ISSUR LOCHUN ROY*

[I. L. R. 14 Calc. 222]

8.—*Joint tenancy—Tenancy in-common*—"Heirs of my property," effect of these words in Hindu will ] *B* died in 1876, leaving *H*, his widow, and *N*, an adopted son, him surviving; and he directed by his will that *H* and *N* should be "the heirs of his property." *N* died childless in 1880, leaving the plaintiff, *L*, his widow, him surviving. *H* thereupon took possession of all *B*'s property, claiming as a joint tenant with *N* under the will to be entitled by survivorship on *N*'s death: *Held*, that, under the will, *H* and *N* had been tenants-in-common, and not joint tenants; and that the plaintiff, therefore, as *N*'s widow, was entitled to *N*'s share. In the expounding of Hindu wills the Court should presume that the holder did not intend to depart from the general law beyond what he explicitly declares. *B*, while he had constituted his widow *H* as one of his heirs contrary to the general principles of Hindu law, which only gave her a right to maintenance, was silent as to how far her right of heirship was to extend. That right was to be construed in a manner most consistent with the general principles of Hindu law; and to hold that a joint tenancy had been created between *H* and *N* would be distinct derogation of the joint-family system, which is the keystone of Hindu law. It would be, in effect, to exclude the son's family, for the benefit of the widow, in total disregard of the relations and obligations of a Hindu family. The fact of *N* dying childless was an accident which could not be presumed to have been in the testator's contemplation. *LAJSHMIBAI v. HIRABAI.*

[I. L. R. 11 Bom. 69]

*Held*, in the same case on appeal affirming the decree of the lower Court that, under the will *H* took only a widow's estate in half the property and that (subject to her right, as a Hindu widow, to a widow's estate in a half share) the entire property vested absolutely in *N*. On *N*'s death the property (subject as aforesaid) vested in the plaintiff *L*, as his widow and heir, for a widow's estate, and she became entitled to joint possession with the defendant *H*. A widow taking under her husband's will takes only a widow's estate in the property bequeathed to her, unless the will contains express words giving her a larger estate. *HIRABAI v. LAJSHMIBAI.*

[I. L. R. 11 Bom. 573]



**HINDU LAW—WILL—continued.****(4) CONSTRUCTION OF WILLS—continued.****(a) SPECIAL CASES OF CONSTRUCTION—contd.**

9.—*Joint tenancy—Gift to husband and wife—Survivorship—Alienation by husband to creditor invalid*] A Hindu, by his will, granted jointly to his brother's son and N, the wife of latter, certain land with power of alienation. The recitals in the will showed that the husband was included in the gift not because of his relationship to the testator, but because he was the husband of N: *Held* that the grantees were joint tenants and not tenants-in-common, and that the joint tenancy was not severed by an alienation of the land by the husband to a creditor. *VYDINADA v. NAGAMMAL*.

**[I. L. R. 11 Mad. 258]**

10.—*Life estate—Bequest of property to an unmarried grand-daughter of testator, and after her death to her children, if any, is a gift of life-interest in such property.*] The will of a Hindu contained the following devise in favour of the testator's grand-daughter K who was unmarried at the date of the testator's death: "When K may marry, there is to be given to her out of my immoveable property one house which has been purchased from Shah Virji Narsi's widow Lilabai. \* \* \* That (house) is to be given to Choru K as *kanayadan*. The rent, which it may yield, K may enjoy after (she) my grand-daughter shall have married. And after K's decease (the ownership of) the said house shall duly be enjoyed by K's children. If by the will of God K should die without (leaving) descendants, then my 'Trustees' are duly to take back the said house into their possession." *Held*, that under the above clause, K was entitled only to a life estate in the house. *KARSANDAS NATHA v. LADKAVAHU*.

**[I. L. R. 12 Bom. 185]**

11.—*Gift to a class—Vested and contingent interest.*] A will made by a Hindu, contained the following clause: "I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall invest the same in lands. . . shall enjoy the produce. . . and shall transmit the *corpus* intact to her male descendants." Within a month after the testator's death his eldest daughter was delivered of a son, who died in a few months. She died subsequently, leaving the plaintiff her husband, but no male issue her surviving. The plaintiff sued as heir of his son to recover the amount of the above bequest: *Held*, that as the daughter's son never acquired a vested interest in the bequest, the plaintiff's suit must be dismissed. *SRINIVASA v. DANDAYUDAPANI*.

**[I. L. R. 12 Mad. 411]**

12.—*Successive interests, bequest of—Gift over after life-interest—Construction of gift to persons, and the heirs male of their bodies.*] A will cannot institute a course of succession unknown to the Hindu law: and in conferring successive estates,

**HINDU LAW—WILL—continued.****(4) CONSTRUCTION OF WILLS—continued.****(a) SPECIAL CASES OF CONSTRUCTION—contd.**

the rule is that an estate of inheritance must be such a one as is known to the Hindu law, which an English estate-tail is not. It is competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event; but an important part of the rules relating thereto is: first, the event must be one that will happen, if at all, at latest immediately upon the close of a life in being at the time of the gift (as decided in the *Mullick case*, *Soorjeemoney Dasse v. Dinobundoo Mullick*, 9 Moore's I. A. 123). Secondly, that a defeasance, by way of gift over, must be in favour of some person in existence at the time of the gift as laid down in the *Tagore case*. (*Juttendro Mohun Tagore v. Ganendro Mohun Tagore*, L. R. I. A., Sup. Vol., 47, 9 B. L. R., 377.) the latter case deciding not only that a gift to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid. A testator bequeathed the residue of his estate to his executors upon trust to pay the income to his daughter during her lifetime; and after her death in trust to convey the residue to his two half-brothers, in equal moieties, and to the heir or heirs male of their or either of their bodies, in failure of whom upon trust to give the same to the sons or son of his daughter. Both the half brothers survived the testator. On the death of one of them, the daughter (to whom children, as well as to the half-brothers, had been born) making all persons interested parties, claimed that the trusts and limitation had become void as to one moiety of the residue bequeathed, and that she had become entitled thereto for the estate of a Hindu daughter. Of the children, all were born after the testator's death, save three sons of the surviving half-brother, who were born in the testator's lifetime: *Held*, that the gift of the residue so far as it purported to confer an estate of inheritance on the half-brothers and the heirs male of their bodies, was contrary to law and void; that the gift to the plaintiff's sons, unborn at the death of the testator, was capable of taking effect: that each of the half-brothers took an estate for life in one moiety of the residue bequeathed, in remainder expectant on the death of the plaintiff and that accordingly, on the death of the half-brother, who had died before this suit was brought, the inheritance of his moiety had devolved on the plaintiff, as daughter and heir of her father, and as she claimed. *KRISTOROMONI DAS v. NARENDRA KRISHNA BAHADUR*.

**[I. L. R. 16 Calc. 383]****[L. R. 16 I. A. 29]**

13.—"*Maharani Sukiba*," meaning of, as applied to wife or wives—*Odish Estates Act* (I of 1869), ss. 8, 13 and 22—*Unregistered will of talukdar—Decree for maintenance to widow under the will on which her suit was based, though her claim was for a different relief*] A talukdar, who died childless, but leaving two widows, bequeathed, by an



**HINDU LAW—WILL—continued.****(4) CONSTRUCTION OF WILLS—continued.****(a) SPECIAL CASES OF CONSTRUCTION—contd**

unregistered will, to the "Maharani Sahiba," his entire estate, and gave a power to the same to adopt a son to him; also providing maintenance for both his widows after such adoption: *Held*, that, to determine whether the will referred, in such bequest and power, only to the elder or to both of the testator's wives, extrinsic evidence of his intention was not admissible; but that the true construction was that which would indicate a reasonable and probable intention consistent with his views, as evidenced by his conduct, and his will generally *Abbott v. Middleton*, 7 H. L. C. 389, referred to and followed. As his views appeared to favour single heirship, and the whole state of things, as well as the language of the will, pointed to the owner of the estate being one, and the donee of the power to adopt being one: *Held*, that accordingly the words, "Maharani Sahiba," were not here used as a collective term for both widows, but signified only the elder, although, when qualified, as they were in another part of the will, they might include both: *Held*, also, that as, if there had been no will, the junior widow would have succeeded to an estate expectant on the determination of the life-estate of the senior, but subject to be defeated by an adoption by the latter, this was an interest bringing her within the meaning of s. 13, para. I of Act I of 1869; so that maintenance bequeathed to her by the will was payable, notwithstanding its not having been registered (as that section required in other cases) as well out of the talukdari as out of the non-talukdari estate of the testator: *Held*, also, that this had been rightly decreed to her, as she had sued upon the will, although her direct claim in her plaint was not for this, but to share the estate equally with the senior widow, a claim which was dismissed. *INDAR KUNWAR v. JAIPAL KUNWAR*.

[I. L. R. 15 Calc 725]

[L. R. 15 I. A. 127]

**14.—Residuary estate—Residue<sup>d</sup> undisposed of—Balance undisposed of, disposition of—Bequest to heir, effect of on his right to residue—Disharison** ] In a suit in which a will of one L C was alleged to be a forgery: *Held*, on the evidence, that the will of L C was genuine. By the said will L C had directed Rs. 25,000 to be paid to the plaintiff's mother and her family. He appointed the defendant's father (T L) his executor, and gave him control and authority over the business. He did not, however, in express terms dispose of the residue of his property, and there was, after providing for the above legacy of Rs. 25,000, a considerable balance to the credit of the business at the time of the testator's death: *Held*, that such balance was a residue undisposed of by the will, and that the plaintiff was entitled to a half share of such residue which was to be divided as if there was no will. But the business itself from

**HINDU LAW—WILL—continued.****(4) CONSTRUCTION OF WILLS—continued.****(a) SPECIAL CASES OF CONSTRUCTION—contd.**

the date of the testator's death was to go to T L. Mere bequests of special portions of the testator's estate to the heir without language of disharison do not exclude him from the undisposed of residue. *TOOLSEYDAS LUDHA v. PREMJI TRICUMDAS*.

[I. L. R. 13 Bom. 61]

**15.—Restrictions on Bequest—Restrictions upon estate bequeathed, effect of, if contrary to Hindu Law—Restrictions separable from valid dispositions.** ] In the will of a Hindu restrictions contrary to law made by the will upon valid dispositions, if they are separable from the latter, need not be held to invalidate them. Three documents of which the second and third were executed by a testator after intervals of some years, together formed his will, containing a bequest of estate to his sons. This was held valid by the High Court, although the testator in the later documents had endeavoured to impose restrictions upon the estate contrary to law, and therefore inoperative; the principal of them being (a) prohibition of actual possession or alienation, by any son, of his share in the estate; and (b), direction that the whole estate should be managed in a common cutcherry. with religious trusts, the sons to get only the remaining amount of profit according to their respective shares in perpetuity. At the same time the Court held good a provision for defraying the marriage expenses of sons from joint funds, with the direction in the will that until the youngest son should attain majority none of the sons should have a right to partition; any son who should separate from the others getting, up to the time of his attaining majority, merely maintenance, and not the profits accruing upon his share. A gift over was that on the death of a son surviving sons should take his share proportionately to their own, and that if any of the sons so taking should die leaving sons, such sons should receive their proportionate parts of the deceased son's share. The first part of this provision was held good, not being invalidated by the second, which, as constituting a gift to an indefinite class, would not take effect. The judgment of the High Court to the above effect was upheld by the Judicial Committee. *RAIKISHORI DASI v. DEBENDRANATH SIRCAR*.

[I L. R. 15 Calc. 409]

[L. R. 15 I. A. 37]

**16.—Direction in will operating as gift—Power to adopt conferred on testator's widow determined on estate vesting in his son's widow—Gift of beneficial interest.** ] The following points were ruled in construing the will of a Hindu testator—(a) a direction to make over the estate to the son when he came of age, is equivalent to a gift to him to take effect at that time; (b) a provision to meet the contingency "if my son dies," in order to be consistent with an absolute gift on his

**HINDU LAW—WILL—concluded.****(4) CONSTRUCTION OF WILLS—concluded.****(a) SPECIAL CASES OF CONSTRUCTION—concluded.**

attaining minority; must mean "if my son dies during minority; (c) *dakildar* though ordinarily meaning "occupant," must be construed in reference to the context and held to mean possessor or manager, though without beneficial interest: *Held* that the testator's widow took no power to adopt under the will in the event which happened, *viz.*, of his estate having vested in his son and afterwards in the son's widow. *Thayammnal v. Venkatarama Ayyan*, L. R. 14 I. A. 67; I. L. R. 10 Mad. 805, followed. *TARACHURN CHATTERJI v. SURESH CHUNDER MOOKERJI*.

[L. R. 16 I A 166]

[I. L. R. 17 Calc. 122]

**HINDU WIDOW***See* DEBTOR AND CREDITOR.

[I. L. R. 11 Bom. 666]

*See* CASES UNDER HINDU LAW—WIDOW.**HINDU WILLS ACT (XXI of 1870)***See* PARTIES—PARTIES TO SUITS—EXECUTORS.

[I. L. R. 12 Bom. 621]

*See* PROBATE—EFFECT OF PROBATE.

[I. L. R. 12 Bom. 621]

*See* SUCCESSION ACT, s. 96.

[I. L. R. 16 Calc. 549]

**HOLIDAY.**

—*Bengal Civil Courts Act VI of 1871, s. 17—Close holiday—Proceeding on civil side of District Court during vacation—Jurisdiction—Irregularity—Consent of parties—Waiver.* S. 17 of the Bengal Civil Courts Act (VI of 1871) was framed in the interests of the Judges and officials of the Courts, and probably also in the interests of the pleaders, suitors and witnesses, whose religious observances might interfere with their attendance in Courts on particular days. On a close holiday, a Judge might properly decline to proceed with any inquiry, trial, or other matter on the civil side of his Court; and any party to any judicial proceeding could successfully object to any such inquiry being proceeded with, and, in the event of any such inquiry having been proceeded with in his absence and without his consent, would be entitled to have the proceeding set aside as irregular, probably in any event, and certainly if his interests had been prejudiced by such irregularity. But, at the furthest, the entertaining and deciding upon a matter within the ordinary jurisdiction of the Court on a close holiday is an irregularity the right to which can be waived by the conduct of the parties; and a party

**HOLIDAY—concluded.**

who, on a close holiday, does attend, and without protest takes part in a judicial proceeding, cannot afterwards successfully dispute the jurisdiction of the Judge to hear and determine such matter. *Bennett v. Potter*, 2 C. & J. 622; *Andrews v. Elliott*, 5 E. & B. 502; 6 E. & B. 338; and *Bisram Mahton v. Sahib-un-nissa*, I. L. R. 3 All 333, referred to. *RAM DAS CHAKRABATI v. OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY*.

[I. L. R. 9 All. 366]

**HOUSE-BREAKING BY NIGHT.***See* CRIMINAL TRESPASS.

[I. L. R. 16 Calc. 657]

**HUNDI.**

—*Acceptance—Communication of acceptance to holder and drawer—Omission by drawee to notify non-acceptance.* An insolvent firm had drawn certain hundis on the plaintiffs payable to the defendant. The defendant had endorsed them to one M. The plaintiffs' Bombay firm was the agent of M, and M accordingly sent the hundis to the plaintiffs, as his agents for realisation. The hundis, however, were dishonoured, and M thereupon returned them to the defendant, and received their value from the defendant, who in this suit now sought to set off the amount so paid by them against the claim of the plaintiffs. It was contended that the plaintiffs were not liable, as there was no proof that the hundis had been accepted by them, it not having been shown that the acceptance had been communicated to M, the owner of the hundis, and that until such communication the plaintiffs were at liberty to cancel their acceptance. *Held*, that the acceptance by the plaintiffs was complete; and that the defendant was entitled to the set-off claimed. The hundis had come to the plaintiffs for acceptance on the 28th October 1884, and their non-acceptance had not been notified to M on the 3rd November. That would be an unreasonable period during which to hold the hundis in dubio. On the 30th October the plaintiffs had stated by letter to the drawer's firm that the hundis had been accepted. That meant that all things had been done to make the acceptance complete. The absence of entries in the plaintiffs' book, with reference to the hundis, afforded no inference that they were not accepted. *Semble*, a communication of acceptance to the drawer, or to a previous holder, binds the acceptor as well as a communication to the present holder, inasmuch as the acceptance enures for the benefit of them as well as for the actual holder, and the primary contract is between the drawer and the acceptor. *PRAGDAS THAKURDAS v. DOWLATRAM NANURAM*.

[I. L. R. 11 Bom. 257]

**HURT.**

—*Causing Hurt—Penal Code, s. 330—Causing hurt to constrain a person to satisfy a demand.* A husband in order to constrain his wife to

**HURT—concluded.**

satisfy his demand that she should return to his house, voluntarily caused hurt to her. He was convicted under s. 330 of the Penal Code:—*Held*, on appeal, that the conviction under that section was bad. *QUEEN-EMPRESS v. ELLA BOYAN*.

[I. L. R. 11 Mad. 257]

**HUSBAND AND WIFE**

*See* MARRIED WOMAN'S PROPERTY ACT, s. 8.

[I. L. R. 11 Bom. 348]

—*Principal and agent—Agency—Authority of wife to pledge husband's credit.* *Held* that the liability of a husband for his wife's debts depends on the principles of agency, and the husband can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done. In a suit by a creditor to recover from his debtor and her husband the amount of money lent by the plaintiff to the former on her notes of hand, it appeared that the defendants had always lived together, that the wife had an allowance wherewith to meet the household expenditure and all her personal expenses, and that the money had been borrowed without the husband's knowledge, and not to meet any emergent need, but to pay off previous debts, and had been raised by successive borrowings over a considerable period, the debt having increased by high rates of interest. It was also found that it had not been shown that the plaintiff looked to the husband's credit, or that the husband had ever previously paid his wife's debts for her: *Held* that under these circumstances no agency on the wife's part for her husband had been established, and that the husband was therefore not liable to the claim. *GIRDHARI LAL v. CRAWFORD*.

[I. L. R. 9 All. 147]

**ILLEGITIMACY, PROOF OF.**

*See* EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—PETITIONS.

[I. L. R. 10 Mad. 334]

**ILLEGITIMATE CHILDREN.**

*See* HINDU LAW—PARTITION—RIGHT TO PARTITION—ILLEGITIMATE CHILDREN.

**IMMOVEABLE PROPERTY.**

*See* ATTACHMENT—SUBJECTS OF ATTACHMENT—PROPERTY AND INTEREST IN PROPERTY OF VARIOUS KINDS.

[I. L. R. 11 Mad. 193]

*See* STAMP ACT 1879, SCH. 1, ART. 5.

[I. L. R. 13 Bom. 87]

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*See* LIMITATION ACT 1877, ART. 140.

[I. L. R. 14 Calc. 801]

**IMPRISONMENT.**

*See* ARREST.

[I. L. R. 12 Bom. 46]

*See* ATTACHMENT—ATTACHMENT OF PERSON.

[I. L. R. 12 Bom. 46]

*See* CASES UNDER SENTENCE—IMPRISONMENT.

**IMPROVEMENTS.**

*See* TRUST.

[I. L. R. 11 Mad. 360]

**INAM.**

*See* ACT OF STATE.

[I. L. R. 11 Bom. 235]

*See* RESUMPTION—EFFECT OF RESUMPTION

[I. L. R. 11 Bom. 235]

**INAM COMMISSIONER.**

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, BOMBAY.

[I. L. R. 13 Bom. 442]

**INDIAN COUNCIL ACT (24 & 25 Vic. c. 67) s. 22.**

*See* HIGH COURT, JURISDICTION OF—HIGH COURT, N.-W. P.

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*See* STATUTES, CONSTRUCTION OF.

[I. L. R. 11 All. 490]

**INFANT.**

*See* CASES UNDER MINOR.

**INFORMATION OF COMMISSION OF OFFENCE.**

—*Criminal Procedure Code, s. 45—Duty to report sudden death—Owner of house distinguished from owner of land—Penal Code, s. 176* } Under s. 45 of the Code of Criminal Procedure, every owner or occupier of land is bound to report the occurrence therein of any sudden death. The head of a Nayar family was convicted and fined under s. 176 of the Penal Code for not reporting a sudden death in the family house: *Held*, following former decisions of the Court, that the conviction was illegal, because s. 45 of the Code of Criminal Procedure does not apply to the owner of a house. *QUEEN-EMPRESS v. ACHUTHA*.

[I. L. R. 12 Mad. 92]

**INHERITANCE.**

*See* CASES UNDER HINDU LAW—INHERITANCE.

**INHERITANCE—concluded.**

See LIMITATION ACT 1877, ART. 144—  
ADVERSE POSSESSION.

[I. L. R. 9 Mad. 482  
[L. R. 13 I. A. 147]

See CASES UNDER MAHOMEDAN LAW—  
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**INJUNCTION.**

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[I. L. R. 12 Bom. 419]

**(1) UNDER CIVIL PROCEDURE CODE.**

1—*Civil Procedure Code*, ss. 492, 493.—*Temporary injunction restraining alienation of property in suit—Mortgage of such property not void—Contract Act IX of 1872, s. 23* ] The effect of a temporary injunction granted under s. 492 (b) of the Civil Procedure Code is not to make a subsequent mortgage of the property in question illegal and void within the meaning of s. 23 of the Contract Act (IX of 1872). Such a penalty must not be read into s. 493, which provides otherwise for the breach of an injunction granted under s. 492. *DELHI AND LONDON BANK v. RAM NARAIN*.

[I. L. R. 9 All. 497]

2.—*Civil Procedure Code* 1882, s. 492 —“*Wrongfully*” sold in execution of decree—*Temporary injunction*.] An objection made under s. 278 of the Civil Procedure Code to the attachment in execution of a decree of a mortgage-bond of which the objector claimed to be the assignee from the judg-

**INJUNCTION—continued.****(1) UNDER CIVIL PROCEDURE CODE—concl'd.**

ment-debtors under an instrument dated prior to the attachment was disallowed; and the objector then brought two suits against the decree-holder and the judgment-debtors, in which he claimed (a) a declaration of his right to the bond, and (b) to recover a sum of money from the judgment-debtors on the basis of the assignment. The first Court dismissed both suits, on the ground that the alleged assignment was a collusive transaction entered into after the attachment between the objector and the judgment-debtors for the purpose of defeating the attachment. Pending an appeal to the High Court, the objector applied to that Court for a temporary injunction under s. 492 of the Code, restraining the decree-holder from bringing the bond to sale in execution of the decree. Held that although in such cases the provisions of s. 492 should be applied with the greatest care one of the objects of the Legislature in passing that section was to guard as far as possible against multiplicity of suits, and as many complications probably resulting in further litigation were likely to arise if the decree-holder were allowed to proceed with the execution-sale, and no practical injury to any one would be caused by restraining her from so doing until the decision of the appeal, a temporary injunction should be granted, subject to security being given by the appellant. *KIRPA DAYAL v. RANI KISHORI*.

[I. L. R. 10 All. 80]

**(2) SPECIAL CASES.****(a) BREACH OF AGREEMENT.**

3—*Injunction to restrain adoption—Interim injunction—Practice*.] A Hindu, died childless, possessed of moveable and immovable property. After his death, disputes arose between his widow (the defendant) and his father and brother. These disputes were settled by an agreement, one of the terms of which was that the widow (the defendant), should not adopt a son, and that certain property which she was to have during her life should after her death go to her brother-in-law, P. In 1872 P died leaving his son, the plaintiff, him surviving. On the 25th August 1888, the plaintiff filed this suit, alleging that the defendant in violation of the agreement was about to adopt a son, and praying for an injunction. On presenting the plaint he applied for an interim injunction, alleging that the defendant intended to adopt a son the next day (Sunday, 26th August). The Court refused the interim injunction. *ASSUR PURSHOTAM v. RATANBAI*.

[I. L. R. 13 Bom. 56]

**(b) INTRUSION UPON OFFICE.**

4.—*Civil Procedure Code*, s. 11—*Right to an office in a temple*.] Plaintiffs sued for an injunction to prevent defendant from interfering with their right to present to certain persons at a certain festival in a certain temple a crown and water. The lower Courts found that plaintiffs

**INJUNCTION—continued.****(2) SPECIAL CASES—continued.****(b) INTRUSION UPON OFFICE—concluded**

possessed the right claimed and granted the injunction : *Held*, that the suit was cognizable by a Civil Court under s. 18 of the Code of Civil Procedure, and that the injunction was properly granted. **SRINIVASA v. TIRUVENGADA.**

[I. L. R. 11 Mad 450]

**(c) OBSTRUCTION TO RIGHTS OF PROPERTY.**

5.—*Mandatory injunction, when to be granted—Judicial discretion—Damages—Rights of co-sharers* ] In granting or withholding an injunction, a Court should exercise a judicial discretion, and should weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which the injunction, if granted, would inflict upon the defendant. There is no such broad proposition as that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights, absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction. **SHAMNUGGER JUTE FACTORY CO. v. RAM NARAIN CHATTERJEE.**

[I. L. R. 14 Calc. 189]

6.—*Co-sharers—Right to deal with joint property—Excavation of tank on joint property—Discretion of Court in granting injunction—Specific Relief Act (I of 1877), s. 55.* ] Before a Court will in the case of co-sharers, make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-sharers without the consent of the other should be restored to its former condition (as, for instance where a tank has been excavated), a plaintiff must show that he has sustained, by the act he complains of, some injury which materially affects his position. **Lala Bismambhar v. Rajaram Lal**, 3 B. L. R. Ap. 67, applied in principle; **Shamnugger Jute Factory Co v. Ram Narain Chatterjee**, I. L. R. 14 Calc. 189, approved. The fact that a portion of the land on which a tank had been excavated by the defendant was fit for cultivation does not constitute an injury of a substantial nature such as would justify an order of that nature. **JOY CHUNDER RUKHIT v. BIPRO CHURN RUKHIT.**

14 Calc. 236

7.—*Co-sharers—Jmal property—Cultivation of indigo by one co-sharer without consent of others—Injunction as between co-sharers—Practice of the English Courts in granting injunction, Applicability of.* ] *W*, while in possession of an entire *mouzah* as *ijaradar*, had under an arrangement with the proprietors built factories and cultivated indigo by reclaiming a quantity of waste land. On the expiration of his lease *W*, who still held a portion of the *mouzah* in *ijara* from a 2-anna co-sharer, continued to cultivate indigo on the *khas* lands as before, and, disregarding the oppo-

**INJUNCTION—continued.****(2) SPECIAL CASES—continued.****(c) OBSTRUCTION TO RIGHTS OF PROPERTY—continued.**

sition of the 14-anna co-sharers, claimed an exclusive title to do so. The 14-anna co-sharers thereupon brought a suit against *W* for *jmal* possession of the *khas* lands, and prayed, among other things, for an injunction prohibiting the defendant from sowing indigo upon the *jmal* lands without the plaintiffs' consent, and also for a general injunction to prohibit the defendant from throwing any obstacles in the way of plaintiffs' holding *jmal* possession of the lands. The Court below granted an injunction prohibiting the defendant from growing indigo on the *khas* lands without the consent of the plaintiffs : *Held*, that the plaintiffs were entitled to an injunction, but having regard to the circumstances under which the defendant cultivated the lands, it was necessary to vary the injunction granted by the Court below by making it an injunction restraining the defendant from excluding by any means the plaintiffs from their enjoyment of the *jmal* possession of the lands. **RAM CHAND DUTT v. WATSON & Co.**

[I. L. R. 15 Calc. 214]

8.—*Village Property—As to what was the common property of a village, viz., a tank—Inability of any of the co-proprietors to exclude the rest from contributing to repair it.* ] A village tank, on the site of an ancient one, was the common property of, and used by, all the inhabitants, of whom one family on the ground of improvements and additions made by their ancestor with the general acquiescence of the village claimed, against the rest, the exclusive right of repairing the tank at their own cost. But no corresponding obligation on the plaintiffs to repair was shown : and from the evidence, including that afforded by a compromise made in 1842, it appeared that the repairs were to be effected by a common collection made through the person in management, who was to account for his receipts and expenses : *Held*, that it was equally at the option of the rest of the villagers either to permit the repairs to be done by the plaintiffs, or to insist on the work being done at the common cost ; the tank remaining the common possession of the village, and no class of the villagers having any right to by injunction or otherwise exclude the rest from contributing to the repairs. **SIVARAMAN CHETTI v. MUTHAYA CHETTI**

[I. L. R. 12 Mad. 241]

[L. R. 16 I. A. 48]

Affirming decision of High Court in **MUTTAYA CHETTI v. SIVARAMAN CHETTI.**

[I. L. R. 6 Mad. 229]

9.—*Mandatory injunction—Damages—Light and air—Ancient lights* ] Where a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the

## INJUNCTION—continued.

## (2) SPECIAL CASES—continued.

## (c) OBSTRUCTION TO RIGHTS OF PROPERTY—continued.

building complained of by him has been completed, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, although there might be cases where it would be granted. Mere notice not to continue building so as to obstruct a plaintiff's rights, is not, when not followed by legal proceedings, a sufficiently special circumstance for granting such relief. *Jannadas Shankarlal v. Atmaram Harjivan*, I. L. R. 2 Bom. 138, referred to. The law regarding relief by mandatory injunction explained. *BENODE COOMAREE DOSSEE v. SOUDAMINEY DOSSEE*.

[I. L. R. 16 Calc 252]

10.—*Light and air—Injunction or damages—Lord Cairns' Act (21 and 22 Vic., C. 27)—Specific Relief Act I of 1877*. The plaintiff owned a house in Girgaon Road, Bombay, in which he had resided with his family for twenty-four years. Through certain windows in the south wall of his house, numbered respectively 3, 5, 7, and 8, he had during all that time enjoyed free access of light and air. In 1887 the defendant purchased the land to the south of the plaintiff's house, pulled down the building that then existed upon it, and proceeded to build a new one on the same site, the north wall of which was about six feet distant from the south wall of the plaintiff's house, and was intended to be sixty-four feet high, i.e., about twenty feet higher than the plaintiff's windows Nos. 7 and 8, which were in the plaintiff's loft. The plaintiff sued for an injunction: *Held*, that the plaintiff was entitled to damages, but not to an injunction. *DHUNJIBHOY COWASHI UMRIGAR v. LISBOA*.

[I. L. R. 13 Bom. 252]

11.—*Light and air—Damages—Specific Relief Act I of 1877, s. 54, cl. c.—Limitation Act XV of 1877, s. 26—Mandatory injunction*. The plaintiff complained that the defendants intended to build so as to obstruct the passage of light and air through an ancient window in his house, and render a room therein unfit for use, and prayed for a perpetual injunction restraining the defendant from so building. It was proved that the wall intended to be built would so shut out the light and air as to render the room completely dark and unfit for use. The Subordinate Judge granted the injunction as prayed. The defendants appealed to the Joint Judge, who amended the lower Court's decree by ordering the removal of the injunction and directing, in its stead, a new window to be opened in the plaintiff's house to the east of the window in question. On appeal by the plaintiff to the High Court, *held*, reversing the decree of the lower Appellate Court, that the plaintiff had an absolute and indefeasible right to the easement he had acquired; and the only possible question was whether injunction or damages was the appropriate remedy under the

## INJUNCTION—concluded.

## (2) SPECIAL CASES—concluded

## (c) OBSTRUCTION TO RIGHTS OF PROPERTY—concluded.

circumstances of the particular case: *Held*, also, that, as the evidence established that, after defendant's wall was built, plaintiff's room would not remain substantially as useful to him as before, the plaintiff was entitled to an injunction. *Holland v. Worley*, L. R. 26 Ch. D. 578, distinguished. The High Court also directed a mandatory injunction to issue to the defendants to remove the wall they had raised after the lower Appellate Court had passed the decree in their favour and pending the plaintiff's appeal to the High Court. *KADARBEAI v. RAHIMBEAI*.

[I. L. R. 13 Bom. 674]

## INQUIRY, JUDICIAL OR ADMINISTRATIVE

See SANCTION TO PROSECUTION—WHERE SANCTION IS NECESSARY.

[I. L. R. 12 Bom. 36]

## INSANITY.

—*Penal Code, s. 84—Plea of insanity in criminal cases—Legal test of responsibility in cases of alleged unsoundness of mind*. The accused stabbed a child (his brother's wife) with a sword and killed her. He was charged with murder, and a plea of insanity was set up at the trial. No motive could be assigned for his attack on the child, in which he persisted in the presence of other persons: and it appeared that he had been in the habit of treating the child kindly and affectionately. He was suffering from fever and want of food at the time, and the medical evidence showed it was possible that the act was committed under a sudden attack of homicidal mania. It was in evidence that he had abused some of his relations a short time before,—the abuse being probably due to irritability of mind caused by fever. He confessed the crime to the village Magistrate and answered questions put to him rationally, but before the committing Magistrate and the Sessions Judge he denied that he had killed the child. He was convicted of murder: *Held*, that as the accused was not proved to have been by reason of unsoundness of mind incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law, the conviction was right. *Queen-Empress v. Lakshman Dagdu*, I. L. R. 10 Bom. 512, approved. *QUEEN-EMPRESS v. VENKATASAMI*.

[I. L. R. 12 Mad. 459.]

## INSOLVENCY.

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See APPEAL—ORDERS.

[I. L. R. 12 Mad. 472]

See CLAIM TO ATTACHED PROPERTY.

[I. L. R. 9 All 232]

## INSOLVENCY—continued.

## (1) INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE.

1.—*Civil Procedure Code (Act XIV of 1882) s. 351, Chap. XX—Refusal to adjudicate debtor insolvent, Grounds for.* A Court cannot refuse the application of a judgment-debtor seeking to be declared an insolvent under the provisions of Chap. XX of the Civil Procedure Code unless it finds affirmatively that the applicant has brought himself within cls (a), (b), (c) or (d) of s. 351 of the Code; and the fact that his schedule assets exceed his liabilities does not disentitle him to such relief. A judgment-debtor applied to be declared an insolvent under the provisions of Chap. XX of the Code of Civil Procedure. The District Judge refused the application on the ground that the assets were admittedly in excess of the liabilities and that he had made no effort for a period of two years to realize his property for the benefit of his creditors: *Held*, that the District Judge was bound to grant the application as the applicant had not brought himself within cls. (a) (b), (c) or (d) of s. 351, in which cases alone he had a right to refuse the application. *IN THE MATTER OF THE PETITION OF JOWALLA NATH. JOWALLA NATH v PARBATTY BIBI.*

[I. L. R. 14 Calc. 691]

2.—*Execution of decree—Civil Procedure Code, Chap. XX ss. 344—360—Ex parte decree subsequent to insolvency—Attachment—Receiver in insolvency.* An insolvent, to whose estate no receiver under Ch. p. XX of the Code of Civil Procedure had ever been appointed, entered in his schedule the names of certain persons as creditors for a sum of Rs. 110-9-3. These creditors subsequently obtained against the insolvent an *ex parte* decree for the sum so entered in the schedule, and in execution attached certain pay which the insolvent was then earning, but which he was not in receipt of at the time his schedule was filed, and did not appear therein as an asset of his estate: *Held*, that the judgment-creditors were entitled to take out execution, and were not prevented from so doing by reason of the insolvency proceedings. *IN THE MATTER OF BADAL SINGH v. BIRCH.*

[I. L. R. 15 Calc. 762]

3.—*Civil Procedure Code, ss. 345, 352—Procedure on claim made by creditor—Proof of debt.* It is open to a creditor, at any time while the assets of an insolvent are undistributed, to produce evidence of his debt and to apply to be admitted on the schedule under s. 352 of the Code of Civil Procedure. *LAKSHMANAN v. MUTTIA.*

[I. L. R. 11 Mad. 1]

4.—*Civil Procedure Code, ss. 344, 588—Insolvent judgment-debtor—Notice to decree-holder.* A debtor was arrested on civil process. He presented a petition to the Court from which process issued, alleging that he was unable to pay the debt and praying to be declared insolvent and to

## INSOLVENCY—continued.

## (1) INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE—continued.

be released. The Court passed an order on the same day, directing that he should be released and that the creditor should proceed against his property: *Held*, that the order was bad for want of notice. *KOMARASAMI v GOBINDU.*

[I. L. R. 11 Mad 136]

5.—*Civil Procedure Code, ss. 228, 239, 344, 360—Application to be declared insolvent made to Court to which decree was transferred for execution.* Where a decree had been transferred for execution from the Court of the District Munsiff of *E*, to that of the District Munsiff of *B*, and an application was made by the judgment-debtor under s. 344 of the Code of Civil Procedure to be declared an insolvent and entertained by the latter Court: *Held*, that the District Munsiff of *B* had no jurisdiction to entertain the application *VENKATASAMI v. NARAYANARATNAM.*

[I. L. R. 11 Mad. 301]

6.—*Civil Procedure Code 1882, s. 351—Unfair preference.* A creditor can put pressure on his debtor to get payment of his claim, notwithstanding that the debtor may be in embarrassed circumstances. But a debtor, who gives an unfair preference to one creditor by giving him a large proportion of his property, so as to reduce the aliquot share of the other creditors, acts fraudulently, and no title is given to that particular creditor, as against the assignees who represent the creditors generally. *A* filed a suit and obtained a decree against *B*. During the pendency of the suit, and only four days before the decree was passed, *B* assigned by way of mortgage nearly the whole of his property to one of his creditors *C*. The assignment was made, not to secure a fresh advance, but in consideration of past debts due to *C*. *C* was aware of *B*'s embarrassments. Two years afterwards *B* was arrested in execution of *A*'s decree. *B* thereupon applied to be declared an insolvent: *Held* that the assignment by *B* of nearly the whole of his property to *C* amounted, under the circumstances, to an unfair preference, within the meaning of s. 351, cl. (c) the Code of Civil Procedure (XIV of 1882). *B* was, therefore, not entitled to be declared an insolvent. *DADAPA v. VISHNUDAS.*

[I. L. R. 12 Bom. 424]

7.—*Civil Procedure Code, s. 352—Suit to establish right to sell property in execution of decree enforcing hypothecation—Suit against purchasers not parties to decree—Judgment-debtor declared insolvent pending suit—Decree-holder scheduling his decree under Civil Procedure Code, s. 352—Effect of schedule.* A suit to establish a right to bring to sale certain moveable property in execution of a decree for enforcement of hypothecation was brought against persons who were not parties to that decree and had purchased in execution of a



## INSOLVENCY—continued.

## (1) INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE—continued.

prior decree. Pending the suit, one of the judgment-debtors under the hypothecation decree was declared an insolvent, and the plaintiff scheduled his decree as a claim under s 352 of the Civil Procedure Code : *Held* that the scheduling of the decree had not the effect of superseding it or creating another decretal right in addition to and independent of it, and did not make the suit, which was founded on a new and a different cause of action against persons who were not parties to the decree, unmaintainable. **ABDUL RAHMAN v. BEHARI PURI.**

[I. L. R. 10 All. 194]

8.—*Jurisdiction—Deputy Commissioner—District Court—Insolvent judgment-debtors—Civil Procedure Code 1882, ss. 344, 360—Application to have judgment-debtor declared insolvent—Costs.* The Court of the Judicial Commissioner, and not that of a Deputy Commissioner, is the "District Court" in Chota Nagpur under ss. 2 and 344 of the Civil Procedure Code. A Deputy Commissioner therefore invested by the Local Government with powers under s 360 of the Code has no jurisdiction apart from any transfer by the "District Court," to entertain an application by a judgment-creditor under s. 344 to have his judgment-debtor declared an insolvent. *In re Waller*, I. L. R. 6 Mad. 430; and *Purbhudas Velji v. Chugan Raichund*, I. L. R. 8 Bom. 196, followed. The question of jurisdiction not having been raised in the lower Court the order was set aside without costs. **JOYNARAIN SINGH v. MUDHOO SUDUN SINGH.**

[I. L. R. 16 Cal. 13]

9.—*Civil Procedure Code 1882, ss. 336, 337—Act VI of 1888—Debt not in schedule—Execution of decree obtained against insolvent for such debt—Scheduled debts.* A person, who has taken the benefit of the insolvent sections of the Civil Procedure Code, and who is undischarged, but has not inserted in his schedule a debt for which a decree is subsequently obtained, is not protected from arrest in execution of such decree, merely because his property is in the hands of the receiver in insolvency. Such a person is liable to arrest under the circumstances and in accordance with the procedure provided for by the Civil Procedure Code Amendment Act (VI of 1888.) **PANNA LALL v. KANHAIYA LALL.**

[I. L. R. 16 Cal. 85]

10.—*Civil Procedure Code, ss. 344, 350, 352, 357, 358—Debt not in schedule—Omission to come in and prove debt.* A judgment-debtor, arrested in execution of a decree, filed his petition, and was adjudicated an insolvent, under the insolvency sections of the Code of Civil Procedure, and the decree-holder was, among other creditors, called upon to prove her debt. She, however, omitted to attend; and her name was not included in the

## INSOLVENCY—continued.

## (1) INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE—continued.

schedule of creditors. The insolvent was discharged under s. 355. The creditors who proved their debts were paid, and the residue of the property was paid out by the receiver to the insolvent. In an application by the decree-holder to execute her decree against the property of the insolvent : *Held*, that the discharge of the insolvent did not operate as a discharge of the debt under s 357 of the Civil Procedure Code, and she was therefore entitled to proceed with execution of her decree against the insolvent's property. *Semble* : Under s 352, a creditor, by omitting to come in and prove his debt, would apparently prevent an insolvent obtaining the relief which the Code contemplates giving him unless that section be read as allowing the insolvent to prove the debts of such creditors as omit to appear and prove them. **HARO PRIA DABIA v. SHAMA CHARAN SEN.**

[I. L. R. 16 Cal. 592]

11.—*Civil Procedure Code 1882, ss. 354, 355 and 356—Receiver selling a mortgaged property of insolvent—Purchaser at such sale—Right of mortgage unaffected by such sale.* By an order dated the 9th July 1879, A was declared an insolvent under s 351 of the Civil Procedure Code (XIV of 1882), and his property vested in the Receiver, who was ordered to convert it into money. Nine fields, which were part of A's property, had been mortgaged to the plaintiff, who was duly cited to appear and prove his debt. The plaintiff, however failed to appear, and he was consequently omitted from the schedule of A's creditors. The Receiver sold one of the fields, which was purchased by A's undivided son G. At the sale the plaintiff gave notice of his claim as mortgagee. After paying off the debts of the scheduled creditors the Receiver made over to A the residue of the purchase-money and the eight unsold fields. In 1881 the plaintiff sued A for possession of the mortgaged property, and on appeal obtained a decree. While that suit was pending, G sold to the defendant the field which he had purchased. In execution of his decree the plaintiff recovered possession of the eight fields, but on attempting to get possession of the ninth field he was obstructed by the defendant, who was in possession, and he consequently brought this suit to recover it. *Held*, that the plaintiff was entitled to recover it from the defendant. The only interest the insolvent had in the mortgaged premises was the equity of redemption, and this having vested in the Receiver under s. 354 he under s 356 was directed to convert it into money. G, therefore, at the sale only purchased the equity of redemption in the one field; and the defendant, who now stood in G's shoes with notice of the plaintiff's claim, although he might possibly be entitled to redeem the whole nine fields comprised in the mortgage, was bound to deliver possession to the plaintiff (the mortgagee) until that was done. The mortgaged property could

**INSOLVENCY—concluded.****(1) INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE—concluded.**

not be sold by the Receiver without the consent of the plaintiff (the mortgagee), or paying him off. S. 356 of the Civil Procedure Code Act XIV of 1882, no doubt contemplates the payment of debts secured by mortgage out of the proceeds of the conversion of the insolvent's property in priority to the general creditors; but this must be taken in connection with s. 354, and must be understood as referring to those cases in which the mortgaged premises have been sold after coming to an understanding with the mortgagee. *SHRIDHAR NARAYAN v. KRISHNAJI VITHOJI.*

[I. L. R. 12 Bom. 272

**INSOLVENT ACT (11 and 12 Vict. c. 21), ss. 28 and 29.**

*See* RIGHT OF SUIT—OFFICIAL ASSIGNEE.

[I. L. R. 11 Bom. 620

*See* VARIANCE BETWEEN PLEADING AND PROOF—SPECIAL CASES—FRAUD.

[I. L. R. 11 Bom. 620

—, s. 36.—*Order to examine witnesses under s. 36—Discovery of insolvent's property—Bonâ fide creditor—Practice—Conduct of examination.* When the Official Assignee makes or supports an application to examine witnesses under s. 36 of the Indian Insolvent Act, such application should be readily granted. When it is made by any other person, the grounds of the application should be carefully sifted, and the Court should satisfy itself that the inquiry will probably lead to some benefit to the creditors or estate, and is not merely made to harass and annoy the persons proposed to be examined. A became insolvent in 1866, and fled out of the jurisdiction. In August 1866, a person alleging himself to be a creditor of the insolvent's estate, obtained an order, under s. 36 of the Indian Insolvent Act (Stat. 11 and 12 Vic., Cap. 21), directing the examination of the insolvent's son and daughter, R and L with a view to the discovery of certain property of the insolvent which might be made available for the creditors. R and L subsequently obtained a rule nisi to aside the order. They filed affidavits alleging that the applicant was not a bonâ fide creditor of the estate; that although he had, no doubt, brought a claim upon the estate in his own name, he was merely a nominee of his brother A, who had supplied the purchase-money; and they alleged that this application was the result of a family quarrel; and was made merely from motives of ill-will. The Court held that the applicant was not a bonâ fide creditor of the estate. The order for examination was, however, supported by the Chartered Mercantile Bank which was admittedly a bonâ fide creditor: *Held*, that the applicant not being a creditor, and the Official Assignee not supporting the application, and the affidavits showing feeling and the bias, the Court would have hesitated to admit the application for the order, under s. 36, if it stood

**INSOLVENT ACT (11 and 12 Vict. c. 21) s. 36—concluded.**

alone. But the fact that the Chartered Mercantile Bank, an admittedly bonâ fide creditor, supported the application, altered the case, and the examination applied for ought to be allowed. Under the circumstances, however, the Court was of opinion that the applicant, who belonged to the insolvent's family, and was involved in a bitter family quarrel, should not conduct the examination; and ordered that the Chartered Mercantile Bank should apply to the Official Assignee to conduct the inquiry, and if he declined to do so, the Bank should do it. *IN RE ALLADINBHOY HUBIBBHOY. EX PARTE RAHMUBHOY HUBIBHOY.*

[I. L. R. 11 Bom. 61

—, s. 44.—*Omission to claim dividend—Expunging names of creditors from schedule—Official Assignee a trustee for creditors admitted in schedule.* The applicant was a creditor of the insolvents, who filed their schedule in Bombay in July 1868. The schedule contained the names of twenty-six creditors, twenty of whom were residents in Karachi and six in Multan. The debts amounted in the aggregate to Rs. 51,819-13-0, and were all admitted, some of them being for trifling sums. The applicant was the largest creditor on the schedule, his debt amounting to Rs. 27,500. The insolvents obtained their personal discharge in March 1869. Since the date of the insolvency one dividend had been declared, viz., a dividend of one per cent. in 1870. Only one creditor had applied for and received that dividend. On the 5th July 1886, the applicant for the first time applied for a dividend on his claim. He was then, after so long a time, unable to adduce any proof in his own possession, in support of his claim, but was ultimately allowed by the Official Assignee to prove his claim from the insolvent's books. Having thus proved his claim against the estate, the applicant obtained a rule on the 5th October 1887, calling on the other creditors of the insolvents to show cause why they should not come in and prove their claims, or, in default, why their names should not be expunged from the insolvent's schedule: *Held*, discharging the rule, that the Court had no power to expunge the name of a creditor where no fraud was proved or alleged in regard to their claims. The Official Assignee holds the assets of an insolvent as a trustee for all the creditors admitted on the insolvent's schedule, whether or not they have actually proved their claims. *IN RE DEWCURN JEWRAJ.*

[I. L. R. 12 Bom. 342

—, s. 58.—*Jurisdiction—Practice—Order to person to attend for examination.* The insolvent filed his petition in December 1865, and in January 1866, on his application for his personal discharge under s. 47, he was ordered to be imprisoned. He never applied for his discharge under s. 59 or 60 of the Indian Insolvent Act (Stat. 21 and 22 Vic., Cap. 21). When he had completed the term of his imprisonment he left Bombay, and went to Morar and ultimately settled at Aligarh in the North-West Provinces. In August 1886, the

**INSOLVENT ACT (11 and 12 Vict. c. 21)  
s 58—concluded.**

Official Assignee was informed that the insolvent was possessed of landed property at Aligarh and also considerable moveable property. On the 25th August 1886, the Official Assignee obtained a rule nisi calling on the insolvent to show cause why he should not hand over all this property to the Official Assignee for the payment of creditors. On the 10th August 1887, an order was made by the Insolvent Court under s. 58 of the Insolvent Act (Stat. 21 and 22 Vic., Cap. 21) directing the insolvent to appear before the Court on the 21st September 1887, to be examined touching his estate and effects and dealings and transactions. The insolvent appealed against this order and contended that the Court had no greater powers than those possessed by the High Court, and consequently could not order the attendance of any person resident more than two hundred miles from Bombay: *Held*, that the Insolvent Court had jurisdiction to make the order. *IN RE COWASJI OOKERJI.*

[I. L. R. 13 Bom. 114]

—, s 86

*See* LIMITATION ACT 1877, ART. 180.

[I. L. R. 11 Bom. 138]

[I. L. R. 13 Bom. 520]

**INSPECTION OF DOCUMENTS—CIVIL  
CASES.**

*Practice—Production of documents—Discovery—Civil Procedure Code, 1882, ss. 131, 136.* If a notice under s. 131 of the Civil Procedure Code be not answered as provided by s. 132, the party seeking the inspection of documents may apply for an order under s. 133, and his application must be supported by an affidavit. The Court has no jurisdiction to pass an order under s. 136, unless the provisions of s. 134 are strictly complied with. *DHAPI v. RAM PERSHAD,*

[I. L. R. 14 Cal. 768]

**INSPECTION OF DOCUMENTS—CRIMINAL  
CASES.**

—*Discovery—Power of Courts to order inspection—Criminal Procedure Code, 1882, ss. 94-99—Search Warrant, Form and validity of* ] A and T, the latter of whom was the book-keeper in the firm of J. M & Co., were charged, on the complaint of that firm, with cheating by having dishonestly induced them to deliver to A certain sums of money between 1882 and 1887, and with having abetted each other in the commission of the said offence. The offence charged was carried out by T omitting to make entries in the account books of sums due by A to the firm, and by making false entries therein of payments by A. Whilst the charge was pending the Presidency Magistrate, before whom the charge had been made, granted a search warrant in the following terms: "To Inspector M.—Whereas A and another have been charged before me with the commission or sus-

**INSPECTION OF DOCUMENTS—CRIMINAL  
CASES—continued.**

pected commission of the offence of cheating, and it has been made to appear to me that the production of khatta books for the year 1882 to 1887 is essential to the inquiry now being made, or about to be made, into the said offence or suspected offence, this is to authorize and require you to search for the said property in the house of A, No. 13, Pollock Street, and if found, to produce the same forthwith before this Court." In execution of this warrant certain books and papers found in the house of A were seized and taken possession of by the police, and of those books and papers the Magistrate, on the application of the prosecution, made an order for inspection. On a rule granted by the High Court to show cause why the order for inspection should not be set aside, it was contended that the search-warrant had been granted without proper judicial inquiry and upon insufficient materials; that it was bad on the face of it, as it did not "specify clearly," as directed in Form VIII, sch. V of the Criminal Procedure Code, whose khatta books were to be produced; and that there was nothing in the criminal law to enable a Court to make an order for inspection of documents by the prosecution in a criminal case: *Held per* NORRIS, J., that, assuming the contention as to the search-warrant arose on the rule as granted, the warrant must be looked at as a whole, and so looked at it sufficiently and clearly showed that it was the khatta books of A which were referred to as being essential to the inquiry, and the objects of the directed search nor was there anything to show that the warrant was issued otherwise than regularly and in due course. *Per* NORRIS, J.—Though the Courts in England have constantly refused to compel discovery in criminal cases, on the ground that no man should be compelled to produce evidence to criminate himself, the Legislature in this country has authorized the production, and under certain circumstances the compulsory production, of an accused person's documents in Court. When once an accused person's documents are in the possession of the Court by virtue of the due execution of a search-warrant issued under the provisions of s. 96 of the Criminal Procedure Code, there is no distinction between such documents and those of any description found upon his person at the time of his arrest, or on his premises at the time of, or subsequent to, his arrest, and it was never doubted that the latter may be used in evidence against him. If, as laid down in the case of *Dillon v. O'Brien*, 20 Irish L R 300 the right to seize and detain property of any description in the possession of a person lawfully arrested for treason, felony, or misdemeanor, rests "upon the interest which the State has in a person justly or reasonably believed to be guilty of a crime being brought to justice, and in a prosecution once commenced being determined in due course of law," a right to inspect such property must exist, as well as a right to seize and detain it, and the proper persons to inspect it are those conducting the prosecution. It would, moreover, be unrea-

# INSPECTION OF DOCUMENTS—CRIMINAL CASES—*concluded.*

sonable that the police or those conducting the prosecution should not have an opportunity of inspecting and examining documents. &c., found on a prisoner when arrested, or on his premises at the time of, or subsequent to, his arrest, before tendering them in evidence. *Per* GHOSE, J.—The contention as to the validity of the search-warrant did not arise on the rule as granted, but, *semble*, that the search-warrant was bad in law, no summons under s. 94 of the Criminal Procedure Code having been, in the first instance, issued for the production of the documents, and there being no evidence to show that they would not be produced on summons only; that although the warrant was not specific, still inasmuch as no objection was raised to the form of the warrant, before the Magistrate, and the accused had not been prejudiced by reason of the specification of the documents being somewhat indistinct, and it was clear what was really meant, the objection as to the form of the warrant should be disallowed. *Per* GHOSE, J.—There is no doubt that by the criminal law of this country, as laid down in the Criminal Procedure Codes since 1861, an accused person may be compelled to furnish evidence, the production of which might have the effect of criminating him. The Magistrate has to determine at the time when he makes an order under s. 94 of the Criminal Procedure Code, or issues a search-warrant under s. 96 whether the documents are necessary for the enquiry; but when they are brought into Court, the inspection should not rest with the Magistrate who does not prosecute and has no interest one way or the other in the result of the prosecution. It is reasonable that those who conduct the prosecution should have such inspection, for the production of such documents is for the purpose of using them in evidence, and this could not be done unless the prosecution had an opportunity of inspecting them. In the case of a search or seizure by the police under Chap XIV of the Criminal Procedure Code, the prosecutor would necessarily have an opportunity of looking at the documents and articles seized, and there is no reason why he should not have the same opportunity or privilege where, under the order of the Court, any particular document or other thing is seized under a search warrant, and brought up to the Court. Bearing in mind the purpose for which any document or thing is seized and brought before the Court, it seems that the Legislature, while providing for the seizure and production in Court of documents, &c., intended by implication that the prosecution should, under the order of the Court, have the power to inspect them, and determine whether they should go in as evidence: *Held, per curiam*—for the reasons above given—that the Magistrate had power to allow the inspection, but such inspection must be limited to the books named in the search-warrant. **IN THE MATTER OF THE PETITION OF AHMED MAHOMED. MAHOMED JACKARIAH & Co. v. AHMED MAHOMED.**

[I. L. R. 15 Calc. 109]

# INSTALMENTS, MONEY PAYABLE BY.

*See* CASES UNDER DECREE—CONSTRUCTION OF DECREE—INSTALMENTS.

*See* DEKKAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), s. 20.

[I. L. R. 12 Bom. 326]

*See* CASES UNDER LIMITATION ACT, 1877, ART. 75.

*See* LIMITATION ACT, 1877, ART. 178

[I. L. R. 15 Calc. 502]

# INSULT.

—*Penal Code, s. 504*—*Intent to provoke a breach of the peace.*] A abused B to such an extent as to reduce B to a state of abject terror: *Held*, that A having given to B such provocation as would under ordinary circumstances have caused a breach of the peace was guilty of an offence under s. 504 of the Penal Code. **QUEEN-EMPRESS v. JOGAYYA.**

[I. L. R. 10 Mad. 353]

# INSURANCE—MARINE INSURANCE.

—*Open cover—Proposal to issue policy—Acceptance—Refusal to issue policy in terms of open cover.*] An open cover to an amount stated for insurance on cargo to be shipped for a voyage in a ship (afterwards lost on that voyage) was given by the agent of the defendant company to the owner of the ship in order that he might give it to the charterer, and it was a proposal to insure. The owner transferred the open cover to the plaintiff, who, under charter with him, shipped rice and applied for policies to the amount stated in the open cover. The defendants' agent then refused to issue any policy on the rice so shipped: *Held*, that the open cover, as given to the owner, constituted a subsisting proposal to insure, and as soon as application for the policy under it was made to the defendants' agent by the shipper, to whom the open cover had been transferred, there was a binding contract that a policy should be issued in its terms. That the shipper asked for two policies did not, under the circumstances, prevent there being an acceptance, there having been a refusal to issue any policy. **BHUGWAN DAS v. NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA.**

[I. L. R. 16 Calc. 564]

[I. L. R. 16 I. A. 60]

# INTEREST.

*Col*

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*See* DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—BREACH OF CONTRACT.

[I. L. R. 12 Bom. 242]

*See* HINDU LAW—USURY.

[I. L. R. 14 Calc. 781]

—, **Payment of.**

*See* LIMITATION ACT 1877, s. 20.

[I. L. R. 11 Mad. 218]

(1) **MISCELLANEOUS CASES.**

(a) **ARREARS OF RENT.**

1.—*Right to interest.*] In March 1884 the rent payable by an occupancy-tenant was fixed by the settlement-officer under s. 72 of the N.-W. P. Land Revenue Act XIX of 1873. In 1885 the landholder brought a suit to recover from the tenant arrears of rent at the rate so fixed for a period antecedent to the settlement-officer's order as well as for the period subsequent thereto. The lower Appellate Court dismissed the claim for rent prior to 1st July 1884, and decreed such as was due subsequently to that date, but without interest: *Held* upholding the decision as to the rent, that the plaintiff was entitled to interest at one per cent on the sum decreed from the date of the institution of the suit. **RADHA PRASAD SINGH v. JUGAL DAS.**

[I. L. R. 9 All 185]

(2) **OMISSION TO STIPULATE FOR, OR STIPULATED TIME EXPIRED.**

(a) **CONTRACTS.**

2.—*Bond—Interest post diem—Non-payment of principal and interest at agreed date.*] Interest as interest cannot be allowed on money lent on a hypothecation bond, or on a deed of conditional sale, unless it appears from the bond or deed that it was intended by the parties that interest should be payable, and then only for the period during which it so appears that it was so intended. Where no such intention appears, interest can be given only by way of damages. *Cook v. Fowler*, L. R. 7 H. L. 27, referred to. **MANSAB ALI v. GULAB CHAND.**

[I. L. R. 10 All 85]

3.—*Civil Procedure Code, s. 209—Stipulated interest—Interest after filing plaint.*] A creditor having stipulated for interest at a certain rate is entitled to a decree for interest at that rate up to the date of decree. *Mangniram Marwari v. Dhowtal Roy* (I. L. R. 12 Calc. 569), dissented from. **RAMACHANDRA v. DEVU**

[I. L. R. 12 Mad. 485]

4.—*Bond—Interest post diem—Damages for non-payment on due date.*] A contract to pay interest *post diem* on a mortgage ought not to be

**INTEREST—continued**

(2) **OMISSION TO STIPULATE FOR, OR STIPULATED TIME EXPIRED—concluded**

(a) **CONTRACTS—concluded.**

implied when the parties to the written contract have not expressed therein any such intention. This is particularly the case where the written contract does in clear terms provide for the payment of interest and compound interest during the term of the mortgage. *Narain Lal v. Chajmal Das*, unreported, followed. *Chhab Nath v. Kamta Prasad*, I. L. R. 7 All. 333; and *Baldeo Pandey v. Gokal Rai*, I. L. R. 1 All. 603, referred to, and *Cook v. Fowler*, L. R. 7 H. L. 27, distinguished. **BHAGWANT SINGH v. DARYAO SINGH.**

[I. L. R. 11 All 416]

(3) **STIPULATIONS AMOUNTING TO PENALTIES OR OTHERWISE**

5.—*Penal Clause in contract—Enhanced rate of interest on default of payment of principal on due date—Penalty—Contract Act (IX of 1872, s. 74—Act XXVIII of 1855, s. 2).*] In a suit on a bond, wherein it was stipulated that the loan was to be repaid on a certain date and to bear interest at the rate of 2 per cent. per mensem, but that if the loan were not repaid on the date named, the principal was to bear interest at the rate of 4 per cent. per mensem from the date of the loan. *Held*, on the authority of the decision in *Balkishen Das v. Run Bahadur Singh*, I. L. R. 10 Calc. 305, that the stipulation as to the payment of interest at the higher rate was not in the nature of a penalty, and that the plaintiff was entitled to a decree for the amount due on the bond with interest at the increased rate from the date of the bond; and that, whether the interest at the increased rate, in case of non-payment on the date fixed in the contract, was payable from the commencement of the loan or from the date fixed for the repayment of the loan, s. 74 of the Contract Act was not applicable. *Mackintosh v. Crow*, I. L. R. 9 Calc 689, upon this point dissented from. The decision in the case of *Balkishen Das v. Run Bahadur Singh*, I. L. R. 10 Calc 395 overrules the decision in the case of *Mathura Persad Singh v. Luggun Koor*, I. L. R. 9 Calc. 615, and all similar cases cited in *Mackintosh v. Crow*, which held that the stipulation for the payment of a higher rate of interest in the event of the non-payment of the debt on the date fixed in the contract, from the commencement of the loan, is in the nature of a penalty. **BAIJ NATH SINGH v. SHAH ALI HOSAIN.**

[I. L. R. 14 Calc 248]

6.—*Contract Act, s. 74—Penalty—Enhanced rate of interest and compound interest.*] A mortgagor agreed that if any instalment of interest accruing due on the mortgage was not paid, he should pay compound interest and discharge the principal in one year, and further that if the principal was not so discharged, he should pay

## INTEREST—continued.

## (3) STIPULATIONS AMOUNTING TO PENALTIES OR OTHERWISE—continued.

interest at an enhanced rate: *Held*, that the mortgagee could enforce the agreement. *APPA RAU v. SURYANARAYANA*.

[I. L. R. 10 Mad. 203]

7.—“*Dharta*”—*Illiterate agriculturist—Unconscionable bargain*] The High Court as a Court of Equity possesses the power exercised by the Court of Chancery of granting relief in cases of such unconscionable or grossly unequal and oppressive bargains as no man of ordinary prudence would enter into, and which, from their nature and the relative positions of the parties, raise a presumption of fraud or undue influence. The principles upon which such relief is granted apply to contracts in which exceedingly onerous conditions are imposed by money-lenders upon poor and ignorant persons in rural districts. The exercise of such power has not been affected by the repeal of the usury laws. *Chesterfield v. Janssen*, 2 Ves. 155; *O'Rourke v. Bolingbroke*, L. R. 2 App. Cas. 814; *Earl of Aylesford v. Morris*, L. R. 8 Ch. Ap. 484; *Nevill v. Snelling*, L. R. 15 Ch. D. 679; and *Beynon v. Cook*, L. R. 10 Ch. Ap. 389, referred to. An illiterate *kurmi* in the position of a peasant proprietor executed a mortgage-deed in favour of a professional money-lender to whom he owed Rs. 97, by which he agreed to pay interest on that sum at the rate of 24 per cent. per annum at compound interest. He further agreed that “*dharta*,” or a yearly fine, at the rate of one anna per rupee, should be allowed to the mortgagee, to be calculated by yearly rests. It was also provided that the interest should be paid from the profits of certain *malikana* land of the mortgagor, and that if the interest were not paid for two years, the mortgagee should be put in possession of this land. As security for the debt, a six pies *zemindari* share was mortgaged for a term of eleven years. The effect of the stipulation as to “*dharta*” was that one anna per rupee would be added at the end of every year, not only to the principal mortgage-money, but also to the interest due, and the total would be again regarded as the principal sum for the ensuing year. Ten years after the date of the mortgage, the mortgagor brought a suit for redemption on payment of only Rs. 97 or such sum as the Court might determine as due to the mortgagee. At that time the accounts made up by the mortgagee showed that the debt of Rs. 97, with compound interest, had swollen to Rs. 873, of which the “*dharta*” alone amounted to Rs. 211: *Held*, that the stipulation in the deed as to “*dharta*” was not of the kind referred to in s. 74 of the Contract Act (IX of 1872), and that there was no question of penalty, but that, looking to the relative positions of the parties, and the unconscionable and oppressive nature of the stipulation, the benefit thereof should be disallowed to the mortgagee, and the mortgagor permitted to redeem on payment of the mortgage-money and interest, no appeal having been pre-

W., D.

## INTEREST—continued

## (3) STIPULATIONS AMOUNTING TO PENALTIES OR OTHERWISE—continued.

ferred by him from the decree of the first Court making redemption subject to the payment of interest. *LALLI v. RAM PRASAD*

[I. L. R. 9 All. 74]

8.—*Unconscionable bargain—Bond—Compound interest*] In a suit for the recovery of a principal sum of Rs. 99 due upon a bond, with compound interest at two per cent. per mensem, it was found that advantage was taken by the plaintiff of the fact that the defendant was being pressed in the *tahsili* for immediate payment of revenue due, to induce him to execute the bond, charging compound interest at the above-mentioned rate, notwithstanding that ample security was given by mortgage of landed property. It was also found that although, under the terms of the bond, the plaintiff had power to enforce the same at any time by bringing to sale the mortgaged property, he had wilfully allowed the debt to remain unsatisfied, in order that compound interest at a high rate might accumulate: *Held* that the bargain was a hard and unconscionable one, which the Court had undoubted power to refuse to enforce, and which, under all the circumstances, it would be unreasonable and inequitable for a Court of justice to give full effect to; and that, under the circumstances, compound interest should not be allowed. *Kamini Sundari Chaudhrani v. Kali Prosunno Ghose*, I L. R. 12 Cal. 225; *Beynon v. Cook*, L. R. 10 Ch. Ap. 389, and *Lalli v. Ram Prasad*, I. L. R. 9 All. 74, referred to. The Court decreed the principal sum of Rs. 99, with simple interest at 24 per cent. per annum, up to the date of institution of the suit. *MADHO SINGH v. KASHI RAM*.

[I. L. R. 9 All. 228]

9.—*Contract Act, s. 74—Bond—Breach of contract—Penalty*.] A bond by which immoveable property was hypothecated provided for interest at 13½ per cent and contained a condition that if the principal with interest were not paid within one year, 27 per cent. should be paid as interest as from the date of the bond: *Held*, that the question to be determined with reference to this condition was whether the parties intended to contract that, on failure by the mortgagor to pay within the stipulated time, 27 per cent. should be payable *quā* interest from the date of the bond, or whether they intended that the condition should be regarded merely as providing for a penalty, leaving the amount of compensation for non-payment at the stipulated time to be determined, in case of dispute, by the Court: *Held* that the condition would not in itself be an unreasonable one under the circumstances, that the parties contracted that the 27 per cent. should be payable *quā* interest, and that interest at that rate must therefore be allowed. *Wallis v. Smith*, L. R. 21 Ch. D. 243, referred to. *BANWARI DAS v. MUHAMMAD MASHIAT*.

[I. L. R. 9 All. 690]



**INTEREST—concluded.****(3) STIPULATIONS AMOUNTING TO PENALTIES OR OTHERWISE—concluded.**

10.—*Contract Act, s. 74—Penalty—Payment of higher rate of interest from date of bond on breach.* Where a mortgage-deed provided for repayment of the debt in four instalments with interest at 6 per cent. and in default of payment of any instalment on the due date, for interest at 12 per cent from the date of the bond. *Held*, following *Balkishen Das v Run Bahadur Singh* (I. L. R. 10 Calc. 305) that the stipulation being reasonable, the plaintiff was entitled on default to recover the higher rate of interest from the date of the bond. *BASAVAYYA v. SUBBARAZU*

[I. L. R. 11 Mad. 294]

11.—*Bond—Stipulation to pay double the amount of debt on default of payment of any instalment.* A stipulation by which, on default or payment of one instalment, double the entire amount of the debt due under an instalment bond was to become at once payable, *held* to be in the nature of a penalty. *JOSHI KALIDAS v. DADA ABHESANG.*

[I. L. R. 12 Bom. 555]

12.—*Contract Act, ss 63, 74—Penalty—Stipulation for enhanced interest—Interest on decree amount up to date of payment—Remission of part performance of contract—Sum accepted on account of interest.* A hypothecation-bond provided for payment of interest on the principal sum at the rate of 9 per cent., and contained a further provision, that on default being made in payment of interest accruing due, interest should be paid from the date of the bond at the rate of 15 per cent. Default was made when the first and second payment of interest became due. After the second payment had become due, the creditor accepted payment on account of interest of a sum a little more than the arrears calculated at 9 per cent. In a suit by the creditor.—*Held*, (1) that the plaintiff had not waived any right under the bond by accepting the payment on account of interest; (2) that the provision for enhanced interest calculated from the date of the bond on default, was of the nature of a penalty under s. 74 of the Contract Act; (3) that the plaintiff was entitled to interest on decree amount from date of decree to date of payment at 6 per cent. *Balkishen Das v Run Bahadur Singh* (I. L. R. 10 Calc. 305) discussed and distinguished; *Bay Nath Sing v. Shah Ali Hosain* (I. L. R. 14 Calc. 248), dissented from. *NANJAPPA v. NANJAPPA.*

[I. L. R. 12 Mad. 161]

**INTERROGATORIES.**

*See PRACTICE—CIVIL CASES—INTERROGATORIES.*

[I. L. R. 14 Calc. 703]

**IRREGULARITY.**

*See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY.*

**IRREGULARITY IN CIVIL CASE.**

*See EXECUTION OF DECREE—TRANSFER OF DECREES FOR EXECUTION AND POWERS OF COURT.*

[I. L. R. 11 Bom 153]

*See MADRAS BOUNDARY ACT, ss 21, 25, 28.*

[I. L. R. 12 Mad. 1]

*See CASES UNDER SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622.*

**IRREGULARITY IN CRIMINAL CASE.**

*See CRIMINAL PROCEEDINGS.*

[I. L. R. 14 Calc. 128, 358, 395]

*See DISCHARGE OF ACCUSED.*

[I. L. R. 12 Mad. 35]

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*See RELIEF.*

[I. L. R. 10 Mad. 375]

**(1) FRAMING AND SETTLEMENT OF ISSUES.**

1.—*Inconsistent issues—Undue influence—Trial of issues.* The execution of a *hibanama* having been denied by the plaintiff, a Mahomedan widow and *purda nashin*, in a suit brought by her to have it set aside as fabricated, she also alleged that undue influence had been exercised upon her. It was decided upon the evidence that the instrument was genuine, having been executed by her of her own free will. The above questions being inconsistent with one another, the latter should not have been admitted to form part of an issue together with the former. On an issue of undue influence, rightly raised, a Court should consider whether the gift in question (a) is one which a right-minded person might be expected to make; (b) is or is not an improvident act on the donor's part; (c) is such as to have required advice, if not obtained by the donor; and (d) whether the intention to make the gift originated with the donor, the principles being always the same, although the circumstances may differ. *MAHOMED BUKSH KHAN v HOSSEIN BIBI.*

[I. L. R. 15 Calc. 684]

[L. R. 15 I. A. 81]

**(2) FRESH OR ADDITIONAL ISSUES.**

2.—*Issue raised by Court which was not raised by parties.* The plaintiffs in a suit denounced in the plaint their two signatures to a sale-deed as forgeries, and never alleged that they witnessed it under pressure. The Court of First Instance found them to be genuine, and the lower Appellate Court, while agreeing with the Court below in its



## ISSUES—concluded.

## (2) FRESH OR ADDITIONAL ISSUES—concl'd.

findings upon the question of the genuineness of the signatures, observed that they were obtained under pressure, and so reversed the decree of the Court below. On second appeal to the High Court; *Held*, that Courts are not to raise an important and serious issue in a case for the parties when they have not raised it themselves by their own pleadings in the cause. *WALIULLAH KHAN v. MUHAMMAD ISRARULLAH KHAN*.

[I. L. R. 10 All. 627]

3—*Civil Procedure Code*, 1882 s. 149—*Court's authority to frame new issue:—Amendment of plaint* [A Court is not authorized by s. 149 of the Code of Civil Procedure (Act XIV of 1882, to frame new issues which have the effect of altering the nature of the suit. A Court's power of raising additional issues is co-extensive with its power of amending plaints, and is subject to the same restrictions. The plaintiff originally sued the defendant as a trespasser, claiming damages for wrongful occupation and for injury done to the land in dispute. Some time after the issues had been framed, the plaintiff applied for an amendment of the plaint, and sought to recover rent for the land in suit, on the basis of a subsisting tenancy. The Subordinate Judge, without making the amendment, framed two additional issues, *viz.*, (1) whether the suit was based on the relation of landlord and tenant, and (2) whether the *thikans* in dispute were let to the defendant, and what rent the plaintiff was entitled to recover in respect of the same. The Subordinate Judge found on these issues that the tenancy was still subsisting, and passed a decree for the rent claimed: *Held*, that the Subordinate Judge had no authority, under s. 149 of the Code of Civil Procedure (Act XIV of 1882), to frame the new issues. *NARAYAN GANESH v. HARI GANESH*.

[I. L. R. 13 Bom. 664]

## JETTISON.

See SHIPPING LAW.

[E. R. 16 I. A. 240]

[I. L. R. 17 Calc. 362]

## JEWS.

See RELIGIOUS COMMUNITY.

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## JHANSI AND MORAR ACT (XVII OF 1886.)

See HIGH COURT, JURISDICTION OF—HIGH COURT, N.-W. P.

[I. L. R. 11 All. 490]

—, s. 8.

See RES JUDICATA—CAUSE OF ACTION.

[I. L. R. 10 All. 517]

## JOINDER OF CAUSES OF ACTION.

*Civil Procedure Code* 1882, s. 41—*Suit for moveable and immoveable property* [There is nothing irregular in seeking to recover moveable and immoveable property in the same suit if the cause of action is the same in respect of both. *GIYANA SAMBANDHA PANDARA SANNADHI v. KANDASAMI TAMBIRAN*

[I. L. R. 10 Mad. 375]

## JOINDER OF CHARGES.

1—*Charge of three offences of the same kind—(Criminal Procedure Code (Act X of 1882), s. 234.*] An accused was charged with criminal breach of trust as a public servant in respect of three separate sums of money deposited in the Savings Bank under three separate accounts. The third of these charges related to the misappropriation of Rs. 195 composed of two separate sums of Rs. 150 and Rs. 45 alleged to have been misappropriated in the 16th and 25th November respectively. These sums the accused in his statement at the trial stated he had paid over on those dates to the depositor, and produced an account book showing entries of such payments on those dates. This statement was proved to be untrue, and the accused was convicted. On an application to quash the conviction on the ground that the trial had been held in contravention of s. 234 of the Code of Criminal Procedure: *Held*, that the entries in the account books did not clearly show that the misappropriation of the sum of Rs 195 took place on two dates, or consisted of two transactions, the entries having been made for the purpose of concealing the criminal breach of trust; and that under the circumstances the criminal breach of trust with regard to the Rs. 195 was really one offence and could be included in one charge. *IN THE MATTER OF LUOHMINARAIN*.

[I. L. R. 14 Calc. 128]

2—*Criminal Procedure Code (Act X of 1882), ss. 233, 234, 537—Separate charges for distinct offences.*] Five persons were charged with having committed the offence of rioting on the 5th December; four out of those persons, and one *F* were charged with having committed the offence of criminal trespass on the 9th December. These two cases were taken up and tried together in one trial, and were decided by one judgment. *Held*, that the trial was illegal and the defect was not cured by s. 537 of the Criminal Procedure Code. *IN THE MATTER OF THE PETITION OF CHANDI SINGH. QUEEN-EMPRESS v. CHANDI SINGH*.

[I. L. R. 14 Calc. 395]

3.—*Criminal Procedure Code*, ss. 284 and 537—*Penal Code*, ss. 372, 373—*Misjoinder of charges—Immaterial irregularity.*] A woman, being a member of the dancing girl caste, obtained possession of a minor girl and employed her for the purpose of prostitution: she subsequently obtained in adoption another minor girl from her parents, who belonged to the same caste. She and the parents of the second girl were charged together under ss. 372, 373 of the Penal Code

**JOINDER OF CHARGES—concluded.**

The charges related to both girls *Held*, that the two charges should not have been tried together, but the irregularity committed in so trying them had caused no failure of justice. *QUEEN-EMPRESS v. RAMANNA*.

[I. L. R. 12 Mad. 273]

**JOINT TENANCY.**

See *HINDU LAW—WILL—CONSTRUCTION OF WILLS—SPECIAL CASES OF CONSTRUCTION—JOINT TENANCY*.

[I. L. R. 11 Bom. 69, 573]

[I. L. R. 11 Mad. 258]

**JUDGE.**

—, Special Judge appointed under Act XVII of 1879.

See *DEKKAN AGRICULTURISTS RELIEF ACT*, ss 53, 54.

[I. L. R. 11 Bom. 684]

**JUDGMENT.**

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**(1) CIVIL CASES.****(a) FORM AND CONTENTS OF JUDGMENT.**

1.—*Applicability of provisions as to first appeal—Remand—Judgment of first Appellate Court—Civil Procedure Code, ss. 574, 578.* The judgment of a lower Appellate Court, after setting forth the claim, the defence, the nature of the decree of the first Court, and the effect of the pleas in appeal, concluded, with general observations, as follows:—"The point to be determined on appeal is whether or not the decision is consistent with the merits of the case. The Court having considered the evidence on the record and the judgment of the Munsif, which is explicit enough, concurs with the lower Court ..... The finding arrived at by the Munsif, that the plaintiff's claim is established, is correct and consistent with the evidence. The pleas urged in appeal are therefore undeserving of consideration." *Held* that this was in law no judgment at all, inasmuch as it did not satisfy the requirements of s. 574 of the Civil Procedure Code, and that the decree of the lower Appellate Court must therefore be set aside, and the record returned to that Court for a proper adjudication, in accordance with the provisions of that section. *Mahadeo Prasad v. Sarju Prasad*, Weekly Notes. All. 1886, p. 171, referred to. Observations by MAHMOOD, J., upon the distinction between the duties of the Courts of first appeal and those of the Courts of second appeal in connection with the provisions of ss. 574 and 578 of the Civil Procedure Code, and with the remand of cases for trial *de novo*. *Ram Narain v. Bhawanidin*, I. L. R. 9 All. 29 note and *Sheoambar Singh v. Lalbu Singh*, I. L. R. 9 All. 30 note, referred to. *SOHAWAN v. BABU NAND*.

9 All. 26

**JUDGMENT—continued.****(1) CIVIL CASES—concluded.****(a) FORM AND CONTENTS OF JUDGMENT—concluded.**

2.—*Judgment of High Court—Civil Procedure Code s. 574, 633—"Substantial question of law"—Contents of judgment—Rules made by High Court under s. 633 for recording judgments* The intention of the Legislature as expressed in s. 633 of the Civil Procedure Code was that the High Court might frame rules as to how its judgments should be given whether orally or in writing, or according to any mode which might appeal to it best in the interests of justice. The section does not merely give the High Court power to direct that judgment shall be recorded in a particular book or with a particular seal. Rule 9 of the rules made under s. 633, in March, 1885, is therefore not *ultra vires* of the Court, and it modifies the provisions of s. 574 in their application to judgments of the High Court. With reference to the terms of Rule 9, it is not necessary, in a case where the High Court substantially adopts the whole judgment of the Court below, to go through the formality of re-stating the points at issue, the decision upon each point, and the reasons for the decision. *Per* EDGE, C. J.—Apart from Rule 9, it never was intended that s. 574 of the Code should apply to cases where the High Court having heard the judgment of the Court below and arguments thereon, comes to the conclusion that both the judgment and the reasons which it gives are completely satisfactory, and such as the High Court itself would have given. Assuming the provisions of s. 574 to be applicable, a judgment of the High Court stating merely that the appeal must be dismissed with costs and the judgment of the first Court affirmed, and that it was unnecessary to say more than that the Court agreed with the Judge's reasons, is a substantial compliance with those provisions. The judgment of the High Court in a first appeal was as follows:—"This appeal must, in my opinion, be dismissed with costs, and the judgment of the first Court affirmed; and I do not think it necessary to say more than that we agree with the Judge's reasons." The appellant applied for leave to appeal to Her Majesty in Council on the ground that the requirements of s. 574 of the Civil Procedure Code had not been complied with. *Held* by the Full Bench that the objection involved no substantial question of law, and that the application for leave to appeal must therefore be rejected. *SUNDAR BIBI v. BISHESHARNATH*.

[I. L. R. 9 All. 93]

**(2) CRIMINAL CASES.**

3.—*Civil Suit—Criminal Procedure Code (Act X of 1882), s. 370 (cl. v.)—Summary Procedure—Conviction, Reasons for.* The meaning of s. 370 (cl. v.) of Act X of 1882 is that, where the offence found is sufficiently grave to involve a fine of Rs 200 or imprisonment as the substantive sentence, the Magistrate is bound to record his reasons for the conviction, so as to enable the party to bring the matter up to the High Court, but in petty cases

**JUDGMENT—concluded****(2) CRIMINAL CASES—concluded.**

which can be met by a fine of a few rupees, the decision of the Magistrate may be recorded shortly. A sentence of a fine of Rs. 10, and imprisonment in default of payment of the fine, is not a sentence of imprisonment within the meaning of the section. *MOTERAM v BELASEERAM*.

[I. L. R. 14 Calc. 174]

**JUDGMENT-DEBTOR.**

See *BENGAL TENANCY ACT*, s. 174.

[I. L. R. 15 Calc. 482]

See *LIMITATION ACT 1877*, ART. 11.

[I. L. R. 15 Calc. 674]

See *CASES UNDER PARTIES—SUBSTITUTION OF PARTIES—JUDGMENT-DEBTORS.*

See *RIGHT OF SUIT—EXECUTION OF DECREE.*

[I. L. R. 15 Calc. 674]

**“JUDICIAL OFFICER.”**

See *BENGAL TENANCY ACT*, s. 153.

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**JUDICIAL NOTICE.**

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**JUDICIAL PROCEEDING**

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[I. L. R. 16 Calc. 121]

**JUNGLEBURI TENURE.**

See *HINDU LAW—WIDOW—POWER OF WIDOW—POWER OF DISPOSITION OR ALIENATION.*

[I. L. R. 14 Calc. 323]

See *RIGHT OF OCCUPANCY—PERSONS BY WHOM RIGHT MAY BE ACQUIRED.*

[I. L. R. 14 Calc. 323]

**JURISDICTION.**

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[I. L. R. 16 Calc. 457, 465]

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[I. L. R. 13 Bom. 114]

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[I. L. R. 11 Mad. 498]

See *WITHDRAWAL OF SUIT.*

[I. L. R. 12 Mad. 380]

**—, Presumption of—**

See *SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE*, s. 622.

[I. L. R. 10 All. 119]

**(1) QUESTION OF JURISDICTION.****(a) GENERALLY.**

1.—*Questions of jurisdiction how governed—Statements in plaint and defence—Valuation of suit.* Questions of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters to be governed by the statements contained in the plaint in the cause. The valuation of the claim as preferred by the plaintiff, and not as set up by the plea in defence, would govern the action, not only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigation. *JAG LAL v. HAR NARAIN SINGH*.

[I. L. R. 10 All. 524]

**(b) WHEN IT MAY BE RAISED.**

2.—*Objection to jurisdiction in Appellate Court* [An objection to the jurisdiction, the validity of which is patent on the face of the proceedings can be taken at any stage of the proceedings. *SIDHESHWAR PANDIT v. HARIHAR PANDIT*]

[I. L. R. 12 Bom. 155]

3.—*Objection to order made without jurisdiction—Objection on appeal from subsequent order.* [A Court has no jurisdiction, reading s. 372 of the Civil Procedure Code with s. 647, to bring in a party after decree and make him a judgment-debtor for the purposes of execution. *Gocool Chunder Gossamee v. The Administrator-General of Bengal*, I L. R. 5 Calc. 726, and *Attorney-General v. Corporation of Birmingham*, L. R. 15 Ch. D. 423, referred to. Where a Court had so acted, by an order which might have been, but was not, made the subject of appeal under s. 588 of the Code: *Held*, that as there was no jurisdiction to make such an order, the party aggrieved was competent to object thereto on appeal from a subsequent order enforcing execution against him as a judgment-debtor. *GOODALL v. MUSSOORIE BANK*.

[I. L. R. 10 All. 97]

## JURISDICTION—continued.

## (1) QUESTION OF JURISDICTION—continued.

## (b) WHEN IT MAY BE RAISED—concluded.

4.—*Objection that Certificate had not been obtained for suit—Suit under Dekkan Agriculturists Relief Act.* Held, that an objection to a suit under the Dekkan Agriculturists Relief Act on the ground that a proper certificate had not been obtained, could be taken for the first time in second appeal, as it was an objection affecting the jurisdiction of the Courts below. *NYAMTULA v. NANA VALAD FARIDSHEA.*

[I. L. R. 13 Bom. 424]

## (c) CONSENT OF PARTIES AND WAIVER OF JURISDICTION.

5.—*Suit brought not in competent Court—Case transferred by consent to competent Court.* When a suit has been tried by a Court having no jurisdiction over the matter, the parties cannot by their mutual consent, convert the proceedings into a judicial process: although when the merits have been submitted to a Court it may result that having themselves constituted it their arbiter the parties may be bound by its decision. On the other hand, in a suit tried by a competent Court, the parties having without objection joined issue and gone to trial upon the merits cannot subsequently dispute the jurisdiction on the ground of irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. A suit having been instituted in a Court not of competent jurisdiction was transferred with the consent of parties to a Court which was competent; but the defence of jurisdiction was set up before the issues were fixed, and was afterwards insisted on throughout. Held, that in the single fact that the defendant had personally concurred in the transfer, there had been no waiver of the right to maintain this defence, and that the suit must be dismissed on the ground that it was not competently brought. *LEDGARD v. BULL.*

[I. L. R. 9 All. 191]

[L. R. 13 I. A. 134]

6.—*Exercise of jurisdiction by Court wrongly, owing to negligence of party.* Where jurisdiction over the subject-matter exists, requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way cannot afterwards challenge the legality of the proceedings due to his own invitation or negligence. But if there is no jurisdiction over the subject-matter, the acquiescence of the parties concerned, cannot create it. *VISHNU SAKHARAM NAGARKAR v. KRISHNARAO MALHAR.*

[I. L. R. 11 Bom. 153]

NARO HARI v. ANPURNABAI.

[I. L. R. 11 Bom. 160 note]

7.—*Bengal Civil Courts Act VI of 1871, s. 17—Close holiday—Proceeding on civil side of District Court during vacation—Irregularity.* S. 17 of

## JURISDICTION—continued.

## (1) QUESTION OF JURISDICTION—continued.

## (c) CONSENT OF PARTIES AND WAIVER OF JURISDICTION—continued.

the Bengal Civil Courts Act (VI of 1871) was framed in the interests of the Judges and officials of the Courts, and probably also in the interests of the pleaders, suitors, and witnesses, whose religious observances might interfere with their attendance in Court on particular days. On a close holiday, a Judge might properly decline to proceed with any inquiry, trial, or other matter on the civil side of his Court; and any party to any judicial proceeding could successfully object to any such inquiry being proceeded with, and, in the event of any such inquiry having been proceeded with in his absence and without his consent, would be entitled to have the proceeding set aside as irregular, probably in any event, and certainly if his interests had been prejudiced by such irregularity. But, at the furthest, the entertaining and deciding upon a matter within the ordinary jurisdiction of the Court on a close holiday, is an irregularity the right to which can be waived by the conduct of the parties; and a party who, on a close holiday, does attend, and without protest takes part in a judicial proceeding, cannot afterwards successfully dispute the jurisdiction of the Judge to hear and determine such matter. *Bennett v. Potter* 2 C. & J 622; *Andrews v. Elliott*, 5 E. & B. 502; 6 E. & B. 338, and *Bisram Maton v. Sahib-un-nissa*, I. L. R. 3 All. 333, referred to. *RAM DAS CHAKRABATI v. OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY.*

[I. L. R. 9 All. 366]

8.—*Objection to jurisdiction after consent.* In a cause which a Judge is competent to try, if the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground of irregularities, which, if objected to at the proper time, might have led to the dismissal of the suit. But when the Judge has no jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process. *Ledgard v. Bull*, L. R. 13 I. A. 134, referred to and followed. *MINAKSHI NAIDU v. SUBRAMANYA SASTRI.*

[I. L. R. 11 Mad. 26]

[L. R. 14 I. A. 160]

9.—*Defendant not taking plea of jurisdiction, effect of.* Where a Court has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent give it jurisdiction. A suit of a nature cognizable by a Court of Small Causes alone was brought in the Court of a Joint Subordinate Judge. The defendant objected to the jurisdiction of the Court, but his objection was overruled. The suit was, however, dismissed on the merits. On appeal before the District Judge, the defendant did not renew the plea of want of jurisdiction. The District

**JURISDICTION—continued.****(1) QUESTION OF JURISDICTION—concluded.****(c) CONSENT OF PARTIES AND WAIVER OF JURISDICTION—concluded.**

Judge reversed the decree of the Subordinate Judge and awarded the plaintiff's claim. The defendant thereupon applied to the High Court under s. 622 of the Code of Civil Procedure (Act XIV of 1882): *Held*, that both the lower Courts had no jurisdiction to deal with the suit. The mere circumstance that the defendant did not raise the plea of want of jurisdiction in the Appellate Court did not clothe that Court with a jurisdiction not given to it by law. **LADLI BEGAM v. RAJE RABIA.** \*

[I L. R. 13 Bom. 650]

**(2) CAUSES OF JURISDICTION.****(a) CARRYING ON BUSINESS OR WORKING FOR GAIN.**

**10.—Letters Patent, cl. 12—Secretary of State for India in Council** ] The words "cause of action" in s. 12 of the Letters Patent, 1865, mean all those things necessary to give a right of action; and in a suit for breach of contract, where leave has not been obtained to sue under that section, it must be established that the contract as well as the breach have taken place within the local limits of the Court. The work carried on by the Government of India in governing the country, in salt, opium, &c., although carried on by Government officers in charge of the several departments of Government, is not, properly speaking, business carried on by Government, but work carried on for the benefit of the Indian Exchequer. The words of s. 12 "carry on business or personally work for gain," are, however, inapplicable to the Secretary of State for India in Council. **DOXA NARAIN TEWARY v. SECRETARY OF STATE FOR INDIA.**

[I L. R. 14 Calc. 256]

**11.—High Court of Bombay, jurisdiction of—Letters Patent High Court 1865, cl. 12—Persons not British subjects resident outside the jurisdiction, but carrying on business by an agent within the jurisdiction—British subjects resident outside the jurisdiction, but carrying on business by an agent within the jurisdiction—Cause of action arising wholly outside the jurisdiction** ] In cl. 12 of the Letters Patent, 1865, of the Bombay High Court the words "if the defendant...shall...carry on business" must be interpreted to mean "if the defendant being a British subject...shall...carry on business," and where the liability of a foreigner is in question, the "carrying on business" must include actual residence. The scope and object of cl. 12 of the Letters Patent was to define the jurisdiction of the Municipal Court of India. It must, therefore be read by the light of the general principles of municipal jurisdiction, save so far as it expressly derogates from their general principles. Every statute is to be interpreted and applied so far its language admits,

**JURISDICTION—continued.****(2) CAUSES OF JURISDICTION—continued.****(a) CARRYING ON BUSINESS OR WORKING FOR GAIN—concluded.**

so as not to be inconsistent with the comity of nations or with the established rules of international law. All legislation is, *prima facie*, territorial. It binds all subjects of the Crown, but only such subjects of other countries as have brought themselves within the allegiance of the Sovereign. A person not a British subject resident out of the jurisdiction, but carrying on a branch business in Bombay through an agent, is not liable to be sued in the High Court of Bombay where the cause of action has arisen wholly outside the jurisdiction. *Semble*: The High Court has jurisdiction in such cases where the defendant is a British subject. See **Chinnammal v. Tulukanammal**, 3 Mad. 146. **KESOWJI DAMODAR JAIRAM v. KHMJI JAIRAM.**

[I. L. R. 12 Bom. 507]

**(b) CAUSE OF ACTION.**

**12.—Agreement at Delhi to pay money in Bombay—Hundi—Acceptance, what amounts to—Communication of acceptance to holder—Communication of acceptance to drawer—Omission by drawee to notify non-acceptance—Absence of entry of acceptance in drawee's book.** ] The plaintiffs, who traded in Bombay, had dealings with certain firms at Delhi. In December, 1884, it was agreed at Delhi between the plaintiffs and the defendant that, in consideration of the plaintiffs accepting a composition of eight annas in the rupee upon the debt due to them by a certain insolvent firm, which amounted to Rs. 11,101-2, the defendant would pay the amount of such composition to the plaintiffs. The plaintiffs in this suit claimed Rs. 5,530-9, being the amount of such composition. The defendant denied the jurisdiction of the Court, contending that no part of the cause of action had arisen within its jurisdiction. He alleged that the terms of the agreement were contained in a composition-deed which was executed at Delhi, &c. At the hearing, the Court found that, subsequently to the execution of the composition-deed the plaintiffs' *munim*, who was anxious to return to Bombay, had a conversation with the defendant at Delhi with reference to the plaintiffs' claim upon the insolvent firm, at which the defendant proposed that he should give a letter to the plaintiffs' said *munim* with reference to the claim, and that the *munim* should give one to him: that the latter should, upon such letters being exchanged, return to Bombay, and that the defendant should remit the amount found due to the plaintiffs when the accounts had been made up. The following letter was accordingly written by the defendant and handed to the plaintiffs' *munim*:—"Peace, prosperity. To Shripast Shah Ganeshdas Thakurdas at that auspicious place the seaport (town) of Bombay. From Delhi written by Dowlatrai Shriram, whose (salutations) victory to (the deity) Gopal do you be good enough to read. Further, do you be pleased to notice one (piece of)

JURISDICTION—*continued.*(2) CAUSES OF JURISDICTION—*continued.*(b) CAUSE OF ACTION—*continued.*

intelligence (as follows) You had an account with Bhai Fatechand and Kanyalal Jugalkissan. I have paid off their debts at the rate of eight annas in the rupee. Therefore, as to whatever (amount) may be found (due) by your account on our making up the account according to the practice of the merchants, the same I will pay you at the rate of eight annas in the rupee. This *chitti* is written 21st December 1884." The plaintiffs' *munim* handed the following letter to the defendant:—"To Shah Dowlatrai Shriramat at that auspicious place, Delhi. From the seaport (town) of Bombay, written by Ganeshdas Thakurdas, whose salutations of victory \* \* \*, &c Do you be pleased to read \* \* \*. I have an account with Shah Fatechand Kanyalal Jugalkissan, wherein Rs. — are claimable by me. On account of those rupees I will receive payment from you at the rate of eight annas in the rupee. A *chitti* in respect thereof I have obtained, in writing, from you 21st December 1884." These letters were exchanged at Delhi, and the plaintiffs' *munim* then returned to Bombay. *Held*, that the Court had jurisdiction. If the oral agreement between the defendant and the plaintiffs' *munim* were taken as the basis of the plaintiffs' claim, it was clear that part of the cause of action arose in Bombay, as payment to the plaintiffs was to be made in Bombay. The exchange of letters was a carrying out, in part, of the oral agreement. When that agreement was made, the defendant was under a legal obligation to pay the plaintiffs' claim upon the insolvent firm. The oral agreement varied the time, place, and mode of payment, as it was competent for the parties to vary them (Contract Act IX of 1872, s. 73, 74). If the letters had varied the terms of the oral agreement, the latter would be modified by the later expressions of the will of the contracting parties; but they did not do so, and the oral agreement remained in force and unvaried. If, on the other hand, the letters were regarded as containing the contract, they were not of such a character as to exclude the proof, under s. 92 of the Evidence Act I of 1872, of a separate oral agreement completely consistent with their terms, namely, that the payment they provided for should be made in Bombay. *Held*, also, that, having regard to the circumstances under which they were written, that a promise to pay in Bombay might fairly be inferred from the terms of the letters themselves. The defendant addressed the plaintiffs at Bombay from Delhi, and plaintiffs addressed the defendant at Delhi from Bombay, and it might be concluded, from this, that the parties intended that the letters should have the same contractual effect as if they had been respectively written to, and from, the places, to and from which they purported to be written: *Held*, also, that the fact that the debt due from the insolvent firm to the plaintiffs, which the defendant had agreed to satisfy, had been contracted in Bombay would not give the Court juris-

JURISDICTION—*continued.*(2) CAUSES OF JURISDICTION—*continued.*(b) CAUSE OF ACTION—*continued.*

diction independently of the stipulation, oral or documentary, by the defendants to pay in Bombay. It would be necessary for the plaintiffs to prove the existence of such debt, as showing the nature and extent of the defendant's promise, but the existence of the debt would not constitute a part of the plaintiff's cause of action. PRAGDAS THAKURDAS v. DOWLATRAM NANURAM.

[I. L. R. 11 Bom. 257]

13.—*Whole cause of action—Contract—Place of performance of contract where no stipulation in Contract—Breach of contract—Leave to sue under Clause 12 of Letters Patent* ] By a contract executed in Bombay on the 19th December, 1885, the defendant promised to pay the plaintiff Rs. 9,152, of which amount the sum of Rs. 4,752 was to be paid by monthly instalments of Rs 132 extending over a period of three years, and the remainder, *viz.*, Rs. 4,400, in a lump sum at the end of the three years. It was provided, that, in case of default being made in payment of any of the instalments, the whole of the amount then due should be paid forthwith. The plaintiff, alleging that the defendant had only paid eight of the instalments, brought this suit for the balance. The defendants, who did not dwell or carry on business in Bombay, pleaded (*inter alia*) that the High Court of Bombay had no jurisdiction, as the whole cause of action had not arisen in Bombay, and no leave to sue had been obtained by the plaintiff under cl. 12 of the Letters Patent. The written contract, which was admittedly executed in Bombay, contained no stipulation as to where the instalments or the final balance was to be paid: *Held*, that, in the absence of stipulation in the contract itself, the intention of the parties to it was to guide the Court in determining the place of its performance. From the facts and acts of the parties it appeared that their intention was that payments under the contract should be made at Surat. The breach of contract consequently took place at Surat, and not in Bombay, and the High Court of Bombay had no jurisdiction to try the suit, the plaintiff having omitted to obtain leave to sue under cl. 12 of the Letters Patent. In the case of an action on a contract, the "cause of action" within the meaning of cl. 12 of the Letters Patent means the whole cause of action, and consists of the making of the contract and of its breach in the place where it ought to be performed. To give jurisdiction to the High Court of Bombay the plaintiff must show that the contract was to be performed, and that its breach took place there. DHUNJISHA NUSSERWANJI v. FFORDE.

[I. L. R. 11 Bom 649]

14.—*Account, suit for—Letters Patent, s 12—Leave to sue—Part of the cause of action material.*] The plaintiff and the second defendant were the owners of a family business which was

**JURISDICTION—concluded.****(2) CAUSES OF JURISDICTION—concluded.****(b) CAUSE OF ACTION—concluded.**

carried on by *munims* in Bombay, Cutch, and Zanzibar. The first defendant was for many years the *munim* in management of the business at Zanzibar. This suit was brought, praying that an account might be taken of the management by the first defendant of the business at Zanzibar, and that in taking such account the first defendant might be charged with all sums misappropriated by him, or lost by his neglect or fraud. The second defendant was joined as a defendant merely because he refused to join as a plaintiff. The plaintiff instanced various acts of misappropriation and neglect and fraud on the part of the first defendant, some few of which were said to have been effected by means of transfer and other entries made in the books of the Bombay firm on instructions sent by the first defendant from Zanzibar. At the time of filing of the suit the leave of the Court, under s. 12 of the Letters Patent, was obtained. On a summons taken out to rescind such leave: *Held*, that the leave given must be rescinded, no such material part of the cause of action having arisen in Bombay as would justify this Court in transferring to itself a case which *prima facie* ought to be tried elsewhere. *Ismail Hadjee Hubbeeb v. Mahomed Hadjee Joosub*, 13 B. L. R. 91, referred to. *KESOWJI DAMODAR JAIRAM v. LUCKMIDAS LADHA*.

[I. L. R. 13 Bom. 404]

**JURISDICTION OF CIVIL COURT. Col**

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**JURISDICTION OF CIVIL COURT—continued.**

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[I. L. R. 9 All. 43]

**(1) CASTE**

1.—*Bombay Regulation II of 1827, s. 21—Suits involving a caste question—Suits to recover caste property from a member of the caste.* Section 21 of Reg. II of 1827 does not debar a Civil Court from taking cognizance of a suit in which a question of a caste rule or of membership of a caste may be raised by way of answer to a claim for property or on a breach of contract. The section provides that there shall be no interference on the part of the Court in caste questions. But to take evidence of the customary law of a caste, to recognize the law and the vote of a majority as given effect to by the law, is not to interfere in caste questions; it is simply to recognize the existence of caste as corporations with civil rights and an autonomy suitable to the purposes of their existence. Certain members of one division of a caste borrowed vessels for use from the priest of that division, and then seceding to the other division refused to return them. A suit was brought to recover possession of the vessels in question: *Held*, that the suit was cognizable by the Civil Court, notwithstanding that incidentally a question as to the relations of the caste divisions might arise for decision. *PRAGJI KALAN v. GOVIND GOPAL*.

[I. L. R. 11 Bom. 534]

2.—*Secession from a caste—Property purchased by seceding section during period of secession—Reunion of section with the caste—Suit by caste to recover from a seceding member property purchased by seceding section* The plaintiff and the defendant belonged to the caste of Visnagra Brahmans, which in 1841 divided into two sections known as the big and little sections. While this division continued, *viz.*, in the year 1868, certain lands were purchased by the small section in the names of the plaintiff, the defendant, and three other persons. In 1873 the members of the small section, with the exception of the defendant, reunited with the other members of the caste. The lands, however, remained in the possession of the defendant. The plaintiff, on behalf of the caste, brought this suit to recover the lands from the defendant. Both the lower Courts held that the case was not cognizable by the Civil Courts, as it involved a caste question. On appeal by the



# JURISDICTION OF CIVIL COURT - continued.

## (1) CASTE—concluded.

plaintiff, the High Court reversed the decrees of the Courts below, and sent back the case for retrial. The lands in question had been admittedly purchased out of their own funds and for their own purposes by the members of the caste who had seceded; and the question, as to whom those lands now belonged to, being one between the caste and one of the seceding members who had purchased them, could not be a caste question, unless the small seceding section itself could be regarded (and it was not so contended) as a separate and distinct caste. Under these circumstances it was for the Civil Court alone to determine who was entitled to the property, although it might be incidentally necessary for that purpose to enquire into the usage and practice (if any) of caste sections, situated as the seceding section of this caste had been, with respect to the property in question. If the lands had been originally the property of the caste, the question would have been between the caste and a section of it, and would have been a caste question, and not cognizable by the Civil Court. *MEHTA JETHALAL v. JAMIATRAM LALUBHAI*

[I. L. R. 12 Bom 225]

3.—*Dispute as to right to office of khatib—Mahomedan law—Bombay Regulation II of 1827, s. 21.* Section 210 Reg. II of 1827 has no application to suits between Mahomedans. A dispute as to the right to an office, such as the office of *khatib* (or preacher) is said to be among Mahomedans, is not a caste question within the meaning of the terms as used in the section: a suit to establish the right to such an office will therefore lie in a Civil Court. *HASHIM SAHEB VALAD AHMED SAHEB v. HUSEINSHA VALAD KARIMSHA FAKIR.*

[I. L. R. 13 Bom 429]

## (2) CUSTOMARY PAYMENTS.

4.—*Bombay Hereditary Offices Act (III of 1874)—Vatandar kulkarni and rayat—Perquisites, Right to.* Bombay Act III of 1874 does not deprive the Civil Court of its jurisdiction to try the question whether a *vatandar kulkarni* is entitled to receive perquisites from his *rayat*. *VISHNU HARI KULKARNI v. GANU TRIMBAK.*

[I. L. R. 12 Bom. 278]

## (3) MAGISTRATES' ORDERS, INTERFERENCE WITH

5.—*Criminal Procedure Code, Act X of 1882, s. 133—Removal of nuisance—Public way—Suit for declaration of right and confirmation of possession—Cause of action* On the 6th of July 1882 the Joint Magistrate of Krishnagur, on a complaint made by A, ordered B to demolish a cow-shed which he had built some months previously, the land on which the cow-shed had been built being part of a public way. Thereupon B

# JURISDICTION OF CIVIL COURT - continued.

## (3) MAGISTRATES' ORDERS, INTERFERENCE WITH—concluded.

brought a suit against A for a declaration of his right to enjoy the land as his private property and for confirmation of possession. The plaintiff did not allege that B, in causing the Magistrate to initiate proceedings against A, had been actuated by malicious motives and had acted with the intention of wrongfully injuring the plaintiff. *Held*, that the suit would not lie. *Mutty Ram Sahoo v. Mohi Lal Roy*, I. L. R. 6 Calc. 291, dissented from. *KHODABUKSH MUNDUL v. MONG-LAI MUNDUL.*

[I. L. R. 14 Calc. 60]

6.—*Criminal Procedure Code, s. 137, Order under—Suit for declaration of title to lands claimed as public road.* An owner of land has a right to bring a suit for declaration of his right, against any one of the public who formally claims to use such lands as a public road, and who has thereby endangered the title of the owner. Such a suit is not barred by an order of a Criminal Court under s. 137 of the Criminal Procedure Code. *Khodabuksh Mundul v. Monglai Mundul*, I. L. R. 14 Calc. 60, overruled. *CHUNI LALL v. RAM KISHEN SAHU.*

[I. L. R. 15 Calc 460]

## (4) OFFICES, RIGHT TO.

7.—*Right of Suit—Civil Procedure Code, s. 11—Hereditary right to an office—Declaratory decree—Jurisdiction—Emolument* A suit for the establishment of a right to the hereditary title of musicians to a *satra* will lie under s. 11 of the Code of Civil Procedure, notwithstanding that the right sought to be established is one which brings in no profit to those claiming it. *MAMAT RAM BAYAN v. BAPU RAM ATAI BURA BHAKAT.*

[I. L. R. 15 Calc. 159]

8.—*Civil Procedure Code, s. 11—Right to an office in a temple.* Plaintiffs sued for an injunction to prevent defendant from interfering with their right to present to certain persons at a certain festival in a certain temple a crown and water. The lower Courts found that plaintiffs possessed the right claimed and granted the injunction: *Held*, that the suit was cognizable by a Civil Court under s. 11 of the Code of Civil Procedure, and that the injunction was properly granted. *SRINIVASA v. TIRUVENGADA.*

[I. L. R. 11 Mad. 450]

9.—*Suit in respect of an injury caused by exclusion from an hereditary office—Bombay Hereditary Offices Act (III of 1874), s. 40—Election of an officiator—Free election—Agreement in restraint of free election—Bombay Act X of 1876, sec. 4—Its application to suits between private persons.* The plaintiff and his co-sharers in a *kulkarni vatan* entered in to an agreement in 1869 for the

## JURISDICTION OF CIVIL COURT— *continued.*

### (4) OFFICES, RIGHT TO—*continued.*

performance of the duties of the *vatan* by the several sharers in turn. The agreement provided that if any of the sharers prevented the nomination of a sharer to officiate in his turn, he should pay Rs. 100 as damages to the person thus excluded from office. The plaintiff alleged that in 1883 it was his turn to officiate, that the defendants, instead of electing him in accordance with the agreement, nominated another person, who was confirmed in the appointment by the Collector. The plaintiff, therefore, sued the defendants to recover Rs. 100 as damages for breach of the agreement of 1869: *Held*, that the agreement could not be enforced by a civil suit, as it was opposed to the policy of s. 40 of Bombay Act III of 1874, which contemplates a free election of an officiator by the whole body of registered representative *vatan*dars to whom the Collector issues his notice—an election unfettered by any promises made beforehand by any of the sharers: *Held*, also, that a suit in respect of any injury caused by exclusion from office or service is barred by the second paragraph of cl (a) of s. 4 of Bombay Act X of 1876. Having regard to the wording of the several clauses of s. 4 the bar therein provided is not limited to suits against Government. *NARO PANDURANG v MAHADEV PURSHOTAM.*

[I. L. R. 12 Bom. 614]

10.—*Bombay Hereditary Offices Act (III of 1874), s. 18—Suit by village Mahars to recover aya—Declaratory suit.* S 18 as much as s. 25 of the Bombay Hereditary Offices Act (III of 1874) excludes by direct implication any right on the part of the Civil Courts to declare that persons are eligible to serve as hereditary officers under the Act. *Khandu Narayan v Apaji Sadashur*, I. L. R. 2 Bom. 370, and *Chinto Abaji v. Lakshimbai*, I. L. R. 2 Bom. 375, followed. *Ram-Chandra Dabholkar v. Anant Sat Shenvi*, I L. R. 8 Bom. 25, distinguished. The plaintiffs sued, as *vatan*dar Mahars of certain villages, to establish their right to receive the *aya* attached to their office, as against defendants, who were the *vatan*dar Mangs of the same villages, and who claimed the right to receive the *aya* equally with the plaintiffs: *Held* that the suit was not cognizable by a Civil Court. *PARSHA v. LAGNYA SHAN.*

[I. L. R. 13 Bom 83]

11.—*Civil Procedure Code 1882, s. 11—Suit for an office to which no fixed fees are attached—Bombay Regulation II of 1827, s. 21—Its application to suits between Mahomedans—Caste question.* Under s 11 of the Code of Civil Procedure (Act XIV of 1882) a suit for an office will lie even though the office be a religious one, to which no fixed fees are attached. S. 21 of Reg. II of 1827 has no application to suits between Mahomedans. A dispute as to the right to an office such as the office of *khatib* (or preacher) is said

## JURISDICTION OF CIVIL COURT— *continued.*

### (4) OFFICES, RIGHT TO—*concluded.*

to be among Mahomedans, is not a caste question within the meaning of the term as used in the section. *HASHIM SAHEB VALAD AHMED SAHEB v. HUSEINSHA VALAD KARIMSHA FAKIR.*

[I. L. R. 13 Bom. 429]

12.—*Suit for a declaration of plaintiff's right to officiate as priest and receive offerings.* A suit will lie in a Civil Court for a declaration of the plaintiff's right to officiate, in alternate years, as priests in a temple and receive the offerings to the idol. *LIMBA BIN KRISHNA v. RAMA BIN PIMPLU.*

[I. L. R. 13 Bom. 548]

### (5) POTTAHS.

13.—*Cause of action—Suit to cancel pottah.* Plaintiff sued in a Civil Court to cancel a pottah which, he alleged, was incorrect and fraudulently antedated by the defendant with a view to prevent plaintiff from taking steps to cancel it in a Revenue Court: a copy of the pottah had been affixed to plaintiff's house: *Held*, that the plaintiff had no cause of action cognizable by a Civil Court. *NURDIN v. ALAVUDIN.*

[I. L. R. 12 Mad. 134]

14.—*Madras Rent Recovery Act (VIII of 1865)—Suit in Civil Court to enforce exchange of pottah and muchalka—Declaratory decree—Civil Procedure Code, s. 53—Amendment of plaint.* A suit in the Court of a District Munsiff to enforce acceptance of a pottah and execution of a *muchalka* by defendant in respect of a holding in a village to which plaintiff claimed title was dismissed as not being maintainable: *Held*, that the suit should not have been dismissed, but the plaint should have been amended by the addition of a prayer for a declaration of the plaintiff's title: and that the Court then would have had jurisdiction to grant by way of consequential relief the relief originally sought. *NARASIMMA v. SURYANARAYANA.*

[I. L. R. 12 Mad. 481]

### (6) PUBLIC WAYS, OBSTRUCTION OF.

15.—*Public thoroughfare—Right to sue—Special damage—Leave—Right of lessee—Trespass.* The plaintiff, a holder of a ten years' lease of the share and rights of one of the co-sharers of a village, sued for the demolition of certain buildings and constructions on a plot of land within the area of the village, on the ground that the public had been very much inconvenienced in going to and coming from the road and in taking carts, carriages, cattle, &c., and that he by reason of his own inconvenience, and also as lessee in possession of the entire rights of his lessor, had legally and justly a right to bring the action. The findings of fact were that by the terms of

# JURISDICTION OF CIVIL COURT— *continued.*

## (6) PUBLIC WAYS, OBSTRUCTION OF— *continued.*

the lease plaintiff was entitled to maintain the action as representing the zemindari rights of his lessor; that the obstructions complained of existed when the lease was granted; that the roadway mentioned in the plaint was one used by the public in general as a footpath and also for vehicles, and that the buildings complained of had encroached on the road. The suit was dismissed by the first Court, but decreed on appeal by the lower Appellate Court. *Held*, that in the absence of proof of damage over and above that which in common with the rest of the public the plaintiff has sustained, his action must fail. Public nuisance is actionable only at the suit of a party who has sustained special damage, and the case law of British India in this respect is the same as the rule of English law on the subject. Further, that the lease to plaintiff failed to show either that the land upon which the defendant had built was included in the lease, or that it intended to confer upon the plaintiff any right to question the legality of the erections at the time of the lease. *Satku v. Ibrahim Aga*, I. L. R. 2 Bom. 457, and *Karim Buxsh v. Budha*, I. L. R. 1 All. 249, referred to, *RAMPHAL RAI v. RAGHUNANDAN PRASAD*.

[I L. R. 10 All. 498]

16.—*Obstruction by building—Suit by zemindar for removal of building—Special damage—Right to sue.* The plaintiff, who was the zemindar of the village, brought an action claiming to have a *chabuttra* or building erected by the defendant in one of the village roads removed. The road in question was a *katcha* road used by the village over which the public had a right of way, and it had been dedicated as a road for the use and convenience of the general public. The plaintiff got a decree for the removal of the *chabuttra* and the defendant appealed. *Held*, that the rule of English law that a member of the public cannot maintain an action for obstruction to a public road without showing special injury to himself beyond that suffered by any member of the public, does not apply to a zemindar who or whose predecessor in title had dedicated to the public the road over his zemindari land. A zemindar in giving the public right of road of way over his land does not give the public or any one else a right to interfere with the soil of the road as by erecting a building upon it. In such a case the zemindar has in common with the public the right to use the road as a road. over and above it, he has a right to the soil in the road, which he had never given to the public. In an action of this kind, the zemindar does not sue as a guardian of the public, but in respect of an interference with his own rights of property. *Sarada Prosad Mustafee v. Gorachand Mustafee*, 3 B. L. R. A. C. 295, 12 W. R. 160, discussed; *Doraston v. Payne*, 2 Smith's L. C. 1st Ed. 154; *R. v. Pratt*, 4 E. & B. 860; *Rolls v. Vestry of St. George*

# JURISDICTION OF CIVIL COURT— *continued.*

## (6) PUBLIC WAYS, OBSTRUCTION OF *continued.*

*the Martyr. Southwark*, L. R. 14 Ch D 785; and *Goodson v. Richardson*, L. R. 9 Ch D 221, referred to. *TOTA v. SARDUL SINGH*

[I. L. R. 10 All. 553]

## (7) RENT AND REVENUE SUITS.

### (a) BOMBAY.

17.—*Bombay Revenue Jurisdiction Act (X of 1876) s. 4, Cls (f) and (k)—Inam Commissioner, investigation of a claim by, under Act XI of 1852, and decision thereon—Government resolution setting aside the Commissioner's decision—"Adjudication"—Claim for interest on mesne profits awarded by Government resolution—Construction.* In 1859 the plaintiffs' claim to hold a certain village as an *inam* village was investigated by the Inam Commissioner under Act XI of 1852 and rejected and the plaintiffs were dispossessed of the village. In 1861 Government confirmed the Commissioner's decision on appeal by the plaintiffs. Ultimately, however, in 1882 Government passed a resolution reversing its former decision, and subsequently passed a further resolution allowing the plaintiffs' claim to the village and ordering the same to be restored to them. In 1885 the village was restored to the plaintiffs, and the arrears of revenue since 1859 were paid back to them. The plaintiffs then claimed interest on the arrears, and being refused the same sued to recover it. The District Judge was of opinion that s. 4, cl. (f) of Act X of 1876 barred the cognizance of the suit by the Civil Court, but referred that question under s. 13 of the Act to the High Court. *Held*, that the Civil Court had jurisdiction to try the suit. The resolutions of Government amounted to a distinct adjudication by competent officers that the land was exempt from payment of revenue, and was sufficient to give the Civil Courts jurisdiction over the plaintiffs' claim. *Per* BIRDWOOD, J.—That the claim of the plaintiffs being to obtain all the advantage flowing from the favourable decision of Government in 1882, cl. (f) of s. 4 of Act X of 1876 apparently did not apply. The words "competent officer" as used in proviso (k) included the Governor in Council, who is one of the authorities upon whom judicial powers were conferred by Act XI of 1852. *JANARDANRAV v. SECRETARY OF STATE FOR INDIA*

[I L. R. 13 Bom. 442]

### (b) NORTH-WEST PROVINCES.

18.—*Suit by landholder for removal of trees planted by tenant—Jurisdiction—Civil and Revenue Court—Act XII of 1881, s. 93 (b), (c), (cc).* *Held* that a suit by a landholder against his tenant for the removal of certain trees planted by the latter on land let to him for cultivating purposes by the former, did not fall within s. 93 of

# JURISDICTION OF CIVIL COURT— *continued.*

## (7) RENT AND REVENUE SUIT—*continued.*

### (b) NORTH-WEST PROVINCES—*continued*

the N.-W. P. Rent Act (XII of 1881), and was cognizable by the Civil Courts. *Devdat Tewari v. Gopi Mistr*, Weekly Notes, All. 1882, p. 102, questioned, PROSONNO MAI DEBI *v* MANSA.

[I. L. R. 9 All 35]

19.—*Assignment of rent of land in satisfaction of interest—"Jamog"—Mutation of names in favour of assignee not effected—Suit on bond.* Subsequently to the execution and registration of a bond, a *jamog* was made orally between the creditor and the debtor, by which the former agreed to take the rents of certain tenants of the latter in satisfaction of interest, the latter agreed to release the tenants from payment of rent to himself, and the tenants (who were parties to the arrangement) agreed to pay their rents to the creditor. No mutation of names in favour of the creditor was effected in the revenue registers. The creditor brought a suit against the debtor to recover the principal and interest agreed to be paid under the bond, alleging that he had never received any rents under the *jamog*; *Held* that whether or not the plaintiff could maintain a suit on the *jamog* against the tenants for the rents assigned to him in the Revenue Court, he could do so in the Civil Court, and the fact that the *jamog* was not in writing did not affect the question. *Gunga Prasad v. Chandrawati*, I.L.R. 7 All. 256, referred to. AUTU SINGH *v* AJUDHIA SAHA.

[I. L. R. 9 All. 249]

20.—*N.-W. P. Rent Act, 1881, s. 184—Landholder and tenant—Suit for rent where the right to receive it is disputed—Third person who has received rent made party—Jurisdiction of Rent Court to pass decree for rent against such party—Question of title* In a suit by a landholder for recovery of rent in which a third person alleged to have received such rent is made a party under s. 148 of the N.-W. P. Rent Act (XII of 1881) the question of title to receive the rent cannot be determined between the plaintiff and such person, but can only be litigated and determined in a subsequent suit in the Civil Court. The only question between the plaintiff and the person so made a party which can be determined in the Rent Court under s. 148 is the actual receipt and enjoyment of the rent. A party who is brought in under s. 148 of the Rent Act cannot be made subject to the decree for rent so as to allow execution to be taken out against him, whether his *bonâ fide* receipt and enjoyment of the rent is proved or not. The only person against whom such a decree can be passed is the tenant. *Madho Prasad v. Ambar*, I. L. R. 5 All. 502, referred to. *Per* EDGE, C. J., *semble*, that the intention of the Legislature in allowing a third person who claims under s. 148 of the Rent Act to be made a party to the suit may possibly have been that, by bringing him in, he may be bound by a declaration in the suit that he had in

# JURISDICTION OF CIVIL COURT— *continued.*

## (7) RENT AND REVENUE SUITS—*continued.*

### (b) NORTH-WEST PROVINCES—*continued*

fact received the rent, so as to prevent him in the civil suit from denying the fact that he had received it. In a suit by a landholder for recovery of rent, the defendants pleaded that they had paid the rent to a co-sharer of the plaintiff. The co-sharer made a deposition in which he alleged that he was entitled to the rent not only as a co-sharer but also as appointed agent of the plaintiff. The Court thereupon made him a party to the suit under s. 148 of the Rent Act, and passed a joint decree against him and the tenant for rent: *Held*, that the Court was justified in making him a party under s. 148 of the Rent Act, but was not competent to pass a decree for rent against him. GOBIND RAM *v* NARAIN DAS.

[I. L. R. 9 All. 394]

21.—*Agreement by occupancy-tenant to relinquish his holding—Suit for specific performance of agreement.* The defendant, who was a tenant with a right of occupancy in the land cultivated and held by him, executed a *kabuliat* in respect of the said land in favour of the plaintiffs (his landlords), agreeing that on the expiry of the term fixed in the *kabuliat* he should have no claim to retain possession of the cultivatory holding, but that he should give it up. Plaintiffs sued for ejectment of the defendant on the basis of the agreement, and obtained a decree from the lower Appellate Court. On second appeal by the defendant. *Held* that inasmuch as the plaintiffs sought to enforce the covenant contained in the *kabuliat* in such a manner as to extinguish the rights of occupancy found upon the facts of the case to have been acquired by the defendant in the land in suit, such suit must fail, as opposed to the policy of the law as shown in the provisions of s. 9 of the Rent Act (Act XII of 1881). Such a tenant may be ousted from his holding by enforcement of the remedies given in that behalf in s. 95 (d) and (f) in a suit in the Civil Court, but not in the manner sought by the plaintiff in this action. KAURI THAKURAI *v* GANGA NARAIN LAL.

[I. L. R. 10 All. 615]

22.—*Civil and Revenue Courts—Suit by co-sharers in a joint undivided mahal for declaration of title to share of rent—Act XII of 1881 (North-Western Provinces Rent Act, ss. 93 (h) 106, 148—Act I of 1877 (Specific Relief Act), s. 42—Civil Procedure Code, s. 11.* The effect and intention of the proviso to s. 148 of the North-Western Provinces Rent Act (XII of 1881) is to preserve the jurisdiction of the Civil Courts under s. 42 of the Specific Relief Act (I of 1877), while prescribing a special period of one year's limitation for such suits when they arise out of adjudications such as s. 148 contemplates. Neither that section nor the proviso affects the jurisdiction of a Civil Court to entertain a suit by some of a body of co-sharers in a joint and undivided *mehal* for a declaration of their title to

# JURISDICTION OF CIVIL COURT— continued.

## (7) RENT AND REVENUE SUITS—concluded.

### (b) NORTH-WEST PROVINCES—concluded.

receive a proportionate share of the rent payable by the tenants. Having regard to s. 11 of the Civil Procedure Code, a suit for the recovery of certain sums of money as the plaintiff's share of rent alleged by them to have been wrongfully received by the defendants, their co-sharers, and in which the plaintiffs' right to receive any portion of the rent claimed is denied by the defendants, is not barred from the cognizance of the Civil Courts by s. 93 (h) of the North-Western Provinces Rent Act. That provision does not contemplate suits in which such claims of title are so made and resisted. But a suit by some of the co-sharers in a joint and undivided *mehal* for such declaration and such recovery of a proportionate share of rent as above referred to, is barred by the provisions of s. 106 of the North-Western Provinces Rent Act, in the absence of proof of local custom or special contract authorising such suits. *MAHADEO SINGH v. BACHU SINGH*.

[I. L. R. 11 All. 224]

### (c) OUDH.

23.—*Oudh Rent Act XIX of 1868, s. 83 cl. 15, s. 106—Suit for partition and account of talukdari estate.* In a suit commenced in 1865 by a member of a joint family for the declaration of his rights in a talukdari estate, partition not being claimed, the order of Her Majesty in Council (1879) directed that the talukdar should cause and allow the villages forming the talukdari estate and the proceeds thereof to be managed and applied according to the trust declared in favour of the members of the family. The plaintiff in that suit afterwards obtained entry of his name as a co-sharer in the villages in the register kept under Act XVII of 1876, s. 56; and then brought the first of the present suits for his share upon partition, both in that estate as it stood in 1865, and also with the addition of villages since acquired out of profits, claiming an account against the talukdar. The latter alleged, among other defences, that the talukdari estate was impartible, and brought a cross-suit to establish this, and also that it was held by him according to the rule of primogeniture, the right of other members of the family being only to the profits: *Held*, that the provisions of the Oudh Rent Act, XIX of 1868, s. 83, cl. 15, and s. 106, precluding proceedings in the civil Court, might be applicable to the proceeds of the villages forming the original estate, the claimant having been recorded in the revenue records as a shareholder therein, but could not be applied to the rest of the joint estate, and the Civil Court therefore had jurisdiction. *PIRTHI PAL v. JOWAHIR SINGH*.

[I. L. R. 14 Calc. 493]

[L. R. 14 I. A. 37]

# JURISDICTION OF CIVIL COURT— continued.

## (8) REVENUE COURTS.

### (a) PARTITION.

24.—*Partition of mehal—application by co-sharer for partition—Notice by Collector to other co-sharers to state objections upon a specified day—Objection raised after day specified by original applicant—Question of title—Distribution of land—North-Western Provinces Land Revenue Act, XIX of 1873, ss. 111, 112, 113, 131, 132, 241 (f)—Civil Procedure Code, s. 11.]* So far as ss. 111, 112, 113, 114, and 115 of Act XIX of 1873 are concerned, a Civil Court is the Court which has jurisdiction to adjudicate upon a question of title or proprietary right, either in an original suit in cases in which the Assistant Collector or Collector does not proceed to inquire into the merits of an objection raising such a question under s. 113, or on appeal in those cases in which the Assistant Collector or Collector does decide upon such questions raised by an objection made under s. 112. The remaining sections relating to partition do not provide for or bar the jurisdiction of the Civil Court to adjudicate upon questions of title which may arise in partition proceedings, or on the partition after the time specified in the notice published under s. 111. S. 132 is not to be read as making the Commissioner the Court of appeal from the Assistant Collector or the Collector upon such questions, nor does s. 241 (f) bar the jurisdiction of the Civil Court to adjudicate upon them. Where, therefore, after the day specified in the notice published by the Assistant Collector under s. 111, and after an Amin had made an apportionment of lands among the co-sharers of the *mehal*, the original applicants for partition raised for the first time an objection involving a question of title or proprietary right, and this objection was disallowed by the Assistant Collector and the partition made, and confirmed by the Collector under s. 131: *Held* that the objection was not one within the meaning of s. 113, that the remedy of the objectors was not an appeal from the Collector's decision under s. 132, and that a suit by them in the Civil Court to establish their title to the land allotted to other co-sharers was not barred by s. 241 (f), and with reference to s. 11 of the Civil Procedure Code was maintainable. *Habibullah v. Kungl Mal* I. L. R. 7 All. 447, distinguished. *Sudar v. Khuman Singh*, I. L. R. 1 All. 613, referred to. *MUHAMMAD ABDUL KARIM v. MUHAMMAD SHADI KHAN*.

[I. L. R. 9 All. 429]

25.—*Suit for partition—Revenue-paying estate—Proceedings under Bengal Act VIII of 1876, s. 31, Effect of.* The jurisdiction of the Civil Courts in matters of partition of a revenue-paying estate is restricted only in questions affecting the right of Government to assess and collect in its own way the public revenue: *Held*, accordingly, that pendency of partition proceedings before the Collector, under s. 31 of Bengal Act VIII of 1876 was

# JURISDICTION OF CIVIL COURT— continued.

## (8) REVENUE COURTS—continued.

### (a) PARTITION—concluded.

no bar to a suit for a declaration that under a partial partition effected between the co-sharers a portion of land had been separately allotted to the plaintiff. *ZAHRUN v. GOWRI SUNKAR*.

[I. L. R. 15 Cal. 198]

26.—*Jurisdiction of Revenue Court—Suit for partition and possession of a share in a particular plot in a patti—North-Western Provinces Land Revenue Act XIX of 1873, ss 135, 241 (f).* A suit by a co-sharer in a joint zemindari estate for partition and possession of his proportionate share of an isolated plot of land is not maintainable in a Civil Court, with reference to ss 135 and 240, of the N-W P. Land Revenue Act (XIX of 1873). *Ram Dayal v. Megu Lal*, I. L. R. 6 All. 452, distinguished. *IRJAIL v. KANHAI*.

[I. L. R. 10 All. 5]

27.—*Partition by Civil Court of a portion of a revenue-paying estate—Civil Procedure Code (Act XIV of 1882), s. 265—Revenue-paying estate, partition of into several revenue-paying estate* The meaning of s. 265 of the Code of Civil Procedure is that where a revenue-paying estate has to be partitioned into several revenue-paying estates, such partition must be carried out by the Collector. *Zahrun v. Gowri Sunkar*, I. L. R. 15 Cal. 198, approved. *DEBI SINGH v. SHEO LALL SINGH*.

[I. L. R. 16 Cal. 203]

### (b) ORDERS OF REVENUE COURTS.

28.—*Suit for confirmation of execution-sale set aside by Collector—Civil Procedure Code 1882 s. 312—Onus Probandi* A suit lies in a Civil Court for confirmation of a sale held in execution of a decree by the Collector under s. 326 of the Civil Procedure Code, and to set aside an order passed by the Collector cancelling the sale. *Madho Prasad v. Hansa Kuar*, I. L. R. 5 All. 314, referred to. *Azim ud-din v. Baldeo*, I. L. R. 3 All. 554, followed. In such a suit, where it is pleaded in defence that the property was sold for an inadequate price, it lies on the defendant to show that there has been a material irregularity in publishing or conducting the sale. *BANDI BIBI v. KALKA*.

[I. L. R. 9 All 602]

29.—*Sale in execution of decree—Civil Procedure Code, ss. 311, 313, 320, 322B, 322D, 322D—Transfer of execution to Collector—Application to Civil Court to set aside sale held by Collector on the ground of irregularity.* Held, by the Full Bench that an application to set aside, on the ground of material irregularity within the meaning of s. 311 of the Civil Procedure Code, a sale held by the Collector in execution of a decree transferred to him for execution under s. 320, cannot be enter-

# JURISDICTION OF CIVIL COURT— concluded.

## (8) REVENUE COURTS—concluded.

### (b) ORDERS OF REVENUE COURT—concluded.

tained by a Civil Court. *Madho Prasad v. Hansa Kuar*, I. L. R. 5 All. 314, followed. *Nathu Mal v. Lachmi Narain*, I. L. R. 9 All. 43, distinguished. *Per Edge, C. J.*—The intention of the Legislature as expressed in s. 320 and the following sections of the Civil Procedure Code, was not to allow any delegation to the Collector of power to adjudicate upon questions of title, but, in other matters, to hand over all the proceedings to the Collector, and to withdraw the matters so handed over from the purview of the Civil Courts to that extent, but not questions of title or the other questions, if in dispute, referred to in ss 322B, 322C or 322D. *KESHABDEO v. RADHE PRASAD*.

[I. L. R. 11 All. 94]

30.—*Suit to cancel patta of Government waste issued by Collector—Power of Collector to cancel patta granted by him—Standing Order* The plaintiff having obtained from the Revenue officers of the district a patta of Government waste, sued for the cancellation of a patta for the same land subsequently granted to other persons by the Collector, who considered that the issue of the plaintiff's patta was not in accordance with the *darkhast* rules: Held, it was competent to a Civil Court to pass a decree declaring the second patta null and void, and the plaintiff was entitled to such a decree. *Kullappa Nair v. Ramanuja Charayyar*, 4 Mad 429, followed. *COLLECTOR OF SALEM v. RANGAPPA*.

[I. L. R. 12 Mad. 404]

## (9) STATUTORY POWERS, PERSONS WITH.

31.—*Madras Forest Act (V of 1882), s. 10—Procedure—Remedy by ordinary suit barred* Where by an Act of the legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the Statute, the ordinary jurisdiction of the Civil Courts is ousted, and in the case of injury the party cannot proceed by action. Plaintiff sued in a Munsif's Court to cancel the decision of a Forest Officer confirmed by a District Judge under s. 10 of the Madras Forest Act, 1882, and to recover certain land, a claim to which had been rejected under the said section: Held, that the Munsif had no jurisdiction to entertain the suit. *RAMACHANDRA v. SECRETARY OF STATE FOR INDIA*.

[I. L. R. 12 Mad. 105]

# JURISDICTION OF CRIMINAL COURT.

1. General Jurisdiction	...	Col.
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## JURISDICTION OF CRIMINAL COURT —continued.

### (1) GENERAL JURISDICTION.

1.—*Tributary Mehals—Kheonjur—"Local Area"*—*Code of Criminal Procedure* (Act X of 1882), ss 182 and 531.] The Penal Code and Criminal Procedure Code have no application to the Tributary Mehal of Kheonjur, which is on precisely the same footing in that respect as Mohurbhunj. Certain persons, officers of the Maharajah of Kheonjur, one of whom was a resident of the Cuttack district, and the others residents of Kheonjur, were charged before the Deputy Magistrate of Tajpore with certain offences under the Penal Code. They were convicted, and on appeal to the Sessions Judge, the conviction was upheld. It was found by the Sessions Judge that the scene of the occurrence which gave rise to the charges was within the territory of Kheonjur: *Held*, that the Deputy Magistrate and Sessions Judge had no jurisdiction to try the case, and that the conviction must be set aside. *Held*, further, that ss. 182 and 531 of the Criminal Procedure Code had no application to the case. The words "local area" used in s. 182 only apply to a "local area" over which the Criminal Procedure Code applies, and not to a local area in a foreign country, or in other portions of the British Empire to which the Code has no application; and similarly s 531 only refers to districts, divisions, sub-divisions and local areas governed by the Code of Criminal Procedure. *IN THE MATTER OF BICHITRANUND DASS v. BHUGGUT PERI. IN THE MATTER OF BICHITRANUND DASS v. DUKHIA JANA.*

[I. L. R. 16 Calc. 667]

### (2) EUROPEAN BRITISH SUBJECTS.

2.—*Criminal Procedure Code* 1882 s. 4, cl. (i), and 453 and ss. 454—*European British Subject—Privilege—Waiver—Jurisdiction of High Court over European British Subjects in Sind—Bombay Act XII of 1866.*] Where a European British subject waives his right to be dealt with as such by the Magistrate before whom he is tried, he thereby loses all the benefits of the special procedure provided for him under Chapter XXXIII of the Code of Criminal Procedure (Act X of 1882), including the right to have the proceedings in his case reviewed by a Presidency High Court, if another Court exercises the highest revisional jurisdiction under the Code in cases other than those against European British subjects in the place where he is tried. The definition of "High Court" in s. 4, cl. (i), of the Code of Criminal Procedure (Act X of 1882) must be read with reference to the "special proceedings" against European British subjects contemplated in Chapter XXXIII, and not with reference to proceedings generally against Europeans, including proceedings in which they waive their rights under that chapter. If, therefore, in any particular case, the special rules contained in Chapter XXXIII of the Code cease to have any application, the definition of "High Court" in the former part of s. 4, cl. (i), ceases also to have

## JURISDICTION OF CRIMINAL COURT —continued.

### (2) EUROPEAN BRITISH SUBJECTS—*conold*.

any application to such a case. The definition in the latter part of the section then prevails, and the case falls within the category of "other cases" to which that part of the section applies. The accused, a European British subject, was tried before the City Magistrate of Karachi and convicted of criminal breach of trust under s. 409 of the Indian Penal Code, and sentenced to six months' simple imprisonment. At the trial, he waived his right to be tried as a European British subject. *Held*, that the accused was not subject to the revisional jurisdiction of the High Court. The accused not having been tried under the special procedure laid down for the trial of European British subjects, the Sadar Court in Sind, which, under Bombay Act XII of 1866, was the highest Court of appeal in all civil and criminal matters in Sind, had the revisional powers of a High Court in the present case by virtue of the latter part of s. 4 cl. (i), of the Code of Criminal Procedure. *QUEEN-EMPRESS v. GRANT.*

[I. L. R. 12 Bom 561]

3.—*Jurisdiction of High Court—Foreign Jurisdiction Act, 1879, ch. II—European British Subjects in Bangalore—Justices of the Peace for Mysore*] The civil and military station of Bangalore is not British territory, but a part of the Mysore State, and the Code of Criminal Procedure is in force therein by reason of declarations made by the Governor-General in Council in exercise of powers conferred by the Foreign Jurisdiction and Extradition Act, 1879. Justices of the Peace for the State of Mysore are also Justices of the Peace for Bangalore, and both the Civil and Sessions Judge and the District Magistrate of Bangalore being such Justices of the Peace, are, by virtue of s. 6 of the said Act, subordinate to the High Court at Madras. The High Court has power therefore to transfer the trial of a European British subject from the Court of the District Magistrate of the civil and military stations of Bangalore to the Court of a Presidency Magistrate at Madras. *IN RE HAYES.*

[I. L. R. 12 Mad. 39]

### (3) OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT.

#### (a) CRIMINAL BREACH OF CONTRACT.

4.—*Breach of Contract to labour in foreign territory*] V having received an advance of money from G, contracted to labour for him in foreign territory. Having broken the contract, V was prosecuted under Act XIII of 1859, ordered to repay, and sentenced to imprisonment in default: *Held*, that the order was illegal as having been made without jurisdiction. *GREGORY v. VADAKASI KANGANI.*

[I. L. R. 10 Mad. 12]

See *SIDDHA v. BILIGIRI.*

[I. L. R. 7 Mad. 354]



## JURISDICTION OF CRIMINAL COURT —concluded.

### (3) OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—concluded.

#### (b) CRIMINAL BREACH OF TRUST.

5.—*Criminal Procedure Code* 1882, s. 188—*Liability of native Indian subjects for offences committed out of British India*]. The accused were charged under s. 407 of the Indian Penal Code (Act XLV of 1860) with committing criminal breach of trust in respect of certain property entrusted to them as carriers. They were all native Indian subjects of Her Majesty. The offence was alleged to have been committed in Portuguese territory, and they were found in a place in British territory: *Held*, that under s. 188 of the Criminal Procedure Code (Act X of 1882) the accused could be tried in the place where they were found. *QUEEN-EMPRESS v DAYA BHIMA*

[I. L. R. 13 Bom. 147]

#### (c) DACOITY.

6.—*Criminal Procedure Code*, s. 180—*Dacoity committed in British territory—Dishonest receipt of stolen property in foreign territory*]. Certain persons, who were not proved to be British subjects, were found in possession, in a native State, of property the subject of a dacoity committed in British India. They were not proved to have taken part in the dacoity and there was no evidence that they had received or retained any stolen property in British India. They were convicted of offences punishable under s. 112 of the Penal Code: *Held* that no offence was proved to have been committed within the jurisdiction of a British Court. *QUEEN-EMPRESS v. KIRPAL SINGH.*

[I. L. R. 9 All. 523]

## JURISDICTION OF REVENUE COURT.

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### (1) N.-W. P. RENT AND REVENUE CASES.

1.—*Determination of rent by Settlement officer—Suit for arrears of rent for period prior to order—Jurisdiction in such suit to determine rent for such period—N.-W. P. Land Revenue Act XIX of 1873, ss. 72, 77—N.-W. P. Rent Act XII of 1881, s. 95(1)*]. The jurisdiction to determine or fix rent payable by a tenant is given exclusively to the Revenue Court, either by order of the Settlement-officer, or by application under s. 95(1) of the N.-W. P. Rent Act (XII of 1881); and such rent cannot be determined in a suit by a landholder for arrears of rent in the Revenue Court in which the appeal lies to the District Judge or High Court. In March 1884, the rent payable by an occupancy-tenant was fixed by the Settlement-officer under s. 72 of Act XIX of 1873 (N.-W. P. Land Revenue Act). In 1885, the landholder brought a suit to recover from the tenant arrears of rent at the rate so fixed for a

W., D.

## JURISDICTION OF REVENUE COURT —concluded.

### (1) N.-W. P. RENT AND REVENUE CASES— concluded.

period antecedent to the Settlement-officer's order as well as for the period subsequent thereto. The lower Appellate Court dismissed the claim for rent, prior to the 1st July 1884, and decreed such as was due subsequently to that date, but without interest. *Held* that the rent could not be fixed in the present suit, neither the Court of First Instance nor the High Court having jurisdiction to fix it; and that the claim for rent for the period in question must therefore be dismissed. *Ram Prasad v. Dina Kuar*, I L. R. 4 All. 515. Special Appeal No 914 of 1879, and *Phulakra v. Jotal Singh*, I. L. R. 6 All. 52, referred to. *RADHA PRASAD SINGH v. JUGAL DAS.*

[I. L. R. 9 All 185]

### (2) OUDH RENT AND REVENUE CASES.

2.—*Oudh Rent Act (XIX of 1868), ss. 41 and 83, cl 4.—Liability of lessees in the position of under-proprietors not entitled to sub-settlement—The Oudh Sub-Settlement Act (XXVI of 1886)—The Oudh Land Revenue Act (XVII of 1876), s. 158.*] A decree, in 1869, of a Settlement Court, upon the compromise of a claim, made by village co-parcenary occupiers, to an order for sub-settlement as against the talukdar, declared the claimants to be entitled to a heritable, but not transferable, lease of the village, at a rent leaving twelve per cent profit to the lessees. For default in payment of rent this lease was decreed to be in future liable to cancellation "by the decree of any competent Court, according to any law which may be in force in Oudh with respect to persons holding an under-proprietary right in land." Afterwards, in 1879, the parties agreed that the lessees might be dispossessed for non-payment of rent. Default occurred, decrees for arrears were made in 1882 and 1883, and remained unsatisfied. In a rent suit brought by the talukdar *held*, that he could not sue in a Revenue Court to have the lease cancelled, under the terms of the Oudh Rent Act (XIX of 1868,) either by virtue of the decree, or of the subsequent agreement. *MADHO SINGH v. AJUDHYA SINGH.*

[I. L. R. 15 Calc. 515]

[L. R. 15 I. A. 77]

## JURY, TRIAL BY.

*See* MAGISTRATE, JURISDICTION OF—  
POWERS OF MAGISTRATES.

[I. L. R. 9 All. 420]

## JUSTICES OF THE PEACE.

*See* HIGH COURT, JURISDICTION OF—  
HIGH COURT, MADRAS—CRIMINAL.

[I. L. R. 12 Mad. 39]

**KABULIAT, AGREEMENT TO GIVE.**

See REGISTRATION ACT 1877, ss. 17 & 49.

[L. R. 16 I A 233

[I. L. R. 17 Calc 291

**KARNAM, OFFICE OF.**

1.—*Office of Karnam in zemindari village—Right of Woman to Succeed—Mad. Reg. XLIX of 1802 s. 7.]* A woman cannot hold the office of *karnam*.  
CHANDRAMMA v. VENKATRAJU.

[I. L. R. 10 Mad 226

2.—*Rights of de facto karnam—Presumption of appointment from long tenure—Limitation.]* A filed a plaint on 28th June 1882 for a declaration of his title as *karnam* of a village and for arrears of dues payable to him as such, including those for Fasli 1288, which accrued due on 1st July 1879. His family had held the office and discharged its duties for three generations, but there was no evidence of any formal appointment of A or his ancestors: *Held*, that the plaintiff was entitled to the dues as *de facto karnam*, and his claim was not barred in respect of any of the arrears claimed.  
GANAPATHI v. SITHARAMA.

[I. L. R. 10 Mad. 292

**KHOJA MAHOMEDANS.**

—*Partition—Right of a son to obtain partition of ancestral property in his father's lifetime without his father's consent—Distinction between ancestral and self-acquired property among Khoja Mahomedans—Burden of proving property to be self-acquired.]* Amongst Khoja Mahomedans a son is entitled to obtain partition of ancestral estate in his father's lifetime without his father's consent. By the law and customs of Khoja Mahomedans there is a distinction between ancestral and self-acquired property in reference to the power of the owner to devise or make a gift thereof similar to that which obtains under the ordinary Hindu law. The presumptions of the Hindu law apply to Khoja Mahomedans, and the burden of proving propositions opposed to that law lies on him who alleges them. Therefore in a suit for partition brought by a son against his father, who alleged that the customs and usages of the Khoja community in matters of partition were not identical with the Hindu law, and did not confer on a son any right to demand in his father's lifetime a partition of the property in the father's hands whether ancestral or self-acquired: *Held*, that the burden of proving the issues framed upon these allegations lay on the defendant. In considering the question of the alleged custom and usages the Court adhered to the less stringent rule of proof applied in *Hirbai v. Gorhai*, 12 Bom. 294. In the same suit where the defendant having failed to establish the existence of the special custom and usages abovementioned yet resisted the plaintiff's claim to partition on the ground that the property claimed was not ancestral: *Held* that the *onus* was on the plaintiff in the first instance to give evidence that the property was ancestral. In such

**KHOJA MAHOMEDANS—concluded.**

cases the amount of evidence required to shift upon the defendant the burden of displacing it, depends on the circumstances of each case. *CASSUMBHOY AHMEDBHOY v. AHMEDBHOY HABIBHOY.*

[I. L. R. 12 Bom. 280

—*Held* (on appeal). The rule that Hindu law as administered in the Bombay Presidency, in the absence of proof of custom to the contrary, is the law applicable to Khoja Mahomedans, is not to be understood in its widest sense, but as confined to simple questions of inheritance and succession. The right of a son to partition in the lifetime of his father, more especially where moveable property is concerned, is one upon which the greatest doubt and difference of opinion has always prevailed, and consequently there is no presumption in favour of its inclusion in the Hindu law, which, in the absence of proof of custom to the contrary, is applicable to Khoja Mahomedans. The *onus* is on the party alleging such a right in the case of Khoja Mahomedans to prove it. *Held*, on the evidence, that it was not established that amongst Khojas in Bombay there was any recognized right of a son to demand partition in the lifetime of his father, although it was proved to be customary in Kathiawar and Cutch for a father to give a son who wished for it his share of the family property both ancestral and self-acquired. *Held*, also on the evidence, that there was no sufficient proof of the property, of which the plaintiff sought partition, being ancestral property in the hands of his father. Where wealth amassed by an individual in trade is said to be ancestral in the hands of that individual, it is not enough to show that he inherited some property; it must be shown that the property inherited contributed in a material degree to the wealth so amassed. *AHMEDBHOY HUBIBBHOY v. CASSUMBHOY AHMEDBHOY.*

[I. L. R. 13 Bom. 534

**KHOTI TENURE.**

1.—*Relations of inamdars with khots—Status of khot in the Ratnagiri district—Ownership not an essential incident of Khotship—Onus—That.]* The plaintiffs were the *inamdars* of a certain village in the Ratnagiri district, which was granted to their ancestors by the Peshwa under a *sanad* dated 3rd September, 1878. The defendants were the *vatandar* (or permanent) *khots* of the same village. In a previous suit between the parties relating to the forest attached to the village, it was held, upon the construction of the Peshwa's *sanad*, that "so far as the Peshwa's Government could pass the soil of the village and its revenues by its grant, it did pass them to the plaintiff's ancestors," and that therefore the plaintiffs were the owners of the forest. *Narayan Dhondbhat v. Pitre Trimbal Vithal* I L R 11 Bom. 688 note. In the present suit, which was brought to compel the defendants to pass a fresh *kabuliat* every year to the plaintiffs, and to recover the revenue from them for the years 1869-1870 and 1870-1871, the defendants contended (*inter alia*) that they had proprietary

**KHOTI TENURE—continued.**

rights, as inherent in their *khotship*, over the cultivated land of the village, and that the plaintiffs, as *inamdars*, were mere alienees of the land-tax payable to Government. In support of this contention they principally relied upon the fact that they were entitled to recover, and did in fact recover *thal*, or rent for lands reclaimed and brought under cultivation by the plaintiffs. The plaintiffs claimed on the other hand, to be the absolute owners of the whole soil of the village, and that the defendants were estopped by the annual *khabuliats* they had passed through a long series of years from setting up a proprietary title: *Held*, that the mere fact of the defendants being *ratandar khots* did not make them proprietors of the cultivated land in the village, that proprietary rights were not essential to the conception of a *khotship*, that in levying *thal* on the lands tilled by the plaintiffs the defendants did not necessarily assert, they certainly did not establish, a proprietary right to the soil as against the *inamdars*, and that the defendants held a position with rights and obligations not essentially different from those of other *khots* in the Ratnagiri district, who were farmers of the public revenue. **MORO ABAJI v. NARAYAN DHONDBHAT PITRE.**

[I. L. R. 11 Bom 680]

2.—*Proprietary right of khot to khoti ratani land—Right of such khot to forest land and to timber and wood growing therein—Government right of, to appropriate to forest preserves assessed or unassessed land—Construction of such khoti grants.* The plaintiff sued the defendant, alleging that that village of Mauze Ambelu, in the Ratnagiri district, was his *khoti ratani* village in which his proprietary right extended to raise crops of any kind or to preserve and cut the jungle and forest trees on the lands therein. He complained that since 1835-36 the Collector of the district prohibited him from exercising the above alleged rights, and prayed that the obstruction might be removed and Rs 600 awarded as damages. The plaintiff based his claim mainly on the settlement of 1788, Dunlop's proclamation of 1824, and several other *khoti* grants in the district. The defendant denied that the plaintiff had any proprietary right in the village, and contended (*inter alia*) that the *khot* derived his rights from the yearly *khabuliats* passed by him, that his right to cultivate did not extend to cultivating the jungle land, and that his position was no better than that of a *patel*. The Joint Judge who tried the suit held that under the settlement of 1788 the plaintiff, as *khot*, was entitled to the jungle produce, except timber; that in virtue of Dunlop's proclamation of 1824 the plaintiff acquired an unqualified right to the forest land in the village and timber growing on it, and that the defendant had no right to appropriate assessed or unassessed land for forest purposes, and awarded the plaintiff the sum of Rs. 600 as damages. On appeal by the defendant to the High Court *Held* that the application of the general rules of construction of grants to a subject by the State requires that language of such general import as is ordinarily to be found

**KHOTI TENURE—continued**

in the *khot's sanads* should be taken most beneficially to the State. *Held*, accordingly, that, in the absence of a *sanad* expressly granting it, the ownership neither of the soil nor of cultivated or uncultivated lands passes by the grant of the *ratandari khotship*. *Held*, also, that the grant of the *ratani khoti* did not make the *khot* a perpetual tenant of Government in respect of all lands in the village, except *dhara* lands. *Held*, on the authority of *Tajubhai v. Sub-Collector of Kolaba*, 3 Bom. A. C. 132 and *Ramchandra Narasimha v. Collector of Ratnagiri*, 7 Bom. A. C. 41, that a permanent relationship was created between the Government and the *khot* which could not be interfered with as long as the settlement of 1788 was in force, except with the *khot's* consent, and, therefore, that in 1855, when the *pahani* of 1788 was in force, the Government could not withdraw the *thikan* in question from the plaintiff's cultivation: *Held*, also, that, in the absence of evidence to show that the right to the jungle produce was intended to be reserved to Government, the plaintiff was entitled to cut down brushwood whether as a source of revenue or for the purpose of bringing the land into cultivation. *Held*, that the respondent was entitled to damages for the years during which he had been excluded, and to an injunction restraining the defendant from excluding him in the future: *Held*, also that, as *khot*, the respondent had no right to cut timber in forest and uncultivated lands whether by virtue of his *khotship* or Dunlop's proclamation. **COLLECTOR OF RATNAGIRI v. ANTAJI LAKSHMAN.**

[I. L. R. 12 Bom. 534]

3.—*Managing khot's right to create tenancies—Maphistara lands—Sutis lands—Sanad—Construction—Fraud.* A managing *khot* is entitled, without any express authorization, to create tenancies in land even though the reversionary interest in it is vested in the person whose lessee he is. If such a *khot* himself takes upland, he can do so consistently with the conditions of the *khoti* tenure. For a *khot*, as regards lands in his private occupation, may be a tenant to himself *qua khot*. In 1832 the British Government granted to the plaintiff's father, *M. I. M.*, the village of Ransai on *khoti* tenure by a *sanad* which provided (*inter alia*) as follows.—1. That the whole of the land lying waste in the village in the year 1830-31 was granted as *nam*. 2. That, exclusive of this *nam* land, all the rest of the village was granted on *khoti* tenure on certain conditions and stipulations set forth in twelve clauses, the chief of which were the following.—Clause 1st provided that the *khot* should annually pay to Government a fixed sum of Rs. 249 2as 35rs. Clause 7th provided that the *khot* should allow the lands, which had been granted on *maphistara* tenure to certain *khandars* before the date of the *sanad*, to continue in their possession, that he should every year recover from them the Government dues and pay the same over to Government in addition to the amount stipulated with him on account of the *khotship*. Clause 9th provided that the holders of the *suti* lands in the village were the owners

## KHOTI TENURE—continued.

of those lands. Should a new survey be made and a new assessment settled, the same should be settled by Government for the holders of the *suti* lands agreeably thereto. From 1845 to 1871 the management of the *khoti* village was entrusted to the defendant as a *mukhtadar*, or lessee under two *kabuliats* passed by him—one in 1845 to *M I M*, the grantee of the *khoti* village, and the other in 1858 to the grantee's heirs and legal representatives. By clause 5th of the *kabuliati* of 1858 the defendant agreed to carry on the management of the village and render a detailed account of the balance of the village revenue every year. Clause 7th of the same *kabuliati* was in the following terms:—"I (the lessee) will bring under cultivation and into prosperous state the waste, cultivable, and unculturable land of the aforesaid village. I will take the proceeds of the same during the years of my contract. After the expiry of the years of the contract you are to take the assessment of the fields according to the practice of the village. I have nothing to do with the same. I will not let (the village) nor lease to anybody for a longer period than for the period of the contract. If I let it, I will make good the damage you may suffer." In 1859 some of the *maphi istara* lands were sold by the Collector for arrears of assessment, and bought in by Government. The defendant applied to the Collector to have the lands transferred to him, and the Collector transferred them to his name. Shortly afterwards the defendant acquired some more lands, which were held on *suti* tenure in the village. He either purchased them or took them up on the tenants abandoning them. In 1861 when the survey was introduced into the village, he got his title to these lands recognized by the Superintendent of Survey. In 1871 the defendant's management of the village ceased. But he refused to deliver up to the plaintiff, either the *maphi istara* or the *suti* lands which he had acquired during his management. The plaintiff, therefore, sued, as *khot* of the village, to recover the said lands with mesne profits, alleging that the defendant had illegally and fraudulently acquired those lands on his own account while acting as plaintiff's agent, and praying that he should be declared to have acquired and held them in trust for the plaintiff. The defendant contended (*inter alia*) that the lands in suit were not included in the *khoti* grant; that they belonged to Government; that he had acquired some from the Collector and the rest from the Superintendent of Survey; that under his *kabuliats* he was entitled to take up the lands direct from Government, and that the plaintiff was only entitled to the assessment due on the lands which he had refused to accept. Lastly, the defendant denied that he had acted in fraud of the plaintiff's rights in acquiring the lands in dispute on his own account: *Held*, on the construction of the *sanad*, that the plaintiff being the *khot* of the whole of the village exclusive of the land granted in *inam* the *maphi istara* lands were included in the *khoti* grant; that the *khot's* interest in them

## KHOTI TENURE—continued.

whatever might be the extent of it, was not separable from the *khoti* estate, and that the *khot* had a reversionary interest in the *maphi istara* lands, as well as in the *suti* lands, which had been abandoned by their former occupants. *Held*, also, that the defendant was not precluded by the terms of his lease from acquiring the lands in dispute on his own account. The engagement to furnish accounts of the balance of the village revenue at the end of each year was simply an engagement to furnish the plaintiff with information which would be of use to him, and which indeed it would be necessary for him to possess when he resumed the management of the village on the determination of the lease. It imported nothing more than that; and the whole transaction evidenced by the *kabuliats* was merely an assignment, in consideration of a fixed annual payment to be made by defendant to plaintiff, of the rights and liabilities of the latter to be exercised and discharged for a certain period by the former. For that period the defendant was the *mukhtadar* or tenant of the plaintiff's *khotship*; and though a certain confidence was necessarily reposed in him in connection with a tenancy of this nature, and though he was bound jealously and scrupulously to protect the plaintiff's interest, so far as they were in his keeping, yet he was not bound by the strict rule which prohibits a trustee from acquiring for himself an estate of his *cestui que trust*. Under clause 7 of the *kabuliati* of 1858 the defendant was at liberty either to take up waste lands himself or put in tenants; if he put in tenants on leases, the special advantages of any leases were to expire with his own lease. But the actual occupation of land either by himself or by his tenants was not to be interfered with at the determination of his lease, so long as he or they continued to pay the assessment according to the practice of the village. The defendant could, therefore, without the intervention of the Collector, have taken up the *maphi istara* lands in suit and become himself the tenant; and he could have also acquired the *suti* lands from former *sutidars*, or taken them up if waste, without the intervention of the Survey Superintendent. The circumstance that, when acquiring the lands he needlessly invoked the assistance of the Revenue authorities, would not invalidate his title if it could not be impugned on other grounds: *Held*, further, that the defendant was not guilty of fraud, as there was no evidence to show that he had acted in a surreptitious or secret manner in acquiring the lands in suit. On the contrary, his action in applying to the Revenue authorities was a sign of his good faith rather than of any fraudulent intent. The plaintiff was, therefore, not entitled to oust the defendant from the lands in suit. *FAK ISMAIL v. MAHOMED ISMAIL*

[1 L. R. 12 Bom. 595]

4.—Lease containing words of inheritance not inalienable—Construction—*Khoti Act* (Bom. Act I of 1880) s. 9.] The *khots* of the village of A

**KHOTI TENURE—concluded.**

in 1854 leased certain land to *B* by a lease which declared that "you (*B*) are to enjoy, you and your sons, grandsons, from generation to generation." The rent fixed by the lease was eleven maunds and six and a half *paolis* of *bhat* per year *B* having died, his widow in 1878 transferred the lease to the plaintiff, who entered into possession and offered to pay to the defendants, who were *khots* of the village and the successors of the grantors of the lease in 1854, the annual rent fixed by the lease. The defendant refused to accept it, and contended that the plaintiff was liable to pay the rent paid by other occupying tenants in the village. The plaintiff thereupon sued to have it declared that he was entitled under the lease to hold the lands permanently at the rent thereby fixed. *Held* by the High Court, that he was entitled to the declaration. The lease was one to hold in perpetuity at the fixed rent, but there were no words making the lease inalienable. There was no evidence of any custom of the village, nor anything in the Khoti Act I (Bombay) of 1880, which could be construed as a declaration of the existing custom of *khoti* villages when the Act was passed. **VINAYAK MORESHVAR v. BABA SHABUDIN.**

[I. L. R. 13 Bom 373]

**LACHES.**

See COSTS—SPECIAL CASES—DELAY.

[I. L. R. 11 All. 372]

**LAND ACQUISITION ACT (X OF 1870) ss. 15, 38. and 55.**

*District Court, Powers of—Compensation, its principle and measure—Lands severed from a factory* [The Land Acquisition Act provides for two classes of reference to the Judge, one to assess compensation under s. 15, and the other to apportion compensation under s. 38. The power of the District Court is limited to the determination of these questions and questions of title incidental thereto. There is no power in the Judge or the High Court in appeal to decide on any such reference a question arising under s. 55. Land taken under the Act is taken, discharged of all easements, and the loss of easements must be taken into account in assessing compensation for injurious affection. **TAYLOR v. COLLECTOR OF PURNEA.**

[I. L. R. 14 Calc. 423]

—, s. 39.

1.—*Apportionment of—Compensation between zemindar and putnidar. Principle of.* [The apportionment between zemindar and putnidar of the amount awarded as compensation for land taken by Government under the Land Acquisition Act will depend partly on the sum paid as bonus for the putni, and the relation that it bears to the probable value of the property and partly on the amount of rent payable to the zemindar, and also the actual proceeds from the cultivating

**LAND ACQUISITION ACT (X OF 1870) s. 39—concluded.**

tenants or under-tenants. **BUNWARI LAL CHOWDARY v. BURNOMOYI DASL.**

[I. L. R. 14 Calc. 749]

—, s. 39.

2.—*Appeal—Additional Judge—District Judge—Land Acquisition Act (X of 1870), s. 39—Civil Procedure Code (Act XIV of 1882), s. 647* [An additional Judge appointed to hear cases under the Land Acquisition Act, 1870, is a District Judge within the meaning of s. 39 of the Act. Under s. 647 of the Civil Procedure Code an appeal from the decision of an additional Judge so appointed lies to the High Court. **IN THE MATTER OF THE APPLICATION OF PORESH NATH CHATTERJEE v. SECRETARY OF STATE FOR INDIA.**

[I. L. R. 16 Calc 31]

—, s. 55.

*Part of property acquired for public purposes—Owner desiring that the whole shall be acquired—Right of owner not confined to small or confined areas—Convenience of owner not the test.* [The Local Government having appropriated for public purposes under the Land Acquisition Act (X of 1870) some of the out-houses attached to a dwelling-house, and part of the compound in which they were situate, without taking the house with its other out-houses or appurtenances, or the rest of the compound, the owner objected, under s. 55 of the Act, that the Government should take the whole of such property or none. *Held*, applying to s. 55 the interpretation placed by the Courts in England upon the corresponding s. 92 of the Land Clauses Consolidation Act (8 & 9 Vic. c. 18), that the section was applicable, and the objection must be allowed. **GROSCENOR v. THE HAMPSHIRE JUNCTION RAILWAY COMPANY.** 262 L. J. N. S. Ch. 731; **COLLINS v. THE WEST LONDON AND CRYSTAL PALACE RAILWAY COMPANY.** 28 L. J. Ch. 767, and **KING v. THE WYCOMBE RAILWAY COMPANY.** 29 L. J. Ch. 462, referred to. *Held*, also that the rule was not in England restricted to small or confined areas, and that the test was not whether the part appropriated could be severed from the rest of the property without inconvenience to the owner. **KHAIRATI LAL v. SECRETARY OF STATE FOR INDIA.**

[I. L. R. 11 All 378]

**LAND REGISTRATION ACT (BENGAL ACT VII OF 1876), s. 78.**

*Suit for rent by unregistered proprietor—Application for registration as proprietor.* [Section 78 of the Land Registration Act, 1876, precludes a person claiming as proprietor from suing a tenant for rent until his name has been actually registered as such under the Act. A mere application to be registered is not sufficient for the purpose. **SURYA KANT ACHARYA BAHADUR v. HEMANT KUMARI DEVI.**

[I. L. R. 16 Calc. 706]

**DHORONIDHUR SEN v. WAJIDUNNISSA KHATOON**

[I. L. R. 16 Calc. 708 note]

## LANDLORD AND TENANT

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## (1) CONSTITUTION OF RELATION.

## (a) ACKNOWLEDGMENT OF TENANCY BY RECEIPT OF RENT, &amp;c.

1.—*N.-W. P. Rent Act XII of 1881, s. 95—N.-W. P. Land Revenue Act XIX of 1873, ss. 72 and 77—Determination of Rent by Settlement-officer—Suit for arrears of rent prior to order* [In March 1884, the rent payable by an occupancy-tenant was fixed by the Settlement-officer under s. 72 of Act XIX of 1873 (N.-W. P. Land Revenue Act). In 1885 the landholder brought a suit to recover from the tenant arrears of rent at the rate so fixed for a period antecedent to the Settlement-officer's order, as well as for the period subsequent thereto. The lower Appellate Court dismissed the claim for rent prior to the 1st July 1881, and decreed such as was due subsequently to that date, but without interest. *Held* that the Court could not decree any amount as arrears due until the rent payable had been fixed by private contract or by a competent Court; that, under s. 77 of the N.-W. P. Land Revenue Act, the rent fixed by the Settlement-officer was payable from the 1st July following the date of his order, but not before; that for the period prior to the 1st July 1884, no rent had been fixed; that it could not be fixed in the present suit, neither

## LANDLORD AND TENANT—continued

## (1) CONSTITUTION OF RELATION—concluded

## (a) ACKNOWLEDGMENT OF TENANCY BY RECEIPT OF RENT, &amp;c.—concluded.

the Court of First Instance nor the High Court having jurisdiction to fix it, and that the claim for rent for the period in question must therefore be dismissed. *Mahadeo Prasad v Mathura*, I. L. R. 8 All. 189, distinguished; *Phulakra v. Jeolal Singh*, I. L. R. 6 All. 52, referred to. *RADHA PRASAD SINGH v. JUGAL DAS*

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## (2) LIABILITY FOR RENT.

2.—*Bengal Act VII of 1876, s. 78—Suit for rent by unregistered proprietor—Application for registration as proprietor* [S. 78 of the Land Registration Act, 1876, precludes a person claiming as proprietor from suing a tenant for rent until his name has been actually registered as such under the Act. A mere application to be registered is not sufficient for the purpose. *SURYA KANT ACHARYA BAHADUR v. HEMANT KUMARI Deyl*.

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## (3) NATURE OF TENANCY.

3.—*Long continuance of a tenancy at a low and unvaried rent—Zemindar's right against tenant—Origin and special purpose of the tenancy—Cessation to use the land for such purpose—Burden of proving permanent tenure—Inference of tenancy-at-will, or from year to year.* [The evidence having shown the origin and particular purpose of a tenancy, long continued at a low and unvaried rent, viz. from 1798 until 1873, when the tenant ceased to use the land for the purpose: *Held*, that it was not to be inferred from that evidence that an agreement had been made between the parties that the tenant should hold a permanent tenure; and *held*, that, on such cessation, the tenant could only resist a suit to eject him by proving, or giving grounds for the inference of, an agreement with the owner of the land that he should have something more of a lease than the ordinary tenancy-at-will, or from year to year; also, that the facts here presented did not lead to that inference. *SECRETARY OF STATE FOR INDIA v. LUCHMESWAR SINGH*

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## (4) ALTERATION OF CONDITIONS OF TENANCY.

## (a) CHANGE OF CULTIVATION OR NATURE OF LAND.

4.—*Forfeiture—Waste—Planting a mango tree on dry land.* [In the absence of local custom, tenants are not entitled to convert land under

## LANDLORD AND TENANT--continued.

## (4) ALTERATION OF CONDITIONS OF TENANCY--concluded.

## (a) CHANGE OF CULTIVATION OR NATURE OF LAND--concluded.

cultivation into a mango grove. Tenants from year to year are not at liberty to change the usual course of husbandry without the consent of the landlord. *LAKSHMAN v. RAMACHANDRA*.

[I. L. R. 10 Mad. 351]

## (5) TRANSFER BY TENANT.

5—*Enhancement of rent, suit for—Transferable tenure—Mutation of names—Tenant who has transferred his holding, liability of, for rent.* The main object of a suit for enhancement is to have the contract between the landlord and tenant as regards the rate of rent re-adjusted. In a suit for enhancement it was found that the defendant had, prior to institution, sold his holding, which by custom was transferable without the consent of the landlord, to a third party. There had been no mutation of names, or payment of a *nazar*, or execution of fresh lease; but the landlord had received rent from the third party and was fully aware of the transfer. *Held*, that the connection of the defendant with the holding had come to an end, and the suit against him did not lie. *ABDUL AZIZ KHAN v. AHMED ALI*.

[I. L. R. 14 Calc. 795]

## (6) PROPERTY IN TREES PLANTED ON LAND.

6.—*Ex-proprietary tenant—Trees—Sale in execution of decree—North-Western Provinces Rent Act XII of 1881, ss. 7, 9.* Held by the Full Bench that an ex-proprietor, who under s 7 of Act XII of 1881 (N.-W. P. Rent Act) gets occupancy-rights in his *sir-land*, obtains analogous rights in the trees upon such *sir-land*. A purchaser of proprietary rights in zemindari property at a sale in execution of a decree for money held by himself applied in execution of the decree for the attachment and sale of certain trees growing on the judgment-debtor's ex-proprietary holding. *Held* by the Full Bench, with reference to the provisions of ss. 7 and 9 of Act XII of 1881 (N.-W. P. Rent Act), that the trees were not liable to attachment and sale in execution of the decree. *Per STRAIGHT, J.*—When a proprietor sells his rights, and becomes entitled under s 7 of the Rent Act to the rights of an ex-proprietary tenant, he holds all rights in the land *quâ* such tenant, which he formerly held in his character as proprietor, and paying rent in his capacity as tenant. Where there are trees upon the *sir-land* held by him at the time when he lost his proprietary rights, neither the purchaser of those rights nor he himself can cut down, or sell them *in invitum* to each other. Short of cutting the trees down, he has the same right to enjoy the trees as he originally had. *JUGAL v. DEOKI NUNDAN*.

[I. L. R. 9 All 88]

## LANDLORD AND TENANT--continued.

## (6) PROPERTY IN TREES PLANTED ON LAND--concluded.

7—*Occupancy-tenant—Trees, sale of—Such sale invalid—Act XII of 1887, s 9.* The trees upon an occupancy-holding, whether planted by the tenant himself or not, belong and attach to such holding, and like it, are not susceptible of transfer by the tenant. *IMDAD KHATUN v. BHAGIRATH*.

[I. L. R. 10 All. 159]

## (7) FORFEITURE.

## (a) BREACH OF CONDITIONS.

8—*Use and Occupation—Re-entry—Demand of rent—Statute 32, Hen. VIII, c 31—Waiver.* A covenant in a lease reserved to the lessor, on default of payment of rent, a power of re-entry; there being no mention in such covenant of a similar power being also reserved to his "heirs, successors or assigns." The lessor sold his rights, in the property leased to third persons, and such third persons endeavoured to re-enter under the covenant: *Held*, that although re-entry was reserved only to the lessor, yet his vendees could take advantage of the covenant, the operative part of the Statute 32, Hen. VIII, c. 31, being wide enough to admit of this, notwithstanding the wording of the preamble: *Held*, further, that the forfeiture having been waived by subsequent demands for rent, and there being no legal demand for rent on the last day on which rent at a date subsequent to the waiver fell due, the vendees were not entitled to make use of the right of re-entry. *KRISTO NATH KOONDOL v. BROWN*.

[I. L. R. 14 Calc. 176]

9—*Planting Trees—Waste—Planting a mango tree on dry land.* In the absence of local custom tenants are not entitled to convert land under cultivation into a mango grove. Tenants from year to year are not at liberty to change the usual course of husbandry without the consent of the landlord. *LAKSHMANA v. RAMACHANDRA*.

[I. L. R. 10 Mad. 351]

## (b) DENIAL OF TITLE.

10—*Right of Landlord to evict on tenants denying his title.* A tenant, repudiating the title under which he entered, becomes liable to immediate eviction at the option of the landlord. *VISHNU CHINTAMAN v. BALAJI BIN RAGHUJI*.

[I. L. R. 12 Bom. 352]

11.—*Non-payment of rent—Relief Forfeiture against—Co-sharers—Lease from one of several co-sharers—Denial of lessor's title—Estoppel.* A person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment. The plaintiff sued to eject the defendant, his tenant, for failure to pay rent on the ground that such failure operated



LANDLORD AND TENANT—*continued*.(7) FORFEITURE—*concluded*.(b) DENIAL OF TITLE—*concluded*.

as a forfeiture under the terms of the lease. The defendant pleaded (1) that he had paid rent to plaintiff's co-sharer, and (2) that the plaintiff alone could not sue without joining his co-sharer. The Subordinate Judge disallowed both these pleas and passed a decree declaring the plaintiff entitled to eject the defendant, unless the latter paid up all arrears of rent up to date of decree, together with interest and costs of suit, within three months. This decree was reversed by the District Judge on appeal, who awarded possession of the land to the plaintiff, on the ground that the defendant having in his written statement denied the plaintiff's exclusive title, was not entitled to be relieved against the forfeiture clause in the lease. *Held*, reversing the decree of the lower Appellate Court, that the plaintiffs alleged cause of action being, not a disclaimer or denial of his title, but merely non-payment of rent, forfeiture for breach of such a covenant in the lease could be relieved against by a Court of Equity. *JAMESDJI SORABJI v. LAKSHMIRAM RAJARAM*.

[I. L. R. 13 Bom. 323]

## (8) ABANDONMENT OR RELINQUISHMENT OF TENURE.

12.—*Bombay Land Revenue Act V of 1879, s 74—Tenant remaining in occupation after passing a rajinama—Effect of the rajinama—Construction—Practice—Ejectment suit by owner of "inter esse terminum."* The first and second defendants were sub-tenants of the third defendant, who had certain land which was part of the *nam* village of D. In 1883 the third defendant executed a *rajinama* in the following terms which he gave to the receiver who had been appointed by the Court to manage the village:—"Up to the present time my father and I have been cultivating the land, but the land belongs to the *inamdar*. I have no title over it, and the *inamdar* can give it for cultivation to any one he pleases." Shortly after the date of this *rajinama* the *inamdar* gave the land to the plaintiff, who now sued to obtain it from the defendants, who had remained in possession: *Held*, that the plaintiff was entitled to the land. The *rajinama* operated as a relinquishment of the tenancy by defendant No. 3 under s. 74 of Bombay Act V of 1879: *Held*, also, that the plaintiff was entitled to sue in ejectment, although he had not been put in possession of the land. *BHUTIA DHONDU v. AMBO*.

[I. L. R. 13 Bom. 294]

## (9) SURRENDER.

13.—*Proof of reconveyance—Receipts of consideration—Relinquishment of possession.* The *mokuravidar* having granted a *dur-mokurari* lease of part of his holding, which was afterwards surrendered for good consideration, *shranamas* to this effect were executed, but not being registered were not receivable in evidence. *Held*, that to

LANDLORD AND TENANT—*continued*.(9) SURRENDER—*concluded*.

prove a formal deed of reconveyance was not necessary—the receipt of the money and the relinquishment of possession sufficiently showing what had become of the *dur-mokurari* interest. *IMAM BANDI BEGUM v. KAMLESWARI PERSHAD*.

[I. L. R. 14 Calc. 109]

[L. R. 14 I. A. 180]

## (10) EJECTMENT.

## (a) GENERALLY.

15.—*Suit for arrears of rent—Bengal Rent Act (Bengal Act VIII of 1869), ss. 22, 52.* A landlord who sues for arrears of rent, for the whole of one year, and a portion of the next, and also for ejectment, is not entitled to a decree for the latter. The right to ejectment under s. 22 of the Rent Act (Bengal Act VIII of 1869), accrues at the end of the year, and forfeiture or determination of the tenancy thereupon takes place, but if the landlord sues for subsequent arrears, he treats the defendant as his tenant, and the right acquired under that section must be taken to have been waived. *JOGESHWARI CHOWDHRAIN v. MAHOMED EBRAHIM*.

[I. L. R. 14 Calc. 33]

15.—*Agreement by occupancy-tenant to relinquish his holding—Agreement not enforceable—Suit for specific performance of agreement—Jurisdiction of Civil Courts.* The defendant who was a tenant with a right of occupancy in the land cultivated and held by him, executed a *habuliat* in respect of the said land in favour of the plaintiffs (his landlords), agreeing that on the expiry of the term fixed in the *habuliat* he should have no claim to retain possession of the cultivatory holding, but that he should give it up. Plaintiffs sued for ejectment of the defendant on the basis of the agreement, and obtained a decree from the lower Appellate Court. On second appeal by the defendant: *Held* that inasmuch as the plaintiffs sought to enforce the covenant contained in the *habuliat* in such a manner as to extinguish the rights of occupancy found upon the facts of the case to have been acquired by the defendant in the land in suit, such suit must fail, as opposed to the policy of the law as shown in the provisions of s. 9 of the Rent Act (Act XII of 1881). Such a tenant may be ousted from his holding by enforcement of the remedies given in that behalf in s. 95 (d) and (f), but not in the manner sought by the plaintiff in this action. *KAURI THAKURAI v. GANGA NARAIN LAL*.

[I. L. R. 10 All. 615]

16.—*Evidence Act I of 1872, s 116—Estoppel—Kumaki land—Unassessed waste reclaimed by plaintiff—Patta granted to defendant.* The plaintiff, who was the holder of a *warg* in Canara demised adjacent waste land to one who brought it into cultivation and remained in occupation

## LANDLORD AND TENANT—continued.

## (10) EJECTMENT—continued.

## (a) GENERALLY—concluded.

for two years. The land was not assessed to revenue in the name of either of these persons. At the end of two years the tenant let into occupation a sub-tenant who subsequently assigned his right to the defendant, the holder of a neighbouring *warg*. The defendant obtained a *patta* for the land from the Revenue authorities. In a suit by plaintiff to eject the defendant: *Held* (1) that the defendant was not estopped from setting up a title adverse to the plaintiff and that his possession became adverse when the *patta* was granted to him; (2) that the plaintiff was not entitled to eject the defendant. *SUBBARAYA v. KRISHNAPPA*.

[I. L. R. 12 Mad. 422]

## (b) NOTICE TO QUIT.

17.—*Co-owners—Notice to quit by one co-owner—Notice to quit before expiry of term of lease—Suit in ejectment by one co-owner—Parties.* *K* and *P* were co-owners of certain property in Bombay, and by a writing, dated January 1883, they granted a lease of the whole of the said property to the defendant for a term of three years from the 1st March 1883, to the 28th February 1886, at a monthly rent of Rs 705. Subsequently to the granting of the said lease, *viz.* on the 1st September 1883, *P* conveyed her equal and undivided moiety of the said property to the plaintiff. On the 30th January 1886, *i.e.*, a month before the expiration of the lease—the plaintiff gave the defendant notice to determine the tenancy, and required him to quit on the 1st March then next. The defendant refused, and the plaintiff brought this suit for possession and for occupation rent from the 1st March 1886. The defendant pleaded that the notice to quit being given by one of the co-owners only, was invalid, and, further, that the plaintiff was not entitled to sue alone; *Held* that the notice was a valid notice, and that the suit was maintainable by the plaintiff alone. The second clause of the lease was as follows:—“If you mean me to vacate at the completion of the term, you must give one month’s notice. In accordance therewith I will vacate and give up possession to you.” *Held*, that the notice to quit was not invalid under the above clause of the lease, although given before, instead of after, the expiry of the term. *EBRAHIM PIR MAHOMED v. CURSETJI SORABJI DE VITRE*.

[I. L. R. 11 Bom. 644]

18.—*Denial of title—Suit for possession by purchaser at sale in execution of decree* [In a suit by the plaintiff, a purchaser at a sale in execution of a decree who had obtained possession through the Court, and been subsequently ejected, to recover the lands he purchased, it appeared that *R* and *G* two of the defendants had mortgaged the lands in 1867 to *GR*, the third defendant, and in 1870 *GR* had obtained against his mortgagors *R* and *G* a decree on his mort-

## LANDLORD AND TENANT—continued.

## (10) EJECTMENT—continued.

## (b) NOTICE TO QUIT—continued.

gage in execution of which the lands were sold and purchased by the plaintiff in 1872. The plaintiff alleged that after he got possession in 1872 he had leased the property to *R* and *G*. They denied the letting by the plaintiff, and alleged that they were tenants of *GR*. The plaintiff failed to prove that *R* and *G* were his tenants: *Held*, that the plaintiff was entitled to recover: *Held*, that as *R* and *G* claimed only to be tenants of *GR*, they could not retain possession of the land, merely because the plaintiff had failed to prove that he had let the land to them. They denied the plaintiff’s title, and were not, therefore, entitled to any notice to quit. *AGARCHAND GUMANCHAND v. RAKHMA HANMANT*.

[I. L. R. 12 Bom. 678]

19.—*Notice of ejectment—Determination of tenancy—Act XII of 1881, ss. 36, 39. (c) 40—Suit for ejectment and mesne profits—Payment by wrong-doer in possession not to be deducted from such profits* [S 39 (c) and s. 40 of the N.-W. P. Rent Act (XII of 1881) imply that if a landlord has failed to give his tenant the written notice of ejectment required by s. 36, the tenancy is not to be treated in law as having ceased on determination of the term provided, but is to be treated as still subsisting. Where upon the expiry of the term of a lease, but without the written notice of ejectment required by s. 36 of the Act having been given by the lessor, possession was taken and rents collected by persons claiming under a subsequent lease. *Held*, that the tenancy of the first lessees did not cease upon the determination of the term of their lease, and that the second lessees were wrong-doers in usurping possession and collecting rents and profits, and were liable in a suit for damages by way of mesne profits after deduction of a sum paid by them for Government revenue, but without deduction of what they had paid the lessor or of the expenses they had incurred in collecting the rents. *SHITAB DEVI v. AJUDHIA PRASAD*.

[I. L. R. 10 All. 13]

20.—*Necessity of notice—Permanent tenancy pleaded* [Suit to eject defendants from certain land held by them from the plaintiff under a *chalgeni* (yearly) demise of 1869. The defendants pleaded that they were *kattugudi* (permanent) tenants of the land in question; they had set up their title as *kattugudi* tenants previous to the *chalgeni* demise, but it did not appear that they had reasserted it up to date of suit. *Held*, that the issue whether the plaintiff had given a notice to quit, reasonable and in accordance with local usage, should be tried. *Baba v. Vishwanath Joshi* (I. L. R. 8 Bom. 228), considered. *SUBBA v. NAGAPPA*.

[I. L. R. 12 Mad. 353]

## LANDLORD AND TENANT—concluded.

## (10) EJECTMENT—concluded.

## (b) NOTICE TO QUIT—concluded.

21.—*Service of notice to quit by registered letter. Sufficiency of.* Where a notice to quit was sent by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it was despatched, that cover containing the notice with an endorsement upon it purporting to be by an officer of the post office stating the refusal of the addressee to receive the letter: *Held*, that this was sufficient service of notice. *Lootf Ali Meah v. Praree Mohun Roy*, 16 W. R. 223, and *Papillon v. Brunton*, 5 H. & N. 518, referred to. *JOGENDRO CHUNDER GHOSE v. DWARKA NATH KARMOKAR*.

[I. L. R. 15 Cal. 681]

## (11) COMPENSATION FOR IMPROVEMENTS, &amp;C, ON LAND.

22.—*Hindu law—Wells dug with consent of landlord* ] Where tenants from year to year, with permission of the landlord, sank wells in the land demised: *Held*, that they were not entitled under Hindu law to any compensation therefor from the landlord after the determination of the tenancy. *VENKATAVARAGAPPA v. THIRUMALAI*

[I. L. R. 10 Mad. 112]

23.—*Mulabhar kanam—Change in character of land—Passive acquiescence of landlord—Estoppel—Compensation for improvements by tenant* ] Land was demised on *kanam* for wet cultivation. The demisee changed the character of the holding by making various improvements, which were held to be inconsistent with the purpose for which the land was demised. On a finding that the landlord had stood by while the character of the holding was being changed and had thereby caused a belief that the change had his approval: *Held*, on second appeal, that the demisee was entitled to compensation for his improvements on redemption of the *kanam*. *Ramsden v. Dyson* (L. R. 1 H. L. 129), followed. *KUNHAMMED v. NARAYANAN MUSSAD*.

[I. L. R. 12 Mad. 320]

See *RAVI VARMAH v. MATHESSEN*

[I. L. R. 12 Mad. 323 note]

Where, however, compensation was refused for some of the improvements, the landlord not having by his conduct acquiesced in their being made, but though compensation was not allowed, the tenant was allowed to remove them.

## LEASE.

Col.

1. Construction ... .. 532

See STAMP ACT, 1879, SCH. I, ART. 5.

[I. L. R. 13 Bom. 87]

## LEASE—continued.

## (1) CONSTRUCTION.

1.—*Kabuliat. Construction of—Stipulations as to rent of new chur—Hawaladar tenure—Measurement and assessment of chur land—Landlord and tenant—Bengal Act VIII of 1869, s. 14* ] A *kabuliat*, executed by the tenant of land held in *hawala* tenure, provided that on an adjoining *chur* becoming fit for cultivation the whole land, old and new, held by the tenant should be measured, and, the old having been deducted from the total, rent should be paid for the excess land at a specified rate up to five drones, and for any more at the prevailing *peigunnah* rates. It provided also that either (a) rent should be realized according to law with interest thereon; or that (b) at the close of the year the owner should, by a notice served on the *hawaldar*, require him to take a settlement of the excess land, and within fifteen days to file a *kabuliat*; or (c) the excess land might be settled with others. Such a *chur* having been formed, the *zemindar* measured without notice to, and in the absence of, the *hawaldar*. He then served a notice on the latter requiring him to execute a *kabuliat* within fifteen days for payment of a fixed rent upon the excess land as found by the measurement, or to yield up possession. Disregard of this led to a suit in which the *zemindar* claimed either *khas* possession or rent on measurement by order of Court. *Held*, that neither the *kabuliat* nor the terms of s. 14 of Bengal Act VIII of 1869 precluded a suit for assessment of the rent upon measurement, nor did the absence of authentic measurement as prescribed by the *kabuliat* have that effect, or effect the measurement by the *amin*; but that, until both the measurement and the assessment of the rent had taken place (which might be either in the manner prescribed or by judicial determination), the *zemindar* could not put the *hawaldar* to his choice between (b) executing a *kabuliat* for the rent and (c) yielding up possession. *RAMKUMAR GHOSE v. KALIKUMAR TAGORE*.

[I. L. R. 14 Cal. 99]

[L. R. 13 I. A. 116]

2.—*Construction of patta as to duration—Use of the word "mukurari"* ] A *ghatwali* estate having been sold for arrears of revenue, the purchaser brought suits to set aside under tenures, and in so doing sued a tenant, who alleged himself to be a *ghatwali*. The latter compromised the suit, receiving a *mukurari patta* not containing any words importing an hereditary interest. *Held*, that the above circumstances were no ground for declining to give effect to the *patta* as it stood, the word "*mukurari*" not importing inheritance. *PARMESWAR PERTAB SINGH v. PADMANAND SINGH*

[I. L. R. 15 Cal. 342]

3.—*Right of occupancy—Permanent cultivator—Paraculi.* ] The defendant's ancestors or predecessors in title were the cultivating tenants of the lands of a certain temple from a date not later than 1827, in which year they were so described in the

**LEASE—concluded.****(1) CONSTRUCTION—concluded.**

*parmaish* accounts. In 1830 they executed a *muchalka* to the Collector who then managed the temple, whereby they agreed among other things to pay certain dues. They were described in the *muchalka* as *paranides*. In 1857, the plaintiff's predecessors took over the management of the temple from, and executed a *muchalka* to, the Collector whereby they agreed, among other things, not to eject the rajats as long as they paid *kist*. In 1882 the dues (which were payable separately), having fallen into arrear, the manager of the temple sued to eject the defendants. *Held*, that there was nothing to show that the defendants were more than tenants from year to year. *Chockalinga Pillai v. Vithalanga Pundara Sannadhy* 6 Mad. 164, and *Krishnasami v. Varadaraja*. I. L. R. 5 Mad 315, discussed and distinguished *THIAGARAJA v. GIYANA SAMBANDHA PANDARA SANNADHI*.

[I. L. R. 11 Mad 77]

4—*Madras Rent Recovery Act, s 4—Uncertainty as to amount of rent* [An agreement in a *patta* to pay whatever rent the landlord may impose for any land not assessed, which the tenant may take up is bad for uncertainty. *RAMASAMI v. RAJAGOPALA*.

[I. L. R. 11 Mad. 200]

5—*Lease containing words of inheritance not inalienable—Khoti Act (Bom.) I of 1880, s 9.* [The *khots* of the village of A in 1854 leased certain land to B by a lease which declared that "you (B) are to enjoy, you and your sons, grandsons, from generation to generation." The rent fixed by the lease was eleven maunds and six and a-half *padis* of *bhat* per year. B having died, his widow in 1878 transferred the lease to the plaintiff, who entered into possession and offered to pay to the defendants, who were *khots* of the village and the successors of the grantors of the lease in 1854, the annual rent fixed by the lease. The defendant refused to accept it and contended that the plaintiff was liable to pay the rent paid by other occupying tenants in the village. The plaintiff thereupon sued to have it declared that he was entitled under the lease to hold the lands permanently at the rent thereby fixed. *Held*, by the High Court, that he was entitled to the declaration. The lease was one to hold in perpetuity at the fixed rent, but there were no words making the lease inalienable. There was no evidence of any custom of the village, nor any thing in the Khoti Act I (Bombay) of 1880, which could be construed as a declaration of the existing custom of *khoti* villages when the Act was passed. *VINAYAK MORESHVAR v. BABA SHABUDIN*.

[I. L. R. 13 Bom 373]

**LEGACY****——. Lapse of**

See SUCCESSION ACT, s 96.

[I. L. R. 16 Calc. 549]

**LEGACY—concluded.****——. To Person appointed Executor.**

See SUCCESSION ACT, s 128.

[I. L. R. 15 Calc. 83]

**LEGAL PRACTITIONERS ACT (XVIII OF 1879)**

See PLEADER—PRIVILEGES OF PLEADERS.

[I. L. R. 15 Calc. 688]

——. ss. 4 and 40—*Irregularity in procedure in dismissing a mukhtear.* [A charge of unprofessional conduct brought against a practitioner holding a certificate under Act XVIII of 1879, having been found to be established by a Subordinate Court, which also considered that he, in consequence, should be dismissed and the same having been reported, in conformity with s 14 of that Act, to the principal Court in the province, such dismissal was ordered. *Held*, that the practitioner could not be dismissed or suspended under that section without his having been allowed, under s. 40, an opportunity of defending himself before that Court. It is within the duties of a Court, informed of the misconduct of one of the practitioners before it to take steps to have the matter adjudicated upon. *IN THE MATTER OF SOUTHERAL KRISHNA RAO*.

[I. L. R. 15 Calc. 152]

[I. L. R. 14 I. A. 154]

——. s. 32.—*Outsider practising as mukhtear, his liability to punishment—Mukhtears their functions—Civil Procedure Code, s 37.* [Act XVIII of 1879 is an amending as well as a consolidating Act, and one of the respects in which it amended the old law was the conferring upon the High Court power "to make rules declaring what shall be deemed to be the functions, powers and duties of the mukhtears practising in the Subordinate Courts. When a person other than a duly certificated and enrolled mukhtear constantly, and as a means of livelihood performs any of the functions or powers which the rule framed by the High Court in accordance with the provisions of the Legal Practitioners' Act says are the functions and powers of a mukhtear, he practises as a mukhtear, and is liable to a penalty under s. 32 of the Act. The words "any person" in s. 32 embrace pure outsiders as well as duly qualified and enrolled mukhtears who have failed to take out their certificates. *G. N.* though not a certificated mukhtear, was in the habit of appointing and instructing pleaders in the Civil Courts on account of certain persons who paid him a regular monthly salary for so doing. In a proceeding against him under the Legal Practitioners Act *G. N.* made this statement "I receive a letter from the mofussil from a person and act for him, he sending the *rakalatnama* with his letter. I receive monthly wages from each of the persons who employ me. Each of the employers I have mentioned belongs to a distinct family and lives in a separate village." *Held*, that *G. N.* was neither a private servant nor a recognised agent

# LEGAL PRACTITIONERS ACT (XVIII OF 1879), s. 32—concluded.

of any of his employers within the meaning of s. 37 of the Civil Procedure Code, and was liable to a penalty under s. 32 of the Legal Practitioners Act for having practised as a mukhtear: *Held*, also that, having regard to the Court in which *G N* practised, the words in s. 32 "to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorising him so to practise in such Court," were equivalent to the words "to a fine not exceeding Rs. 250." *IN THE MATTER OF THE PETITION OF GIRHAR NARAIN, TUSUDUQ HUSAIN v. GIRHAR NARAIN.*

[I. L. R. 14 Calc 556]

—, s. 40.

*See* s. 14.

[I. L. R. 15 Calc. 152]

## LEGISLATURE, POWER OF

*See* HIGH COURT, JURISDICTION OF — HIGH COURT, N-W P.

[I. L. R. 11 All. 490]

## LETTERS OF ADMINISTRATION.

*See* PRACTICE—CIVIL CASES—LETTERS OF ADMINISTRATION.

[I. L. R. 16 Calc 776]

—*Citation—Defective citation—Revocation of letters of administration—Act V of 1881, ss. 16 and 50* ] *S*, a Parsi, died, leaving a will, whereby he directed that after his death his estate should be managed by his widow *J* and after her death by his sister-in-law *H*, and after *H*'s death by the appellant, his adopted son *H N*. On *J*'s death the testator's brother *D* applied for letters of administration, and issued a citation to the appellant *H N*. *H* entered a  *caveat*  No further proceedings were taken, and the matter remained pending. On *H*'s death, *D* applied for a fresh citation to the appellant *H N*, but the District Judge held it to be unnecessary, and declined to issue it. Letters of administration were then granted to *D*. The appellant *H N* subsequently applied for probate of the testator's will. The respondents filed *caveats*, alleging that the will was void, on the ground of certain bequests contained in it. They further contended that as the appellant had been cited to appear when application was made by *D* for letters of administration, he could not now apply to have the letters of administration cancelled. *Held*, that the letters of administration granted to *D* should be revoked and that probate should be granted to the appellant. The only citation which had been issued to the appellant was in 1882, when *D* commenced his proceedings to obtain letters of administration. At that time *H*, who was the executrix named in the will (the appellant *H N* being only named as executor on her death), was still alive, and the citation did not, therefore, call on

# LETTERS OF ADMINISTRATION—concluded.

him to accept or renounce executorship. On *H*'s death, however, which took place before the actual grant of administration was made to *D*, such a citation was necessary, under s. 16 of Act V of 1881, before the grant could be legally made. In default of such a citation the proceedings were defective in substance—a circumstance which constituted good cause for the revocation of the letters of administration under s. 50 of Act V of 1881. *HORNUSJI NAVROJI v. BAI DHANBAIJI.*

[I. L. R. 12 Bom. 164]

## LETTERS PATENT, HIGH COURT, cl. 12

*See* HIGH COURT, JURISDICTION OF — HIGH COURT, BOMBAY—CIVIL.

[I. L. R. 13 Bom. 302]

*See* JURISDICTION—CAUSES OF JURISDICTION—CARRYING ON BUSINESS OR WORKING FOR GAIN

[I. L. R. 14 Calc. 256]

[I. L. R. 12 Bom. 507]

*See* CASES UNDER JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION.

*See* PARSIS.

[I. L. R. 13 Bom 302]

*See* PRACTICE—CIVIL CASES—LEAVE TO SUE OR DEFEND

[I. L. R. 13 Bom. 404]

*See* STATUTE, CONSTRUCTION OF.

[I. L. R. 12 Bom 507]

—, cl. 15.—*Appeal—"Judgment"—Order granting review of judgment—Civil Procedure Code, 1882, s. 529* ] A second appeal was decided on the 1st June 1888 in favour of the respondents by two Judges of the High Court. On the 24th July 1888, an application for review was filed with the Registrar. Various reasons prevented the two Judges from sitting together until the month of March 1889. On the 9th March, the matter came up before them, when a rule was issued, calling upon the respondents to show cause why a review should not be granted, and made returnable on the 28th March 1889. On that day one of the Judges had left India on furlough, and the rule was taken up, heard and made absolute by the other of the two Judges sitting alone: *Held*, that the order was not a judgment within the meaning of cl 15 of the Letters Patent; and that no appeal would lie therefrom, the order being final under s. 629 of the Code of Civil Procedure. *Bombay-Persia Steam Navigation Company v. The Zuari* (I. L. R. 12 Bom. 171), and *Achaya v. Rutnavelu* (I. L. R. 9 Mad. 253), approved. *AUBHOY CHURN MOHUNT v. SHAMANT LOCHUN MOHUNT.*

[I. L. R. 16 Calc. 788]

**LETTERS PATENT, HIGH COURT, cl 26**

See MERCHANT SHIPPING ACT, s. 267.

[I. L. R. 16 Calc. 238]

**LETTERS PATENT, HIGH COURT, N. W. P. cl. 2.**See HIGH COURT, CONSTITUTION OF—  
HIGH COURT, N.-W. P.

[I. L. R. 9 All. 625]

—, cls. 7 and 8.

See ADVOCATE.

[I. L. R. 9 All. 617]

—, cl 10.

See COURT FEES ACT, 1870, SCH. I. CL. 5

[I. L. R. 11 All. 176]

See REVIEW—GROUND FOR REVIEW.

[I. L. R. 11 All. 176]

See RULES OF HIGH COURT, N.-W. P.

[I. L. R. 9 All. 115]

1.—cl. 10—*Difference of opinion in Division Bench*—“*Judgment*.”] Where the Judges of a Division Bench hearing an appeal differed in opinion, one of them holding that the appeal should be dismissed as barred by limitation, and the other that sufficient cause for an extension of time had been shown, and that the appeal should be determined on the merits. *Held* that the “judgment” of the latter Judge came within the meaning of that term, as used in s. 10 of the Letters Patent, and that, as the result of the difference of opinion was that the appeal to the Division Bench stood dismissed, an appeal under s. 10 was not premature. *HUSAINI BEGAM v. COLLECTOR OF MOZAFFARNAGAR*.

[I. L. R. 9 All. 655]

2.—cl. 10 —*Appeal from single Judge*—“*Judgment*”—*Interlocutory order*—*Order refusing leave to appeal in formā pauperis*—*Civil Procedure Code*, ss. 588, 591, 632.] Under ss. 588 and 591 read with s. 632 of the Civil Procedure Code, no appeal lies, under s. 10 of the Letters Patent for the High Court for the North-Western Provinces from an order of a single Judge refusing an application for leave to appeal *in formā pauperis*. *Achaya v Ratnavelu*, I. L. R. 9 Mad. 253, and *In re Rajugopal*, I. L. R. 9 Mad. 447, followed, *Hurrah Chunder Chowdhry v. Kali Sundera Debi*, I. L. R. 9 Calc. 482, distinguished. *BANNO BIBI v. MEHDI HUSAIN*.

[I. L. R. 11 All. 375]

—, cl. 27.—*Practice*—*Difference of opinion on Division Bench regarding preliminary objection as to limitation*—*Civil Procedure Code*, s. 575.] S. 27 of the Letters Patent for the High Court of the N.-W. Provinces has been superseded in those cases only to which s. 575 of the Civil Procedure

**LETTERS PATENT, HIGH COURT, N.-W.P. cl. 27—concluded.**

Code properly and without straining language applies. There are many cases to which s. 575 even with the aid of s. 647, does not apply; and to these s. 27 of the Letters Patent is still applicable. One of the cases to which s. 575 of the Code does not apply is where a preliminary objection being taken to the hearing of a first appeal before the High Court on the ground that the appeal is time-barred, the Judges of the Division Bench differ in opinion as to whether the appellant has shown sufficient cause, within the meaning of s. 5 of the Limitation Act (XV of 1877), for not presenting the appeal within the prescribed period. The decision of such a preliminary objection is not a “hearing” of the appeal, but precedes the hearing, or determines that there is no appeal which the Court can hear or decide. Where such a preliminary objection is allowed, it cannot be said that the Court which, by reason of the Limitation Act, has no jurisdiction to hear the appeal, should nevertheless “affirm” the decree of the Court below. In the case of such a preliminary objection and such a difference of opinion (the Bench being equally divided), the opinion of the senior Judge should, under s. 27 of the Letters Patent, prevail. *Appaji Bhuvrao v. Shival Khubchand*, I. L. R. 3 Bom. 204, and *Gridharaj Maharaj Tikait v. Purushotam Gossami* I. L. R. 10 Calc. 814, distinguished. *HUSAINI BEGAM v. COLLECTOR OF MOZAFFARNAGAR*.

[I. L. R. 11 All. 176]

**LIBEL.**

See PRIVILEGED COMMUNICATION.

[I. L. R. 12 Mad. 374]

**LIBERTY TO APPLY.**

See DECREE—ALTERATION OR AMENDMENT OF DECREE.

[I. L. R. 15 Calc. 211]

See SPECIFIC PERFORMANCE—GENERAL CASES.

I. L. R. 15 Calc. 211

**LICENSE, BREACH OF CONDITION OF.**

See CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—GENERALLY.

[I. L. R. 10 All. 577]

**LICENSE TO QUARRY.**

See CONTRACT—CONSTRUCTION OF CONTRACTS.

[I. L. R. 13 Bom. 680]

**LICENSE TO USE LAND OF ANOTHER, REVOCATION OF.**

See USER RIGHT OF.

[I. L. R. 16 Calc. 640]

## LICENSEE.

See PATENT.

[I. L. R. 15 Calc. 244]

## LIEN.

See VENDOR AND PURCHASER—LIEN

1.—*Mortgage—Covenant that mortgagee be entitled to enter—Entry, Right of—Mortgage-deed in English form.* *B* executed a mortgage-deed in the English form in favour of the *L* Bank, containing amongst other covenants one providing that, upon default, the mortgagee would be entitled to enter into possession of the mortgaged properties. *B* died, leaving a widow, a daughter, and a sister *S*, his heirs. According to Mahomedan law *S* was entitled to a six-annas share of the mortgaged properties. On the 9th of May 1872, after the mortgage-money became due, the *L* Bank brought a suit, and on the 13th of July 1872, obtained a decree by consent. The existence or right of *S* to share in the properties was not known to the Bank, and she was not made a party to that suit. The Bank, in execution of their decree, caused the mortgaged properties to be sold, and themselves purchased some of them. The sale-proceeds did not satisfy the entire claim. On the 1st of December 1875, *S* sold her share of six annas in the properties to *R*. In a suit by *R* against the purchaser of two of the mortgaged properties at the aforesaid sale it was held that the share of *S* in the estate of *B* did not pass to the purchasers, though the Bank purported to have brought the whole sixteen annas in the properties to sale. *R* then brought this suit for the recovery of possession of the six-annas share of the properties purchased at the sale by the Bank themselves, and which were now in their possession. *Held* that the share of *S* not having been sold, the lien imposed upon it by the mortgage-deed remained intact and continued in the hands of the Bank. *Held*, also, that, under the covenant in the mortgage-deed above referred to the Bank were entitled to remain in possession as mortgagees until the proportion of the debt which might legitimately be imposed upon the six annas share of the properties in their hands was paid. LUTCHMIPUT SINGH BAHADUR v. LAND MORTGAGE BANK OF INDIA

[I. L. R. 14 Calc 464]

2.—*Joint Stock Company—“Secretaries and treasurers”—Advances and disbursements to, and on behalf of, the Company—Lien on Company's property—Contract Act IX of 1872, ss. 171, 217, 222—Principal and Agent.* *Messrs E L & Co.* were the secretaries and treasurers of the *B S M* Company, which went into liquidation. *Messrs E L & Co.*, claimed to be creditors of the company for Rs. 1,12,000 in respect of advances made to and expenses incurred and disbursements made on behalf of the company from time to time and in the conduct of its business. Rupees one lakh of this amount was in respect of sums lent to the company and guaranteed by the claimants. The remainder consisted of money

## LIEN—concluded.

expended in the working of the company's business. *Messrs E L & Co.* claimed to be in possession generally of all the property of the company, and to be entitled to a lien on such property in respect of the above claim of Rs. 1,12,000. Other creditors disputed the possession and the right to the lien claimed. *Held*, that, even assuming *Messrs E L & Co.* to be in possession of the property of the company as alleged, they had not the lien that they claimed. A lien is either general or particular. The claimants had not a general lien, because they were neither “bankers, factors, wharfingers, attorneys, or policy-brokers,” to whom a general lien is limited by s. 171 of the Contract Act. Nor had they any particular lien not under s. 217 of the Contract Act, because that section was inapplicable, having to do only with a lien on a sum of money of the principal in the hands of the agent nor under s. 221 of the Contract Act, because the sums advanced and expended were not, as required by that section, “disbursements and services in respect of” the property on which the lien was claimed, but were loans made on behalf of the company generally and for the purposes of the whole concern. IN RE BOMBAY SAW MILLS COMPANY; EWART LATHAM & Co.'s CLAIM.

[I. L. R. 13 Bom. 314]

## LIGHT AND AIR.

See INJUNCTION—SPECIAL CASES—OBSTRUCTION TO RIGHTS OF PROPERTY.

[I. L. R. 16 Calc 252]

[I. L. R. 13 Bom 252, 674]

See CASES UNDER PRESCRIPTION—EASEMENTS—LIGHT AND AIR.

## LIMITATION.

See BENGAL TENANCY ACT, SCH. iii, ART. 3.

[I. L. R. 15 Calc. 317]

[I. L. R. 16 Calc 741]

See DEKKAN AGRICULTURISTS RELIEF ACT, s. 39

[I. L. R. 13 Bom 424]

See ESTOPPEL—ESTOPPEL BY DEEDS AND OTHER DOCUMENTS.

[I. L. R. 10 Mad. 272]

See KARNAM.

[I. L. R. 10 Mad. 292]

See MAJORITY ACT, s. 3.

[I. L. R. 13 Bom. 285]

See MORTGAGE—REDEMPTION—MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE.

[I. L. R. 13 Bom. 567]



LIMITATION—*concluded*.

See CASES UNDER ONUS PROBANDI—  
LIMITATION AND ADVERSE POS-  
SESSION

See PARTITION—MISCELLANEOUS CASES.  
[I. L. R. 16 Calc 117]

See RES JUDICATA—ADJUDICATIONS  
[I. L. R. 10 Mad. 272]

See RES JUDICATA—COMPETENT COURT  
—REVENUE COURTS  
[I. L. R. 10 Mad. 347]

See SERVICE OF SUMMONS  
[I. L. R. 13 Bom 500]

See SET-OFF—CROSS DECREES.  
[I. L. R. 10 All 188]

LIMITATION ACT (XIV OF 1859), s. 1,  
cl. 13.

See CASES UNDER LIMITATION ACT, 1877,  
ART. 127.

—, s 1, cl. 16.

See LIMITATION ACT, 1877 ART. 120  
[I. L. R. 11 Mad. 207]

## LIMITATION Act (XV OF 1877)

—, s 3.

See ART. 144—ADVERSE POSSESSION.  
[I. L. R. 13 Bom 160]

—, s. 4 —“*Appeal presented*”—*Civil Procedure Code Act (XIV of 1859) s 511—Execution of decree* ] The words “*appeal presented*” in the Limitation Act, 1877, mean an appeal presented in the manner prescribed in s 541 of the Code of Civil Procedure. The words “*where there has been an appeal*,” in art 179, cl. 2, of sch. II of the Limitation Act, 1877, mean where a memorandum of appeal has been presented in Court. In execution of a decree against which an appeal has been presented but rejected on the ground that it was after time, limitation begins to run from the date of the final decree or order of the Appellate Court. AKSHOY KUMAR NUNDI v CHUNDER MOHUN CHATHATI,

[I. L. R. 16 Calc. 250]

—, s 5

See CIVIL PROCEDURE CODE, 1882, s. 575.  
[I. L. R. 11 All. 176]

See LETTERS PATENT, HIGH COURT,  
N.-W. P., CL. 27.

[I. L. R. 11 All 176]

See SMALL CAUSE COURT PRESIDENCY  
TOWNS — PRACTICE AND PROCEDURE—REHEARING.

[I. L. R. 13 Bom. 408]

LIMITATION ACT (XV OF 1877), s. 5.  
—*continued*.

1 —s. 5.—*Madras Forest Act (Madras Act V of 1882), ss 14, 39—Period of Limitation—Power to excuse delay.* Delay in preferring an appeal under the Madras Forest Act beyond the period prescribed by s 14 of that Act, may be excused under s 5 of the Limitation Act, 1877. REFERENCE UNDER MADRAS FOREST ACT V OF 1882

[I. L. R. 10 Mad 210]

2 —s. 5. — *Appeal—Admission after time—“Sufficient cause”—Poverty—Purdah nashin* ] On the 11th February 1881, the High Court dismissed an application of the 22nd March 1883, by a *purdah nashin* lady, for leave to appeal *in forma pauperis* from a decree, dated the 16th September 1882, the application, after giving credit for 86 days spent in obtaining the necessary papers, being out of time by 73 days. On the 16th August 1884 an order was passed allowing an application which had been made for review of the previous order to stand over, pending the decision of a connected case. On the 24th April 1885, the connected case having then been decided, the application for review was heard and dismissed. Nothing more was done by the appellant until the 18th June 1885, when, on her application, an order was passed by a single Judge allowing her under s 5 of the Limitation Act (XV of 1877) to file an appeal on full stamp paper, and she thereupon having borrowed money on onerous conditions to defray the necessary institution fees, presented her appeal, which was admitted provisionally by a single Judge. *Held* by TYRRELL, J. (MAHMOOD, J., *dissenting*), that the appellant had made out a sufficient case for the exercise of the Court's discretion under s 5 of the Limitation Act, and that the Court should proceed to the trial of her appeal. *Held* by MAHMOOD, J. that the *ex-parte* order of the 8th June 1885 was one which the Civil Procedure Code nowhere allowed and was *ultra vires*, and that the Bench before which the appeal came for hearing was competent to determine whether the order admitting the appeal should stand or be set aside. *Dubey Sahai v. Ganesh Lal*, I. L. R. 1 All. 35, referred to. *Held* also by MAHMOOD, J. (TYRRELL, J., *dissenting*) that the circumstances were such as to require the Court to set aside the order admitting the appeal and to dismiss the appeal as barred by limitation, inasmuch as it was presented more than two years beyond time, and neither the facts that the main reason why it was presented so late was that the appellant was awaiting the result of the connected case, and that the appellant was a pauper and a *purdah nashin* lady, nor the orders of the 16th August 1884, and the 18th June 1885, constituted “sufficient cause” for an extension of the limitation period within the meaning of s. 5 of the Limitation Act. *Mosh-ullah v Ahmed-ullah*, I. L. R. 13 Calc. 78; and *Mangu Lal v. Kandhari Lal*, I. L. R. 8 All 475, referred to. HUSAINI BEGUM v. COLLECTOR OF MUZAFFARNAGAR.

[I. L. R. 9 All. 11]

**LIMITATION ACT (XV OF 1877), s. 5—**  
*continued*

*Held* on appeal under the letters Patent affirming the judgment of MAHMOOD, J., that the poverty of the appellant, and the fact that she was a *pardah nashin* lady, did not constitute "sufficient cause" for an extension of the limitation period within the meaning of s. 5 of the Limitation Act, and that such extension ought not to be granted. *Moshavillah v. Ahmedullah*, I. L. R. 13 Cal. 78, and *Collins v. Vestry of Paddington*, L. R. 5 Q. B. D. 368, referred to. *HUSAINI BEGUM v. COLLECTOR OF MUZAFFARNAGAR*.

[I. L. R. 9 All. 655]

3.—s. 5.—"Sufficient cause" for not presenting appeal within time—*Admission of appeal—Discretion of Court* ] In a suit for ejectment instituted in the Revenue Court under s. 93 (b) of the N.-W. P. Rent Act (XII of 1881), the Court gave judgment decreeing the claim on the 15th September 1884. The value of the subject-matter exceeded Rs. 100 and an appeal consequently lay to the District Judge; but there was nothing upon the face of the record to show that the decree was appealable. The period of limitation for the appeal expired on the 15th October, and the defendant, being under the impression that the decree was not appealable, applied to the Board of Revenue on the 8th January 1885 for revision of the first Court's decree. The proceedings before the Board lasted until the 24th April when the defendant for the first time was informed that the value of the subject-matter being over Rs. 100, the decree was appealable, and that the application for revision had therefore been rejected. On the 23rd May the defendant filed an appeal to the District Judge, who, under s. 5 of the Limitation Act, admitted the appeal, and, reversing the first Court's decision, dismissed the claim: *Held*, on appeal by the plaintiff, that under the circumstances, the High Court ought not to interfere with the discretion exercised by the District Judge in admitting the appeal under s. 5 of the Limitation Act after the period of limitation prescribed therefor. *Per* EDGE, C. J.—That under the circumstances above stated, he would not himself have held that the defendant had shown "sufficient cause," within the meaning of s. 5, for the admission of the appeal; but that the Court ought not to interfere with the discretion of the Judge when he had applied his mind to the subject-matter before him, unless he had clearly acted on insufficient grounds or improperly exercised his discretion. *FATIMA BEGUM v. HANSI*.

[I. L. R. 9 All. 244]

4.—s. 5 and s. 14—*Delay—Sufficient cause—Deduction of time spent in another litigation in respect of the same subject-matter—Mistake of law.* ] Mere ignorance of the law cannot be recognized as a sufficient reason for delay under s. 5 of the Limitation Act (XV of 1877). A obtained a decree against B as the heir and legal representative of his deceased uncle C. The decree directed that the amount adjudged should be recovered

**LIMITATION ACT (XV OF 1877), s. 5—**  
*continued.*

from C's assets in the hands of B. In execution of this decree certain property was attached. B claimed this property as his own, and sought to remove the attachment, but the Court passed an order confirming the attachment on the 20th November 1880. In 1881 B filed a regular suit to set aside this order. The suit was dismissed in 1885, as barred by s. 244 of the Civil Procedure Code (Act XIV of 1882). Thereupon B filed an appeal from the order in execution made on the 20th November 1880. This appeal was rejected as time-barred, under art 152 of sch. II of the Limitation Act XV of 1877: *Held* that the time spent in the actual proceedings in the suit to set aside the order in execution might be deducted in computing the delay that occurred before the appeal was filed. But the plaintiff was not entitled to a deduction of the time that intervened between the date of the order appealed against and the date of filing the suit. *SITARAM PARAJI v. NIMBA VALAD HARISHET*.

[I. L. R. 12 Bom 320]

5—s. 5 and s. 14.—*Admission of appeal beyond time—"Sufficient cause"—Appeal filed in wrong Court—Bonâ fide proceedings* ] Presentation of an appeal within the period of limitation prescribed therefor to a wrong Court in ignorance of the provision of law, is not a sufficient cause within the meaning of s. 5 of the Limitation Act for admitting the same appeal in the proper Court after the period of limitation prescribed therefor had expired. To enable the Court to admit an appeal after the period of limitation prescribed therefor had expired, on the ground that the same had in the first instance been preferred within the period of limitation provided therefor but to a wrong Court, the appellant must satisfy the Court that he made his appeal to the wrong Court *bonâ fide*, that is under an honest though mistaken belief, formed with due care and attention, that he was appealing to the right Court. *JAG LAL v. HAR NARAIN SING*.

[I. L. R. 10 All. 524]

6.—s. 5 and s. 14—*Appeal preferred to wrong Court through mistake of law—Exclusion of time.* ] s. 14 of the Limitation Act (XV of 1877) does not contemplate cases where questions of want of jurisdiction arise from simple ignorance of the law the facts being fully apparent, but is limited to cases where from *bonâ fide* mistake of fact the suitor has been misled into litigating in a wrong Court. The phrase "other cause of a like nature" in the section is vague, and cannot be held to release a person from the obligation to know the law of the land. The decree in this suit was passed by the Subordinate Judge as the Court of First Instance on the 31st March 1886. Against the decree the plaintiffs preferred an appeal to the District Court on the 1st July 1886, and on the 11th December 1886, the District Court returned the memorandum of appeal filed in that Court to the plaintiff upon the ground that the subject-matter in dispute was above Rs. 5,000. The

**LIMITATION ACT (XV OF 1877), s. 5—**  
*continued.*

plaintiff then on the 20th December 1886 presented the memorandum of appeal to the High Court and it was admitted, subject to the consideration by the Bench determining the appeal of any question as to its admissibility, after the period of limitation prescribed for presentation of appeals to the High Court. Upon the hearing of the appeal the respondent objected to the appeal being entertained, on the ground that it was presented beyond the period of limitation. *Held* that no sufficient cause being shown for the delay in the presentation of the appeal, the appeal must be dismissed. *Balwant Singh v. Guman Ram*. I. L. R. 5 All 591, explained. *RAMJIWAN MAL v. CHAND MAL*.

[I. L. R. 10 All. 587]

7—s. 5 and art. 156.—*Appeal—Review. Exclusion of time taken up with—Practice* [The mere presentation of an application for review where it is not shown that the grounds therefore are reasonable and proper is not a sufficient reason for admitting an appeal after the period of limitation prescribed for such appeal has passed. *ASHANULLA v. COLLECTOR OF DACCA*.

[I. L. R. 15 Calc 242]

—, s. 6.—*Construction of s. 6—Period of limitation.* [The true construction of s. 6 of the Limitation Act 1877, is that, save as to the period of limitation the other provisions of the Act are applicable to cases governed by special and local laws of limitation. *SESHAMA v. SANKARA*.

[I. L. R. 12 Mad. 1]

—, s. 7.

*See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY—GENERAL CASES.*

[I. L. R. 9 All. 411]

—, s. 7.—*Joint decree-holders—Minor, Right of, to execute whole decree when remedy of major joint decree-holder is barred.* [In execution of a decree for possession of certain lands and for mesne profits, dated the 15th August 1878, possession having been obtained in August 1880, two decree-holders, one of whom was a minor, applied on the 4th April 1882 for ascertainment of the amount of such mesne profits. Upon that application the Amin was directed to ascertain the amount due, but after repeated reminders had been sent him, and no report being submitted, the execution case was struck off the file on the 9th October 1882. The minor judgment-creditor having attained his majority on the 17th April 1885, an application was made by both decree-holders for execution of the decree by ascertainment of the amount of mesne profits, and for the recovery of the amount when so ascertained. The judgment-debtors pleaded limitation. *Held* that under s. 7 of the Limitation Act, the remedy of the minor decree-holder was not barred, as the other decree-holder could not give a valid

W., D.

**LIMITATION ACT (XV OF 1877), s. 7—**  
*continued.*

discharge without his concurrence (*Ahamudeen v. Grishh Chander Shamaat* I. L. R. 1 Calc 350, distinguished) and that under s. 231 of the Code of Civil Procedure he was entitled to execute the whole decree, as though the remedy of the major decree-holder was barred his right was not extinguished. *ANANDO KISHORE DASS BAKSHI v. ANANDO KISHORE BOSE*.

[I. L. R. 14 Calc 50]

—, s. 8.

*See* ART 178.

[I. L. R. 14 Calc. 50]

—, s. 10

*See* ART. 141—ADVERSE POSSESSION.

[I. L. R. 10 Mad 375]

1.—s. 10.—*Auction-purchaser—Assignee of trustee* [An auction purchaser acquiring trust property for valuable consideration at a sale in execution of a decree is an assignee of the trustee within the meaning of that term as used in s. 10 of the Limitation Act (XV of 1877), and consequently a suit against such a person by a plaintiff claiming to be entitled as trustee to possession of the trust property is governed by the ordinary rules of limitation and not excluded therefrom by the provisions of s. 10. *CHINTAMONI MAHAPATRO v. SARUP SE*

[I. L. R. 15 Calc. 703]

2.—s. 10.—*Suit against dharmakarta of temple to recover money misappropriated* [Plaintiff, as *dharmakarta* of a Hindu temple, alleging that the defendant, a former *dharmakarta*, who had been removed from office had, when in office, misappropriated certain temple funds held by him, sued to recover a certain sum alleged to have been misappropriated. *Held* that the defendant was a person in whom the temple funds had become vested in trust for a specific purpose within the meaning of s. 10 of the Limitation Act, 1887, and that as the plaint disclosed a right to follow trust funds in his hands, the suit might be treated as a suit for that purpose. *SETHU v. SUBRAMANYA*.

[I. L. R. 11 Mad 274]

3.—s. 10.—*Trust—Position, as regards the daughters of sons managing estate of deceased Mahomedan.* [A *solehnama* in 1847 to which were parties the sons, daughters, and widow of a deceased Mahomedan proprietor, transferred the shares of two minor daughters in their father's estate, having been executed by their mother, the widow, on their behalf. In a suit in 1882 to set aside the *solehnama* at the instance of the two daughters, the evidence showed that the sons managed the property after their father's death, and at the time the *solehnama* was executed. *Held*, on the question of limitation, that it was not to be inferred that the sons, by reason of their having

LIMITATION ACT (XV OF 1877), s. 10—  
*continued.*

managed then late father's estate, should be regarded as trustees, at the time of the execution of the *solehnama*, for the daughters, and therefore s. 10 of Act XV of 1877 was inapplicable. So that as regards the property included in the *solehnama* a suit brought in 1882 by the daughters would be barred by time. MAHOMED ABDUL KADIR v. AMTAL KARIM BANU.

[I. L. R. 16 Calc. 161  
[I. L. R. 15 I. A. 220]

1.—s. 12.—*Civil Procedure Code, 1882, s. 599.—Period of Limitation for admission of an appeal to Privy Council.* On a petition for leave to appeal to the Privy Council presented on the 8th April, it appeared that the period of six months from the date of the decree to be appealed against had expired on the 23rd of March if the time occupied by the petitioner in getting a copy of the decree was to be computed in that period. *Held*, that the petition was barred by limitation. *Per cur*—It is not at all clear that the word "ordinarily" in s. 599 of the Code of Civil Procedure does not refer to the circumstance referred to in the second paragraph of that section, *viz.* when the last day happens to be one on which the Court is closed. LAKSHMANAN v. PERYASAMI.

[I. L. R. 10 Mad. 373]

2.—*Exclusion of day on which cause of action arose—Suit on bond.* On the 29th November 1886, this suit was filed on a bond, dated the 29th November 1881, payable in two years. The Subordinate Judge dismissed it as time-barred, being of opinion that the cause of action had accrued on the 28th November 1883. Against this decision the plaintiff applied to the High Court under s. 623 of the Code of Civil Procedure (Act XIV of 1882). *Held*, reversing the decision of the Subordinate Judge, that the suit was not barred by time, the cause of action having accrued on the 29th November 1883—that is, the day of the month corresponding with the day on which the bond was dated. VENKUBAI v. LAKSHMAN VENKOBIA KHOT.

[I. L. R. 12 Bom. 617]

—s. 13.—*Absence from India—Defendant carrying on business by agent* The words "absent from British India," in s. 13 of the Limitation Act should be construed broadly, and not limited in their application only to such persons as have been present there, or would ordinarily be present or may be expected to return. *Semble*—A defendant is within s. 13, notwithstanding his having carried on a trade, or had a shop, or a house of business under an agent in British India. Harrington v. Ganesb Roy, I. L. R. 10 Calc. 440, commented upon. ATUL KRISTO BOSE v. LYON & Co.

[I. L. R. 14 Calc. 457]

LIMITATION ACT (XV OF 1877)—*continued.*  
—s. 14.

*See s. 5.*

[I. L. R. 10 All. 524, 587]

[I. L. R. 12 Bom. 320]

1.—s. 14.—*Deduction of time spent in another litigation in respect of the same subject-matter—Mistake of law* A obtained a decree against B as the heir and legal representative of his deceased uncle C. The decree directed that the amount adjudged should be recovered from C's assets in the hands of B. In execution of this decree certain property was attached. B claimed this property as his own, and sought to remove the attachment, but the Court passed an order confirming the attachment on the 20th November 1880. In 1881 B filed a regular suit to set aside this order. The suit was dismissed in 1885, as barred by s. 244 of the Civil Procedure Code (Act XIV of 1882). Thereupon B filed an appeal from the order in execution made on the 20th November 1880. This appeal was rejected as time-barred under art. 152 of sch. II of Limitation Act XV of 1877. *Held*, that the time spent in the actual proceedings in the suit to set aside the order in execution might be deducted in computing the delay that occurred before the appeal was filed. But the plaintiff was not entitled to a deduction of the time that intervened between the date of the order appealed against and the date of filing the suit. SIFARAM PARAJI v. NIMBA VALAD HARISHET.

[I. L. R. 12 Bom. 320]

2.—s. 14.—*Exclusion of time taken up in prosecuting former suit eventually withdrawn—Civil Procedure Code, 1882, s. 374* On the sale of certain *thikars* in execution of decrees against his father, the plaintiff intervened, and obstructed the auction-purchasers in obtaining possession. His obstruction was, however, removed by an order of the Court, dated 23rd October 1873. In a suit which was filed in 1883, for partition of the ancestral property and possession of his share: *Held*, that the suit not having been brought within one year from the date of that order, as required by the law then in force, the claim was clearly time-barred. The plaintiff was not entitled to a deduction of the time taken up in prosecuting a former suit, which was filed in 1872 and disposed of in 1883, as that suit did not fail for want of jurisdiction or any defect of a like nature such as is contemplated by s. 14 of the Limitation Act XV of 1877, but was withdrawn by the plaintiff himself for want of parties, with liberty to bring a fresh suit. S. 374 of the Code of Civil Procedure (Act XIV of 1882), therefore, applied to the present case. KRISHNAJI LAKSHMAN v. VITHAL RAVJI RENGE.

[I. L. R. 12 Bom. 625]

3.—s. 14.—*Appeal preferred to wrong Court through mistake of law—Exclusion of time.* S. 14 of the Limitation Act (XV of 1877) does not

LIMITATION ACT (XV OF 1877), s. 14—  
*continued.*

contemplate cases where questions of want of jurisdiction arise from simple ignorance of the law, the facts being fully apparent but is limited to cases where from *bonâ fide* mistake of fact the suitor has been misled into litigating in a wrong Court. The phrase 'other cause of a like nature' in the section is vague, and cannot be held to release a person from the obligation to know the law of the land. *Balmant Singh v Guran Ram* 1 L R 4 All 591, explained. *RAMJIWAN MAL v CHAND MAL*

[I. L. R. 10 All 587]

4—s 14.—*Presentation of plaint in wrong Court—Madras Boundary Act, s. 25* ] In 1833 a plaint, by way of appeal from a decision purporting to be passed under s. 25 of the Boundary Act, was presented to the Court of a District Munsif and returned on the ground that the subject-matter of the suit was beyond the jurisdiction of the said Court. The plaint was then filed in the District Court more than two months after the date when the decision of the Boundary Settlement Officer was communicated to the parties. *Held*, that s. 14 of the Limitation Act, 1877, applied, and that the suit was not barred by limitation. *SESHAMA v. SANKARA.*

[I L R 12 Mad. 1]

5.—s. 14.—*Exclusion of time during which former suit was pending—Suit to set aside order—Limitation Act, 1877, art. 11.* ] Under a decree obtained against the *karnavan* and *anandaveen* of a Malabar *tarwad* a suit was brought on 8th August 1881, to declare that a sale in execution was not binding on the *tarwad*. The present plaintiffs being members of the *tarwad* intervened in execution of the decree but their claim was dismissed on 5th September 1882. On the 27th September 1882, they filed a suit in the Court of the District Munsif, praying for the relief now sought. The District Munsif dismissed the suit on the ground that he had no jurisdiction. On appeal the District Judge made an order directing him to dispose of it, which he accordingly did, and he passed a decree against which an appeal was pending on 17th August 1883. But on the last-mentioned date the High Court set aside the order of the District Judge, and directed him to ascertain the market value of the land and make a fresh order, and the enquiry, directed by the High Court, did not terminate until 30th October 1883, when another order was made by the District Judge by which the original decision of the District Munsif was confirmed. *Held*, that under s 14, expln 1, of the Limitation Act the prior suit terminated only on the 30th October 1883, and that the present suit was not barred, under sch. II, art. 11. *SANKARAN v. PARVATHI.*

I. L. R. 12 Mad 434

6.—s 14.—*Proceedings bonâ fide prosecuted in a Court without jurisdiction—Rent Recovery Act (Madras Act VIII of 1865), s. 78.* ] A landlord not

LIMITATION ACT (XV OF 1877), s. 14—  
*continued.*

having tendered a legal *patta* to his tenant made a demand on him as for rent, and on his refusal to pay attached his holding. The tenant, to release the attachment, paid the sum demanded under protest on 23rd September 1885. On 22nd March 1886, the tenant filed a suit on the Small Cause side of the District Munsif's Court to recover the amount so paid that suit was dismissed for want of jurisdiction on 2nd September 1886. On the last-mentioned date the tenant filed the present suit on the same cause of action. *Held*, the suit was not barred by limitation under the six-months' rule in s 78 of the Rent Recovery Act by reason of the provisions of s. 14 of the Limitation Act, 1877. *KULLAYAPPA v. LAKSHMIPATHI.*

[I. L. R. 12 Mad. 467]

—s 15.—*Period of time injunction was in force* ] A member of a firm sued for a partnership debt and obtained a decree; he died before execution. In a suit brought by his widow an injunction was issued restraining his partner from realising the partnership assets. Subsequently, a receiver was appointed for the partnership assets, and he applied for execution of the above decree. *Held*, that the time during which the injunction was in force was not to be excluded in computing the period of limitation. *RAJARATHNAM v. SHEVALAYAMMAL*

[I L. R. 11 Mad. 103]

1—s 18.—*Landlord and Tenant—Sale by landlord of land held by tenant—Fraud in such sale—Suit by purchaser against tenant—Plea by tenant impeaching sale by his landlord* ] The defendant was tenant of the lands in dispute under a lease dated 22nd June 1875. In 1878 his landlord sold the lands to the plaintiffs by registered deed, but in 1879 complained to the Mamlatdar that he had been cheated by the plaintiffs who, he alleged, had not paid the purchase-money. This allegation the plaintiffs denied. In September 1881, the defendant brought a suit against the plaintiffs, in which he prayed for a declaration that the sale of the land to the plaintiffs was fraudulent, and that no consideration had been paid. This suit, however, was withdrawn by the defendant on the 15th November 1881, with leave to bring a fresh suit, but no fresh suit was brought by him within three years from November 1881, nor was any suit brought by the plaintiffs' vendors to set aside their sale to the plaintiffs. In 1883 the plaintiffs brought this suit against the defendant to recover Rs. 50 as arrears of rent for four years for the land described in their plaints. They alleged that the lands in question had been sold to them on the 17th September 1878, and that the lands mentioned in their plaint had been leased on the 22nd June 1875 to the defendant by their (the plaintiffs') vendors, and that in that lease the defendant had contracted to pay Rs. 240 annually. The defendant in his defence again raised the

LIMITATION ACT (XV OF 1877), s. 18—  
*continued.*

question whether the sale to the plaintiffs was not fraudulent and without consideration. *Held* that the right of the defendant to plead as a defence to this suit, that the plaintiffs' purchase of the 12th September was fraudulent and void, was barred. As a tenant he had no independent right to impeach the sale by his own landlords. He could only do so with their consent, assuming it to be still open to them to impeach it. But their complaint to the Mamlatdar in 1879 showed that they were then acquainted with the facts which entitled them to set aside the sale, and by the end of 1882, at the latest, their right to file a suit for that purpose was therefore barred. Their right to impeach the sale by suit being thus barred, their tenant (the defendant) could not be allowed to impeach it as a defence to an action by the plaintiffs. *JUGALDAS v. AMBASITANKAR.*

[I. L. R. 12 Bom 501]

2.—s. 18 and art. 166.—*Civil Procedure Code (Act XIV of 1882), ss 311, 312—Sale in execution—Application to set aside—Fraud* ] An application under s. 311 of the Civil Procedure Code to set aside a sale cannot be made after the expiry of thirty days from the date of such sale and after such sale has been confirmed, even though it be alleged that the sale was fraudulently kept from the knowledge of the applicant until after such confirmation. *Semble*, that if, before such sale had been confirmed, an application had been made, although after thirty days from the date of the sale, the Court would possibly have been justified in granting the application, and extending the period of limitation if sufficient cause under s. 18 of the Limitation Act were made out. *GOBIND CHUNDRAMAJUMDAR v. UMA CHARAN SEN.*

[I. L. R. 14 Calc. 679]

1.—s. 19.—*Acknowledgment of debts—Acknowledgment of liability—Suit for possession* ] Acknowledgment of liability, in order to be within the meaning of s. 19 of the Limitation Act, must be an acknowledgment of liability to the person who is seeking to recover possession, or some person through whom he claims. *MYLAPORE IYASAWMY VYAPOORY MOODLIAR v. YEO KAY.*

[I. L. R. 14 Calc. 801]

[L. R. 14 I. A. 168]

2.—s. 19.—*Commission agent.* ] A acted as commission agent for B and C. A furnished a debit and credit account in February 1878. The account was disputed, and the matter was referred to arbitration for which purpose in March 1880 a "memorandum of items to be settled" was drawn up and signed by B and C, in which they denied that any balance would be found due to A, but acknowledged that accounts must be taken and that they would be liable if any balance were found due to A. In June 1880, B signed and sup-

LIMITATION ACT (XV OF 1877), s. 18—  
*continued.*

plied to the arbitrator an account on behalf of himself and C. The arbitrator made an award which was set aside. A filed a suit against B and C in September 1882, for a balance due to him: *Held*, that B and C had made an acknowledgment of their debt to A, and that the suit was not barred by limitation. *SITAYYA v. RANGAREDDI.*

[I. L. R. 10 Mad. 259]

3.—s. 19.—*Acknowledgment within "the new period."* ] In a suit brought on the 20th July 1886, by the plaintiff to recover the price of goods sold on the 12th March 1881 to the defendant, the plaintiff filed two *khatus* under the defendant's signature, acknowledging the debt, and bearing dates the 6th March 1882, and the 29th October 1884. The Subordinate Judge being of opinion that the suit was barred, referred the case to the High Court. *Held*, that the suit was not barred; the second acknowledgment having been made within "the new period" arising from the first acknowledgment, was made within a period prescribed for the suit, and was, therefore, itself the starting point of a new period. *ATMARAM v. GOVIND.*

[I. L. R. 11 Bom. 282]

4.—s. 19.—*Acknowledgment after period of limitation has expired—Promise to pay—Conditional promise to pay barred debt—Contract Act IX of 1872, s. 25* ] Where the defendant, after his debt had become barred by limitation, wrote as follows to his creditor in reply to a demand for payment:—"I bear the matter in mind, and will do my utmost to repay this money as soon as I possibly can." *Held*, that this promise by the defendant was only a conditional promise to pay when he was able; and the plaintiff having failed to prove the defendant's ability to pay, the promise did not operate, and the plaintiff could not recover. *WATSON v. YATES.*

[I. L. R. 11 Bom. 580]

5.—s. 19.—*Oral evidence of acknowledgment—Acknowledgments made before the coming into force of Act XV of 1877* ] Under s. 19 of the Limitation Act XV of 1877, oral evidence of the contents of an acknowledgment cannot be received, nor is there any saving of acknowledgments received or given back before the Act came into operation. *ZIULNISSA LADLI BEGAM v. MOTIDEV RATANDEV.*

[I. L. R. 12 Bom. 268]

6.—s. 19.—*Explan 1—Acknowledgment in writing.* ] In a suit upon a bond brought against the defendant as a principal debtor, an acknowledgment of liability as a surety only is sufficient to save limitation, with reference to s. 19, explan. 1, of the Limitation Act (XV of 1877). *UNCOVERED SERVICE BANK v. GRANT.*

[I. L. R. 10 All. 93]

**LIMITATION Act (XV OF 1877)—contd.**

1—s 20—*Payment of interest—Prescribed period—Extension of period* ] The words "prescribed period," used in s 20 of the Limitation Act, 1877, mean the period prescribed by the Act. The contention that only one extension of the period of limitation is given by payment of interest is unfounded. **VENKATARATNAM v KAMAYYA.**

[I. L. R. 11 Mad 218]

2.—s 20—*Payment of interest—Entry on account of interest in debtors' books in presence of plaintiff* ] The plaintiffs, who were members of the Dalvadi community, sued in 1883 to recover from the defendants the sum of Rs 2 611-3-0 as found credited to their account in 1880 by the defendants' father, with whom the community had lodged a sum of Rs 2,320 in 1874. They alleged that the sum was lodged on the condition that it was to be returned with interest on demand. It appeared that small sums were paid by K to the plaintiffs from time to time and entries of interest were made in the defendant's books as being credited to the plaintiff. The defendants contended that the suit was barred. For the plaintiffs it was contended that the entry of interest in the defendant's book was made in the plaintiffs' presence and amounted to a payment of interest within the meaning of s 20 of the Limitation Act (XV of 1877). *Held*, that such an entry did not amount to payment of interest within the meaning of the section so as to save limitation. Nothing took place which could be regarded as equivalent to payment of interest. **ICHHA DHANJI v. NATHA.**

[I. L. R. 13 Bom 338]

—, s 21.—*Acknowledgement signed by one of several partners.* ] The word "only" in s 21 of the Limitation Act (XV of 1877) is not to be treated as a surplusage. It means that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partner, unless it can be shown that he had otherwise power to bind that partner for the purpose of making such acknowledgment, and in effect purporting so to bind him. **GAU BIBI v PARSON-TAM**

[I. L. R. 10 All 418]

1—s 22—*Parties—Civil Procedure Code, ss 27 and 32—Institution of suits—Change of parties* ] The change of parties as plaintiffs, in conformity with the provisions of s 27 of the Civil Procedure Code, does not give rise to such a question of limitation as arises upon the addition of a new person as a defendant under s 32. **SUBODINI DEBI v. CUMAR GANODA KANT ROY BAHADUR.**

[I. L. R. 14 Calc 400]

2.—s 22.—*Suit for partnership accounts—Joint contract—Necessary parties. Omission of—Addition of new defendant—Time of joinder, how material.* ] A suit was brought for partnership accounts.

**LIMITATION ACT (XV OF 1877), s 22—continued.**

Upon the objection of the defendant it was found that a necessary party defendant had been omitted and such party was afterwards added as a defendant at a time when the suit as against him was barred. *Held* that the whole suit was rightly dismissed. **RAMDOYAL v. JUXMENJOY COONDOL.**

[I. L. R. 14 Calc. 791]

3.—s 22—*Parties defendants substituted as plaintiffs after suit by them is barred—Suit to set aside sale—Civil Procedure Code, s 32* ] A *mitta* held by tenants in common was sold for arrears of revenue at a time when the owners of a moiety thereof were minors. In a suit brought by the mother of these minors on their behalf against the Collector to set aside the sale, the plaintiffs impleaded also the other previous owners, of whom one was the purchaser at the sale. Two others in their written statement, pleaded that the purchase had been made in fraud of their rights, and claimed to be still entitled to their shares in the *mitta* on the ground that the purchaser must be held to have purchased for their benefit (Indian Trusts Act, II of 1882, s. 90). They further claimed that should the sale be set aside so far as the plaintiffs' interests were concerned, the sale of their interests also should be held to be null and void. Before the suit came on for hearing the District Judge *suo motu* ordered that these two defendants should be made plaintiffs in the suit under s 32 of the Code of Civil Procedure. At the date when this order was made, the claim of these defendants, had they sued to set aside the sale in their own interest, was barred by limitation. *Held* that the order was illegal. **KRISHNA v MEKAMPURUMA. COLLECTOR OF SALEM v. MEKAMPURUMA.**

[I. L. R. 10 Mad. 44]

—, s 23—*Bond—Interest post diem—Non-payment of principal and interest at agreed date—Continuing breach—Act XV of 1877, sch. II, arts. 115, 116* ] Upon failure to pay the principal and interest secured by a bond upon the day appointed for such payment, breach of the contract to pay is committed and there is no "continuing breach" within the meaning of s 23, nor "successive breaches" within the meaning of art. 115 of the Limitation Act (XV of 1877). **MUNSHI ALI v GULAB CHAND.**

[I. L. R. 10 All. 85]

—, s 26.

*See PRESCRIPTION—EASEMENTS—LIGHT AND AIR.*

[I. L. R. 14 Calc. 839]

1—Art. 10—*Wajib-ul-arz—Co-sharers—Effect of perfect partition—Physical possession—Purchase of equity of redemption by mortgagee in possession.* ] The *wajib-ul-arz* of three villages which originally formed a single *mehal* gave a



LIMITATION ACT (XV OF 1877) Art 10—  
*continued.*

right of pre-emption to co-shares in case of transfers of shares to strangers. Afterwards the shares in these villages were made the subject of a perfect partition and divided into separate *mehtas*. Subsequently, by two deeds of sale executed on the 13th January 1884, and registered on the 17th January 1884, some of the original co-shares sold to strangers their shares in all three villages. At the time of the sale, the shares in two of the villages were in possession of the vendees under a possessory mortgage, the amount due upon which was set off against the purchase-money. The share in the third village was, at the time of the sale, in possession of another of the original co-shares under a possessory mortgage. On the 17th January 1885, this last-mentioned co-share brought a suit against the vendors and the vendees to enforce his right of pre-emption under the *wajib-ul-arz* in respect of the shares sold in the three villages. *Held*, that in the case of the sale of an equity of redemption by the mortgagor to the mortgagee in possession, which has the effect of extinguishing the right to redeem by a merger of the two estates in the mortgagee, it cannot properly be said that any property is sold which is capable of "physical possession" within the meaning of art. 10, sch. II of the Limitation Act. In a statute, such as the law of limitation, which contemplates notice express or implied to the party to be affected by some act done by another in respect of which a right accrues to him to impeach it, and as to which time begins to run against him, *quoad* his remedy, from a particular point, the word "physical" implies some corporeal or perceptible act done which of itself conveys or ought to convey to the mind of a person notice that his right has been prejudiced. An equity of redemption is not susceptible of possession of this description under a sale by which it is transferred, and a pre-emptor impeaching such a sale has one year from the date of registration of the instrument of sale within which to bring his suit. *Held*, therefore, that the period of limitation began to run from the date of the registration of the deed of sale, and that the suit was within time *SHYAM SUNDER v. AMANANT DEGAN*.

[I. L. R. 9 All. 234]

2—Art. 10 and Art 120—*Mahomedan Law—Pre-emption—Conditional sale—Right of pre-emption among Co-parceners—Private partition of partitioned estate.* A and B had certain proprietary rights in an 8-annas putti of a certain *mehtal*. C and D had no rights in that putti, but D had a small share in the remaining 8-annas putti. A private partition between the puttis having taken place, C and D's brother lent to B two sums of Rs. 200 and Rs. 199 by deeds of *bai-bil-wafa*, dated the 12th and 21st June 1876. C and D subsequently instituted foreclosure proceedings, and on the 5th May 1881, were put into possession of B's share in the first mention-

LIMITATION ACT (XV OF 1877), Art. 10  
*—continued*

ed putti in execution of a decree which they had obtained. On the 18th April 1885, A sued C and D to enforce his right of pre-emption: *Held*, that the suit was not barred by limitation, it being governed by either art. 10, sch. II of the Limitation Act (Act XV of 1877), which gave the plaintiff a year from the 5th May 1884, the date on which the mortgagee obtained possession, or by art 120, under which his right to sue accrued upon the expiry of the six months' grace allowed to the mortgagor after the decree for foreclosure, and there would be six years allowed from that time. *DIGAMBUR MISSEER v. RAM LAL ROY*.

[I. L. R. 14 Calc 761]

## —Art 11.

See s. 14.

[I L R. 12 Mad 434]

1—Art 11—*Suit on title after Summary order—Omission of judgment-debtor to set aside Summary order—Right of purchaser from judgment-debtor to sue* ] On the 24th March 1879 a certain property was attached in execution of a money-decree against S, and was finally sold on the 22nd September 1879, and purchased by the plaintiff's father. Subsequently to the attachment, the defendant caused the same property to be attached in execution of his decree against R. On the 15th August 1879, S intervened and claimed the property as his own, but his claim was disallowed and the property was sold on the 4th August 1880 and purchased by the defendant himself. On proceeding to take possession the plaintiffs obstructed him, but the obstruction was disallowed on the 28th July 1882 and they were dispossessed. The plaintiffs therefore brought a suit to recover possession. The Court of First Instance rejected their claim, on the ground that the omission on the part of S to sue to set aside the summary order passed against him on the 15th August 1879 barred the plaintiffs. The lower Appellate Court reversed that decree. On appeal by the defendant to the High Court: *Held*, confirming the decree of the lower Appellate Court that the plaintiff's suit was not barred: the plaintiffs' father having purchased under the attachment, dated 24th March 1879 and having then acquired by his purchase the interest of S as it stood at that date, that interest could not be affected by any subsequent act or omission of the judgment-debtor. *S. PAXAPA v. PADMAPA*.

[I. L. R. 11 Bom. 45]

2—Art. 11—*Civil Procedure Code, 1882, ss. 278, 283—Suit by a judgment-creditor to establish his judgment-debtor's right to property so as to make it subject to attachment in execution of his decree—Dismissal of such suit—Judgment-debtor not represented by judgment-creditor in such suit—Subsequent suit by judgment-debtor to recover the same property—Second appeal, point taken for the*

**LIMITATION ACT (XV OF 1877), Art 11—**  
*continued.*

*first time on.*] A judgment-creditor of the plaintiff having obtained a decree against the plaintiff, attached the house in dispute. The defendant intervened in 1878, and set up a previous purchase of the house by himself from the plaintiff. The attachment was removed. The judgment-creditor brought a suit against the defendant for a declaration that the property belonged to the plaintiff, and, as such, was liable to be attached and sold in execution. At the hearing of this suit the judgment-creditor did not appear. The defendant appeared and produced a sale-deed, which the Court found proved, and dismissed the judgment-creditor's suit. The plaintiff now brought the present suit against the defendant to recover possession of the house. It was contended for the defendant that the plaintiff, as the judgment-debtor, might at any rate be regarded as a party against whom the order in the execution-proceedings in 1878 was made, and that the present suit was therefore barred by limitation: *Held* that the plaintiff could not be regarded as a party to those proceedings. Whether a judgment-debtor is to be regarded as a party to an investigation under s. 278 of the Code, must depend upon the facts of each case. As the question of limitation was raised for the first time on second appeal, it could not be decided against the plaintiff. **SHIVAPPA v. DOD NAGAYA**

[I. L. R. 11 Bom 114

**3—Art. 11.—Code of Civil Procedure, ss. 278, 280, 283—Investigation of claim to attached property.]** A decree-holder, against whom the release of property, attached in execution of his decree, has been ordered, after investigation under s. 280 of the Code of Civil Procedure, is limited by art 11 of sch. II of Act XV of 1877, the Indian Limitation Act, to one year within which to institute a suit to establish that the property is that of his judgment-debtor. **SARDHARI LAL v. AMBIKA PERSHAD.**

[I. L. R. 15 Calc. 521 : L. R. 15 I. A. 123

**4.—Art. 11 — Civil Procedure Code (Act XIV of 1882), ss. 283 283 — Judgment-debtor. Suit by, to establish title to property the subject-matter of claim in execution-proceedings.]** A judgment-debtor is not necessarily a party against whom an order is made within the meaning of that term as used in s. 283 of the Code of Civil Procedure so as to preclude his instituting a suit after the lapse of one year from the date of such order (the period of limitation prescribed by art. 11, sch. II, Act XV of 1877) to establish his title to and to recover possession of the property which has been the subject-matter of a claim in execution-proceedings, and in respect of which an order has been made under s. 280 of the Code. *G.*, in execution of a decree, attached certain immoveable property belonging to the plaintiff, whereupon *Z* preferred a claim, and on the 10th March 1881 got the attachment removed. On the 20th July 1881, *B*

**LIMITATION ACT (XV OF 1877), Art 11—**  
*continued.*

sold the property to *K*. In 1882 *G* instituted a suit against *B* to set aside the order of the 10th March 1881 and to have it declared that the property was liable to attachment as belonging to the plaintiff. *K* was not made a party to that suit, and it was eventually compromised between *G* and *B* the plaintiff's title being admitted. *G* thereupon again attached the property, and was met by a claim preferred by *K* which was allowed on the 15th August 1883. *G* then brought another suit against *K* to obtain relief similar to that claimed in his suit against *B*, but his suit was dismissed on the 17th February 1885. On the 25th September 1885 the plaintiff instituted a suit against *G*, *B* and *K*, to obtain a declaration of his title to and to recover possession of the property. It was contended that the suit was barred by limitation, being governed by art. 11, sch. II of Act XV of 1877, inasmuch as it was brought more than one year after the date of the order of the 15th August 1883; *Held*, that the suit was not such a suit as was contemplated by s. 283 of the Code of Civil Procedure, not being one to establish any right which was the subject-matter of the litigation in the execution proceedings, and that consequently the provision of art. 11 did not apply to it, and it was not barred by limitation. **KEDAR NATH CHATTERJI v. RAKHAL DAS CHATTERJI.**

[I. L. R. 15 Calc. 674

**5—Art 11 — Claim to attached property — Order passed against claimant—Neglect of claimant to sue within a year after date of order — Civil Procedure Code (Act XIV of 1882), ss. 278, 279, 280, and 283.]** *V* mortgaged certain land to the defendant's father for a sum of Rs 64 advanced by the latter at the date of the mortgage. The mortgage-deed stated that *V* owed the mortgagee another debt of Rs. 100, which was due on a separate bond, and it contained a clause in the following terms:—"The principal sum of *huns* (coins) due on that document, as also this document, I will pay at the same time and take back the land along with this document as well as that document. Till then you are to continue to enjoy the land \* \* \*." The plaintiff having obtained a decree against the mortgagor attached the land in execution. The defendant, (son of the original mortgagee), thereupon claimed that he held a mortgage upon it to the extent of Rs 164. On the 9th March 1881, the Court executing the plaintiff's decree made an order allowing the defendant's claim only to the extent of Rs 64, and directing that the land should be sold subject to the defendant's lien for that sum. The plaintiffs bought the land at the execution-sale, and offered the defendant Rs 64 in redemption of his mortgage, which the defendant refused. The plaintiffs then brought the present suit to recover possession. *Held* that the charge on the land did not include the old debt of Rs 100. There were no words in the mortgage-deed expressly making that debt a charge on the

LIMITATION ACT (XV OF 1877), Art. 11—  
*continued.*

property. The provisions in the deed only made the equity of redemption conditional on the payment of both the debts. *Quære*—Whether, under the circumstances of the case, the purchaser at the execution-sale would be bound by such a condition. *Held* also, that the object of the defendants' application in March 1881, was virtually that the Court should allow his mortgage to the extent of Rs 164, and the Court having allowed his claim only to the amount of Rs 64 by its order, *pro tanto* rejected his application. It was therefore an order passed against him, and having neglected to establish his right by suit within a year from the date of that order, he was now estopped from insisting on the condition. **YASH-VANT SHENVI v. VITHOBA SHETI.**

[I. L. R. 12 Bom. 231]

6—Art. 11—*Execution of decree—Deceased judgment-debtor—Execution against a person not the legal representative*] The defendants along with one N and C, had brought a suit against one A, in the Civil Court at Peshawar in the Punjab, and obtained a decree on the 22nd July 1878, for Rs. 30,545-12-0. In 1881 application for transfer of the decree to the Court at Moradabad for execution was made and it was granted, but no steps were taken thereupon. On the 12th June 1883, A died. On the 30th April 1884, the defendants again applied to the Court at Peshawar treating their judgment-debtor as being then alive, for a fresh certificate to execute their decree in the Moradabad district, and obtained it. On the 20th of August 1885, they made an application to the District Judge of Moradabad for execution of their decree and in it it was stated that the application was 'for execution against A and after his death against A L the own brother, and D K widow, and L P and others, sons of A residents of Kundaiki and the said A L at present residing at Umballa and employed in the Commissariat Transport Department, judgment-debtors.' It was further stated that "the judgment-debtor was dead and his heirs are living and in possession of his estate, and A L himself has realised Rs 9,637-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta and appropriated the same therefore to that extent the person of the said A L was liable." Notification of this application was issued to A L as also to the other persons named therein. A L objected to the application as against him, stating that, although he was the brother of A, deceased, yet he always lived separate and carried on business separately, and that there was no connection or partnership between him and the deceased judgment-debtor and that he had no property of the deceased in his possession. Further that as A left issue it was wrong to call him as heir to A and take out execution-process against him. In reply to these objections the judgment-creditors (defendants) did not contend that A L was the legal representative of the deceased judg-

LIMITATION ACT (XV OF 1877), Art. 11—  
*continued.*

ment-debtor, but treated him as a person in possession of a sum of money belonging to the deceased and therefore liable to the extent of the sum so received by him. The Subordinate Judge holding that A L was the brother of the deceased and had realised the amount from the Commissariat office, which he failed to prove that he paid to the deceased, ordered execution to proceed against him. A L then instituted this suit to set aside the order of the Subordinate Judge. It was contended that the suit was in effect a suit under s. 283 of the Code of Civil Procedure, and therefore barred as not having been brought within a year from the order of the Subordinate Judge. *Held*, that the contention must fail, inasmuch as an essential condition precedent to a suit under s. 283 of the Code, is the making of an attachment of some property, of objection being taken to such attachment, of investigation being made into such objection; and lastly, of its being allowed or disallowed, and these did not exist in this case. **ANGAN LAL v. GUDAR MAL.**

[I. L. R. 10 All. 479]

7—Art. 11.—*Attachment of property of judgment-debtor—Application by third party to have attachment removed—Order refusing to remove attachment—Suit by claimant to establish his title to attached property*] A obtained a decree against B and in execution attached certain property. The plaintiff objected, and applied to have the attachment removed. His application was rejected on the 14th January 1881, but on the 23rd March 1881, the judgment-debtor paid the amount of the decree into Court, and the attachment was thereupon removed. A subsequently again attached the same property in execution of another decree against B. The plaintiff again objected under s. 278 of the Code of Civil Procedure (Act XIV of 1882), and on the 9th June 1883, an application made by him to remove this second attachment was refused. Within one year from that date he filed the present suit to establish his title to the property attached. The defendant contended that the suit was barred, not having been filed within one year from the date (14th January 1881) of the order made against the plaintiff refusing his application to raise the first attachment. *Held*, that the suit was not barred by limitation. No doubt an order had been made against the plaintiff on the 14th January 1881; but as the attachment in respect of which that order had been made was finally withdrawn on the 23rd March 1881, although not on the plaintiff's application, and as he continued in possession of the property, there was after the 23rd March 1881, no right of action remaining to him in respect of the order of the 14th January 1881, disallowing his claim. The second attachment was a new and distinct act giving a new cause of action on which the plaintiff was entitled to a fresh inquiry and decision. **IBBAHIM-BHAI v. KABULABHAI.**

[I. L. R. 13 Bom. 72]

**LIMITATION ACT (XV OF 1877), Art. 11—***—continued.*

**S.—Art. 11.—Civil Procedure Code, 1859, s 246—Limitation Act (IX of 1871). sch II, art. 15, (Act XV of 1877) sch II, art. 13—Suit after rejection of claim to attached property.]** A petition under s 246 of the Code of Civil Procedure of 1859, objecting to the execution of the decree by the attachment of certain land on the ground that the land was the property of the petitioner, was heard and dismissed in July 1875. In July 1877 within twelve years from the dispossession of the objector, he filed a suit against the decree-holder who had purchased at the execution-sale for the possession of the land held by him as purchaser at the execution sale: *Held* that the suit was not barred by limitation. **NARASIMMA v. APPALACHARLU.**

[I L. R. 12 Mad. 294]

—, Art 12.

See Art. 95.

[I L. R. 11 Bom. 119]

**1—Art 12—Suit by reversioner to establish his title to property sold in execution of decree obtained against a widow as representing estate—Collusion.]** A widow of a deceased Hindu represents the estate of the reversioner for some purposes, but it is her duty not only to represent the estate, but to protect it. When a suit is brought on the ground that the widow did not in a former suit protect the interests of the person who was to take after her death, but collusively suffered judgment against herself and sale of her husband's property in execution, then if such person on that ground treats the sale as inoperative, and seeks for a declaration that it is not binding on him, art 12 cl (a) of sch II of the Limitation Act XV of 1877 does not apply to the suit. **PAREKH RANCHOR v. BAI VAKHAT.**

[I. L. R. 11 Bom. 119]

**2—Art. 12.—Minor, when bound by proceedings against him—Minors' Act (XX of 1864) s 2—Suit by a minor, one year after attaining majority to recover property sold in execution of a decree obtained against him during minority.]** In 1870 a creditor of the plaintiff's father brought a suit (No. 573 of 1870) against the plaintiff and obtained a money-decree against him. The plaintiff was then a minor, and his estate was administered by the Collector of Ratnagiri. In this suit he was represented by his mother and guardian. At the sale held in 1871 in execution of the decree, the property in question was purchased by the defendant, who obtained possession in 1876. In 1879 the plaintiff attained majority, and 1882 he brought the present suit to recover the property from the defendant. The lower Courts, regarding the suit as one to set aside the sale to the defendant, held that it was barred by a limitation under art. 12 of sch. II of the Limitation Act XV of 1877. On appeal by the plaintiff to the High Court *Held*, that art. 12 of the

**LIMITATION ACT (XV OF 1877), Art. 12—**  
*continued*

Limitation Act XV of 1877 did not apply; and that the suit was not barred. That article applies only to cases in which the plaintiff would be bound by the sale if he did not succeed in getting it set aside; but in the present case the plaintiff was not bound by the proceeding in suit No. 573 of 1870, as he had not been properly represented as required by s. 2 of Act XX of 1864. **VISHNU KESSHAV v. RAMCHANDRA BHASKAR**

[I. L. R. 11 Bom. 130]

**3—Art. 12—Sale for arrears of revenue—Suit for possession of land—Fraud.]** The plaintiff's land was sold by the Revenue authorities for arrears of assessment due to the *inamdar*. The plaintiff applied to the Mamlatdar to have the sale set aside on the ground of fraud on the part of the *inamdar*, but his application was rejected, and the sale was confirmed in July 1879. The auction-purchaser was thereupon put in possession. In 1886 the plaintiff sued to recover possession of the land in question. *Held*, that the suit having been brought more than one year after the date of the sale was barred by art 12, cls (b) and (c) of sch II of the Limitation Act (XV of 1877). The sale was one in pursuance of an order of the Collector or other officer of revenue, and if not for arrears of Government revenue was at any rate a sale for arrears of rent recoverable as arrears of revenue. The plaintiff, as occupant of the land, was bound by the sale, unless and until it was reversed, and the title of the purchaser at the sale was a perfectly good title until the sale is set aside in due course of law. **BALAJI KRISHNA v. PIRCHAND BUDHARAM.**

[I L. R. 13 Bom. 221.]

**4—Art 12 and Art 7.—Guardian—Representative of minor in a suit against him—Certificate—Act XX of 1864—Joint family—Mortgage by father and eldest son—Death of father and eldest son—Decree obtained by mortgagee against minor son represented by the widow—Sale in execution—Subsequent suit by minor to set aside sale.]** In 1862 R and his son A mortgaged the property in dispute to B. In 1863 A died, leaving a widow S. and two sons, viz, A and P, a minor. In 1866, A and S, the latter of whom acted for herself and as guardian of her minor son P. settled the account with B, the mortgagee, obtained a fresh advance, and passed a fresh mortgage-bond to him. In 1868, A died. In 1869 B's assignee filed a suit upon the mortgage, and obtained a decree against the mortgaged property against S both as guardian of the minor P and also against her in her individual capacity. At the Court-sale held in execution of this decree, D purchased the property in dispute in 1870. In 1881 P filed the present suit to recover possession of the property, alleging that D's purchase was invalid as against him, he having been a minor at the time of the Court-sale. He subsequently assigned his interest to the respondent (second plaintiff). It was contended on behalf of the

**LIMITATION ACT (XV OF 1877), Art. 12—**  
—continued.

defendant *D*, that the suit, not having been brought within one year after *P* had attained majority, was barred by limitation under art. 12, sch. II of Act XV of 1877. *Held*, that the suit was not barred by limitation. *P* had not been properly represented by *S* in the suit of 1869, as she had not obtained a certificate under the Minois' Act (XX of 1864). *P* was, therefore, not bound by the decree in that suit, or by the sale in execution, and art. 12, sch. II, of Act XV of 1877 did not apply. **DAJI HIMAT v. DHIRAJRAM SADARAM**

[I. L. R. 12 Bom. 18]

**5.—Art. 12 and Art. 14—***Suit to set aside an act or order of an officer of Government—Suit for possession—Dispossession under an order made by officer of Government* ] Arts. 12 and 14 of sch. II of the Limitation Act (XV of 1877) refer to orders and proceedings of a public functionary, to which by law is given a particular effect in favour of one person or against another, subject in the regular course to a further judicial proceeding having for its object to quash them or set them aside. When an order does not fall within the authority of an official who makes it, it is legally a nullity, and therefore need not be set aside. **SHIVAJI YESJI CHAWAN v. COLLECTOR OF RATNAGIRI.**

[I. L. R. 11 Bom. 429]

—, Art. 13.

See ART. 11.

[I. L. R. 11 Mad. 294]

—, Art. 14.

See ART. 12.

[I. L. R. 11 Bom. 429]

—, Art. 29.—*Mortgage—Presumption that person paying off a mortgage intends to keep the security alive—Power of Court to order refund of money wrongfully paid out of Court in another suit* ] In 1861 *B* granted a lease of his zemindari to *A* for 30 years, *A* undertaking to pay off all debts then due by *B*. *B* died in 1882 and his successor sued *A* and obtained a decree that on payment of Rs. 1,20,000 *A* should give up possession of the zemindari. This sum having been paid into Court, *A* lost possession of the zemindari. On 5th January 1875, *A* had mortgaged the whole zemindari, which consisted of 22 villages, to *M* to secure a loan of Rs. 1,00,000 borrowed by *M* to pay off the debts of *B* which *A* undertook to pay in 1861. On June 27th 1879, *A* being indebted to *M* in the sum of Rs. 1,78,000, paid *M* Rs. 1,00,000 and undertook to pay the balance out of the income of the estate, *M* releasing the 22 villages from the mortgage of January 5th 1875. On June 28th 1879, *A* executed a mortgage of the 22 villages to *L* to secure repayment of Rs. 1,30,000. Of this sum, Rs. 1,00,000 was borrowed to pay *M* and Rs. 30,000 was a prior debt due by *A* to *L*. Of the Rs. 1,00,000 paid to *M*, 27,000 was specially applied to discharge so much of the charge created by the mort-

**LIMITATION ACT (XV OF 1877), Art. 29—**  
—continued

gage of 5th January 1875. On 30th January 1875, *A* borrowed from *S* Rs. 48,000 and mortgaged to her 10 of the 22 villages of the zemindari. In the suit brought by *B*'s successor against *A* to recover the zemindari *L* was a party, but *S* was not. In that suit *L* obtained an order for payment of Rs. 1,00,000 of the sum paid into Court by the zemindari. In a suit brought in 1885 by *S* against *L* to have her debt declared a first charge on the money paid into Court by the zemindar, it was contended by *L* that *S* could have no decree for repayment of this sum, and that if the money was wrongly paid under the order of the Court to *L* it was wrongfully seized within the meaning of art. 29 of sch. II of the Limitation Act. *Held* that the Court had power to order a refund and that art. 29 of sch. II of the Limitation Act was not applicable. **RUPABAI v. AUDIMULAM.**

[I. L. R. 11 Mad. 345]

—, Art. 32.—*Suit for removal of trees* ] A suit by a zemindar for removal of trees planted in certain waste land of his village by persons who have no right to plant them, is governed by art. 120, sch. II of the Limitation Act, and not by art. 32, sch. II of the Act. Where a defendant having a right to use property for a specified purpose perverts it to other purposes, and a suit has to be instituted for any relief in respect of any injurious consequences arising from such perversion, such a suit will be governed by art. 32, sch. II of the Limitation Act. **Gangadhar v. Zuhurriya**, I. L. R. 8 All 116 distinguished. **MUSHARAF ALI v. IFT-KHAR HUSAIN**

[I. L. R. 10 All. 634]

—, Art. 36

See ART. 49

[I. L. R. 11 Mad. 338]

—, Art. 36 and Art. 115.—*Shipping—Collision—Suit for damages for loss of ship by collision—Limitation in action of tort* ] A suit to recover damages for the loss of a ship caused by collision at sea is an action of tort founded upon the negligence of the defendant or his servants in the management of his vessel, and must be brought within two years under the provisions of art. 36 of sch. II. of the Limitation Act XV of 1877. From the provisions of arts 36 and 115 of sch. II of the Limitation Act XV of 1877, the intention of the Act appears to be that not more than two years should be allowed for bringing a suit founded on tort, except in certain well-defined particular instances. **ESSOO BHAYAJI v. STEAM-SHIP "SAVITRI."**

[I. L. R. 11 Bom. 133.]

1.—Art. 49—*Suit for damage to property—Property in custody of person other than owner—Damage to ship by collision.* ] Art. 49 of sch. II of the Limitation Act XV of 1877 applies only to suits in respect of property in the hands of some other person, and not to suits in respect of property in

**LIMITATION ACT (XV OF 1887), Art. 49—**  
*continued.*

the plaintiff's own possession, and the injury to property there mentioned, is limited to cases of injury to property while in the custody of some person other than the owner *ESSO0 BHAYAJI v. STEAM-SHIP "SAVITRI."*

[I. L. R. 11 Bom. 133]

**2—Art. 49 and Art 36.—***Suit for damages for wrongful conversion—Injury to moveable property.* Plaintiff was the owner of a house mortgaged to defendants. On the 22nd August 1885 defendants sold the house by auction under a power of sale contained in the mortgage and gave possession to the purchaser. On the 2nd September 1887 plaintiff sued the defendants to recover the value of certain timber which was stored in the house and not mortgaged, and which plaintiff alleged the defendants had taken possession of and converted to their own use. It was proved that the timber was in the house when defendants took possession from the plaintiff and defendants did not account for it. *Held* (1) that plaintiff was entitled to recover from the defendants the value of the timber, and (2) that the suit was not barred; art 49 and not art 36 of sch. II of Limitation Act being applicable to it. *PASSANHA v. MADRAS DEPOSIT AND BENEFIT SOCIETY.*

[I. L. R. 11 Mad 333]

—, **Art. 57—***Suit for money lent—Limitation for a suit to recover debt personally from the mortgagor where mortgage-deed contains no personal undertaking for repayment.* By a registered mortgage-deed dated the 11th May 1876, the defendant mortgaged certain land with possession to the plaintiff for a term of five years, the mortgage-deed stipulating that the plaintiff was to enjoy the profits, pay the assessment for it and restore it to the defendant on repayment of the debt. But no personal undertaking to pay was given by the defendant. The land was sold by the Revenue authorities for arrears of assessment due from the defendant for certain other lands of the defendant. The plaintiff now sought to recover the debt personally from the defendant. The Court of First Instance dismissed the plaintiff's claim, on the ground that the failure, on the part of the plaintiff, to pay the arrears of assessment, disentitled him to recover the debt from the defendant personally. The plaintiff appealed to the District Judge, who referred the case to the High Court. *Held* that the mortgage consideration for the debt having failed, the debt was recoverable within three years—the registered mortgage-deed containing no personal undertaking by the defendant (mortgagor) to pay the loan. *SAWABA KHANDAPA v. ABAJI JOTIRAV.*

[I. L. R. 11 Bom. 475]

—, **Art 59.**

*See* ART. 60

[I. L. R. 16 Calc. 25]

**LIMITATION ACT (XV OF 1877), Art. 59—**  
*continued.*

—, **Art 59.—***Native banker and customer—Deposit—Loan—Suit to recover money lodged with a native banker more than three years after lodgment* [The relationship between a native banker and the person depositing money with him in the ordinary way of business is that of borrower and lender, and the money lodged can be recovered as money lent. Art 59 of the Limitation Act (XV of 1877) applies to such a transaction. The plaintiffs, who were members of the Dalvadi community, sued in 1883 to recover from the defendant the sum of Rs. 2,611-3-6 as found credited to their account in 1880 by the defendants' father, with whom the community had lodged a sum of Rs. 2,320 in 1874. They alleged that the sum was lodged on the condition that it was to be returned with interest on demand. It appeared that small sums were paid by K to the plaintiffs from time to time, and no demand had ever been made during the lifetime of K for repayment. The defendants denied the alleged condition, and contended that the suit was barred. The Court of First Instance awarded the plaintiffs' claim. The defendants appealed to the Assistant Judge, who reversed the decree, being of opinion that the transaction was a loan and not a deposit, and that the suit was barred. On appeal by the plaintiffs to the High Court. *Held*, confirming the decree of the lower Appellate Court, that the plaintiffs' suit was barred by art 59 of the Limitation Act (XV of 1877). The plaintiffs contended that the money was lodged as a "deposit" and not as a loan, and that art 60 of sch II of the Limitation Act applied. They relied upon the following circumstances as showing the nature of the transaction, viz., (1) that it was arranged that the money should remain until a favourable opportunity should occur for applying it to the building of a *dharma-shāla*; (2) that interest was to be paid upon it, (3) that the account was to be annually settled; (4) that it was to be withdrawn in one sum. *Held*, that these circumstances, if proved, did not necessarily deprive the transaction of the character of a loan by creating a fiduciary relationship between the parties (which is essential to a deposit in its technical sense), and thus distinguishing it from the ordinary dealings between native bankers and their customers. *ICHHA DHANJI v. NATHA.*

[I. L. R. 13 Bom 338]

—, **Art. 60**

*See* ART. 59

[I. L. R. 13 Bom. 338]

—, **Art. 60—***Money deposited—Banker and Customer—Money lent—"Deposit"—"Trust"—Cause of action—Demand* [The plaintiff deposited from time to time with the firm of the defendant, who carried on a banking business various sums of money, the amounts deposited bearing interest, and at times certain sums being withdrawn by the plaintiff, and an account



LIMITATION ACT (XV OF 1877) Art. 60—  
*continued.*

of the balance of principal and interest being struck at the end of each year and presented to the plaintiff. The date of the first deposit was not known, but it was some time previous to 1282 (1875). A demand was made for the whole amount of the principal and interest in Bhadio 1292 (August—September 1885), and the demand not having been complied with, a suit to recover the money was brought on the 8th March 1886. *Held*, that art 60 and not art. 59 of the Limitation Act was applicable to the case; the cause of action therefore arose at the date of the demand and the suit was not barred. The *dictum* of WHITE, J., in the case of *Ram Sukh Bhungo v. Brohmoy Dasi*, 6 C. L. R. 470, that the "word 'deposit' in the Limitation Act as distinct from 'loan' points to cases where money is lodged with another under an express trust or under circumstances from which a trust may be implied," dissented from. *ISHUR CHUNDER BHADURI v. JIBUN KUMARI BIBI*.

(I. L. R. 16 Calc. 25)

—, Art. 61.

*See* ART. 115.

(I. L. R. 14 Calc. 256)

1—Art 62—*Money paid—Money had and received—Goods paid for before delivery—Short delivery—Failure of consideration* ] Money paid as the price of goods to be delivered hereafter is money received for the use of the seller, and it is only upon failure of consideration that the money so paid becomes money received for the use of the buyer. When goods which have already been paid for are afterwards found to be short delivered, the failure of consideration takes place on the date of delivery, and limitation in respect of a suit to recover back the sum over paid will be reckoned from that date. *ATUL KRISTO BOSE v. LYON AND CO.*

(I. L. R. 14 Calc. 457)

2—Art 62—*Suit to recover purchase-money—Failure of consideration—Cause of action Accrual of* ] Purchase money paid for a consideration which has wholly failed is money received for the use of the buyer, and a suit to recover back the money is thus governed by art. 62 of sch II of the Limitation Act. A purchased a share of joint property from a member of a Mitakshara family, but his suit to recover possession of it was dismissed on the ground that the sale having been made without the consent of the other coparceners was void under the law. A then brought a suit to recover back the purchase-money by reason of failure of consideration. *Held*, that the failure of consideration, although it did not become apparent until the former suit was brought and failed, was a failure from the beginning, and time ran from the date when the purchase-money was paid. *HANUMAN KAMUT v. HANUMAN MANDUR*.

(I. L. R. 15 Calc. 51)

LIMITATION ACT (XV OF 1877)—*contd.*

—, Art. 64.

*See* ART. 97.

(I. L. R. 11 All. 47)

1—Art 75.—*Decree payable by instalments—Instalment, Failure of whole sum decreed to full due—Right of decree-holder to waive his right to execute the whole decree—Waiver* ] A proviso in a decree made payable by instalments by which the whole amount of the decree is to become due upon default in payment of any instalment is a proviso enuring for the benefit of the decree-holder alone, and he is at liberty to take advantage of it or to waive it as he thinks fit. In this case it was held that he did waive his right, and therefore his right to recover the amount by instalments subsequently was not barred, limitation not running against him from the original default. *RAM CULPO BHATTACHARJI v. RAM CHUNDER SHOME*.

(I. L. R. 14 Calc. 352)

2.—Art 75.—*Instalment bond—Default in one instalment, the whole amount to fall due—Waiver* ] The mere fact that a creditor has done nothing to enforce a condition in an instrument, under which the whole debt became due on failure in the payment of one instalment, is no evidence of waiver within the meaning of art 75 of the Limitation Act. *NOBODIP CHUNDER SHAHA v. RAM KRISHNA ROY CHOWDHRY*.

(I. L. R. 14 Calc. 397)

3.—Art. 75—*Bond payable by instalments—Default in payment of an instalment—Waiver of a condition of forfeiture on default in payment of one instalment—Acceptance of an instalment overdue.* ] A bond payable by instalments, provided that if default was made in paying one instalment the whole debt should become due. The amount of the third instalment was paid five days after it became due. The lower Court found that this payment was accepted by the obligee as a payment made on account or in satisfaction of the third instalment, and not as a mere part payment on reduction of the whole debt, and that the circumstances indicated an intention to waive the forfeiture though there was no express waiver. *Held*, that the acceptance of the amount of the third instalment constituted a waiver within the meaning of art. 75 of sch II of the Limitation Act, 1877. *NAGAPPA v. ISMAIL*.

(I. L. R. 12 Mad 192)

4.—Art. 75—*Execution of Decree—Decree payable by instalments—Default—Waiver* ] A decree was made for payment of the decretal amount by monthly instalments running over a period of twelve years: and it was provided that on default the decree-holder might execute the decree as a whole for the balance then due. In 1883 a default was made, and in 1884, the decree-holder filed an application for execution in respect



LIMITATION ACT (XV OF 1877), Art 75 —  
—continued.

thereof, but did not proceed with it, and continued to receive the monthly instalments. In 1887, he made another application for execution, in which he relied on the same default. *Held* that the default if it was one had been waived by the decree-holder, and that such waiver was a good defence to the present application. *Mumford v. Peal*, I L R. 2 All 857, and *Asmatullah Dalal v. Kally Churn Mitter*, I L R. 7 Calc 56, distinguished. *BUDDHU LAL v. REKKHAB DAS*.

[I. L. R. 11 All. 482]

—, Art 80 — *Suit on unregistered Bond pledging moveable property for repayment* [In a suit on an unregistered bond, whereby certain moveable property in the debtor's possession was pledged as security for the repayment of principal and interest. *Held*, that the suit was governed by art. 80, sch. II, of the Limitation Act, 1877. *VITTA KAMU v. KALEKARA*.

[I L R. 11 Mad. 153]

1—Art. 85 — *Mutual current accounts—Reciprocal demands* [A employed B as his agent. Baloue kept written debit and credit accounts. A sued B for a balance due on the account between them. *Held*, that the debit and credit account showed reciprocal demands between plaintiff and defendants, and that the account was a mutual open and current account within the meaning of Limitation Act, 1877, sch. II, art. 85. *LAKSHMAYYA v. JAGANNATHAM*.

[I. L. R. 10 Mad. 199]

2—Art. 85.—*Mutual, open and current accounts*. [A acted as commission agent for B and C. A furnished a debit and credit account in February 1878. The account was disputed and the matter was referred to arbitration for which purpose in March 1880 a "memorandum of items to be settled" was drawn up and signed by B and C, in which they denied that any balance would be found due to A but acknowledged that accounts must be taken and that they would be liable if any balance were found due to A. In June 1880 B signed and supplied to the arbitrator an account on behalf of himself and C. The arbitrator made an award which was set aside. A filed a suit against B and C in September 1882 for the balance due to him. *Held* that the accounts were mutual, open and current, and that the suit was not barred by limitation. *SITAYYA v. RANGAREDDI*.

[I. L. R. 10 Mad 259]

—, Art 89.—*Principal and Agent—Suit by principal for an account—Object of a decree for an account, as distinguished from a decree made upon the hearing* [A continued agency, or employment as *dewan*, for the purpose of drawing and expending the money of a principal, resulted in a suit by the latter, who alleged that more had been drawn than expended for him, and that a speci-

LIMITATION ACT (XV OF 1877), Art 89  
—continued.

fic sum, or balance, stood against the defendant, having been misappropriated by him. The principal claimed also any further sum that might be proved to be payable. *Held* that in such a suit limitation, which was governed by art. 90 of Act IX of 1871 commenced from the date on which the agency ceased. *HURRINATH RAI v. KRISHNA KUMAR BAKSHI*.

[I. L. R. 14 Calc. 147]

[L. R. 13 I. A. 123]

—, Art. 90.

See ART. 89.

[I. L. R. 14 Calc. 147]

[L. R. 13 I. A. 23]

1—Art. 91.—*Suit to set aside an instrument creating a charge on immovable property, and to recover possession* [Art. 92, sch. II, of Act IX of 1871 has no application to a suit to set aside a mortgage-bond, on the ground of fraud, and to recover possession of the immovable property therein referred to. The article in question applies only where a bare declaration is sought regarding the cancellation of a bond, or other instrument. *Sikher Chund v. Dulputty Singh*, I L. R. 5 Calc. 363, followed. *BOO JINATBOO v. SHANAGAR VALAB KANJI*.

[I. L. R. 11 Bom. 78]

2.—Art. 91 — *Suit to set aside deed—Fraud* [In a suit instituted in 1884 by a husband and wife to have a deed granting land, which was executed by the husband in 1872, set aside on the ground that it had been obtained from the latter by fraud and undue influence the facts relied upon were known to the husband from the date of the deed. Although in another suit a sale by the husband, effected in 1879, was set aside in 1882, on the ground of his having been unduly influenced, he was not at the time of the previous transaction, nor for some years after it mentally incompetent or unable to allow that knowledge to operate on his mind. *Held* that, therefore, the suit, falling within s. 91 of sch. II of Act XV of 1877 was not maintainable by either of the plaintiffs. *JANKI KUNWAR v. AJIT SINGH*.

[I L. R. 15 Calc 58]

[L. R. 14 I. A. 148]

3—Art. 91.—*Mahomedan Law—Gift—Suit by heir for share of donor's property by declaration of invalidity of gift*. [A Mahomedan, who in October 1875, executed a deed of gift of his property, under which possession was taken by the donees, died in June 1885 never having taken any steps to have the deed of gift set aside. In February 1886, a suit was brought by his nephew, claiming a share in the donor's estate by right of inheritance, and by having it declared that the deed was procured from the donor by fraud and undue influence. It was found that

LIMITATION ACT (XV OF 1877), Art. 91—  
—continued.

the plaintiff was aware of the existence of the deed soon after its execution, and that if there were any facts entitling him to have it cancelled, those facts were known to him more than three years before the institution of the suit. *Held* that the plaintiff had, during the donor's lifetime, no reversionary or vested interest in the estate, but a mere possibility of inheritance, and consequently the donor, when he executed the deed, had full disposing power over his property, and the right which, at his death, accrued to the plaintiff, came to the latter affected by the donor's acts and disposition, and that as a suit by the donor to set aside the deed would, at the time of his death, be barred by art 91 of the Limitation Act (XV of 1877) such a suit was also barred against the plaintiff, who claimed through him, the cancellation of the deed being a substantial and necessary incident of the claim, and the necessity which rested upon the plaintiff for obtaining such cancellation before he could dislodge the donees not being obviated by his choosing to call the suit one for possession of immoveable property. *Abdul Wahid Khan v. Nuran Bibee*, L. R. 12 I. A. 91, and *Jagadamba Choudhram v. Dakshina Mohun*, L. R. 13 I. A. 84, referred to *HASAN ALI v. NAZO*.

[I. L. R. 11 All. 456]

4.—Art 91 and Art. 120.—*Suit for declaration of title—Incidental relief—Setting aside instrument* ] The period of limitation for suits to declare title is six years from the date when the right accrued, under the Limitation Act, 1877, sch. II, art 120, and this period is not affected by art. 91, though the effect of the declaration is to set aside an instrument as against the plaintiff. *PACHAMUTHA v CHINNAPPAN*.

[I. L. R. 10 Mad 213]

—, Art. 93.

See FRAUD—EFFECT OF FRAUD.

[I. L. R. 11 Bom. 708]

1.—Art. 95.—*Revenue Recovery Act (Madras)—Madras Act II of 1864, s. 59—Suit to set aside a sale for arrears of revenue—Fraud* ] In a suit in July 1885, to set aside a sale of land of the plaintiff, made in July 1884 as if for arrears of revenue under Act II of 1864 (Madras), on the ground that the sale had been brought about by fraud and collusion between the purchaser and the village officers, it was found the plaintiff had knowledge of the alleged fraud more than six months before suit: *Held* that the law of limitation applicable to the case was s. 59 of Act II of 1864, and not s. 95 of the Limitation Act, and that the suit was therefore barred. *Venkatapatha v Subramanya*, I. L. R. 9 Mad. 457, explained *Baij Nath Sahu v. Lala Sital Prasad*, 2 B. L. R. F. B. 1, and *Lala Mobaruk Lal v Secretary of State for India*, I. L. R. 11 Calc. 200, considered, *VENKATA v. CHENGADU*.

[I. L. R. 12 Mad. 168]

LIMITATION ACT (XV OF 1877). Art. 95  
—continued.

2.—Art 95 and Art 12.—*Suit by reversioner to establish his title to property sold in execution of decree obtained against a widow as representative of her deceased husband's estate—Fraud—Collusion.* ] The plaintiff, as the nearest heir of one O T, who died intestate in 1873, sued to set aside a sale of certain immoveable property belonging to the estate of the deceased which had been sold on the 3rd November 1875, in execution of a money-decree obtained by the defendant J, against B V, the widow of O T. B V had married a second time in 1876, and her second husband was the brother of the purchaser at the execution sale. The plaintiff alleged that the decree had been fraudulently and collusively obtained on a bond in O T's name, which had been forged by J. The suit was brought on the 28th January 1878, and the plaintiff prayed that the sale might be cancelled, having been made in order to defeat his right; that he might be declared the heir of O T, and that possession of the property, with mesne profits, might be awarded to him. The lower Courts dismissed the suit, holding that it was barred by art. 12, cl. (a) of sch. II of the Limitation Act XV of 1877. On appeal to the High Court. *Held* that art 12 did not apply; for, although the plaintiff sued to set aside a sale held in execution of a decree, he did so, not as one who would have been bound by the sale if the suit had not been brought, but in order to obtain a declaration that he was not bound by it, the decree under which the sale was held having been fraudulent and collusive, so that the cause of action could only have arisen when he became aware of the fraud. Art. 95 of sch II of Act XV of 1877 applied to the present suit which was, therefore, in time. *PAREKH RANCHOR v. BAI VAKHAT*.

[I. L. R. 11 Bom. 119]

3.—Art 95 and Arts. 12 and 144.—*Sale for arrears of revenue—Suit for possession of land—Fraud* ] The plaintiff's land was sold by the Revenue authorities for arrears of assessment due to the *mamdar*. The plaintiff applied to the Mamlatdar to have the sale set aside on the ground of fraud on the part of the *mamdar*, but his application was rejected; and the sale was confirmed in July 1879. The auction-purchaser was thereupon put in possession. In 1886 the plaintiff sued to recover possession of the land in question. *Held* that the suit, having been brought more than one year after the date of the sale, was barred by art. 12, cl. (b) and (c) of sch II of the Limitation Act (XV of 1877). The sale was one in pursuance of an order of the Collector or other officer of revenue, and if not for arrears of Government revenue was at any rate a sale for arrears of rent recoverable as arrears of revenue. The plaintiff, as occupant of the land, was bound by the sale, unless and until it was reversed, and the title of the purchaser at the sale was a perfectly good title until the sale was set aside in due course of law: *Held*

LIMITATION ACT (XV OF 1877) Art. 95  
—continued.

also, that the plaintiff's allegation, that the sale took place in consequence of the fraud of the *namdar*, would make, not art. 114, but art 95, applicable to the case. **BALAJI KRISHNA v PIRCHAND BUDHARAM.**

[I L. R. 13 Bom. 221

—, Art 97 and Art. 64 —*Retention of debt by debtor as part of consideration of another contract* ] Money due on an account stated which would as such, have been barred in three years from the statement, under Act XV of 1877, sch. II, art. 64, becomes, for purposes of limitation, a debt of another character, when, it having been the subject of an arrangement whereby it was to be retained by the debtor as part of the consideration upon a proposed sale of land, that arrangement failed, the sale not being specifically enforceable, and so declared by decree. In contemplation of a sale of land by the debtor to the creditor, it was agreed that the book debt should be retained by the former in satisfaction of part of the price, but the parties failing to agree as to certain other terms, a suit, brought by the intending vendor for specific performance, was dismissed, on the ground that no effectual agreement had been made. *Held* that this decree brought about a new state of things, and imposed a new obligation on the debtor, who could no longer allege that he was absolved by the creditors being entitled to the land instead of the money. He became bound to pay that which he had retained in payment of his land, the date of the decree giving the date of the failure of an existing consideration, within the meaning of art. 97. **BASSU KUAR v. DHUM SINGH.**

[I L. R. 11 All. 47

1.—Art. 99 and Art. 132—*Suit to recover assessment paid by a co-owner of property from other co-owners—Charge on share of co-sharer* ] In 1868 the uncle of the plaintiff brought a suit (No. 176 of 1868), against five members of the undivided family, to which the defendants in the present suit belonged, and obtained a money-decree. In execution of that decree, he attached and sold certain land, in which all the members of the defendants' family were interested. At the sale he purchased the land himself, and was put into possession. In 1873 he began to pay the assessment upon the whole property. Subsequent litigation took place between him and the defendants' family, pending which the plaintiff separated from his uncle, and obtained the property in question as his share. The result of that litigation was a decree by the High Court, on the 23rd September 1879, declaring that the plaintiff's uncle was only entitled to the interest of the five members of the family who had been defendants in his suit (No. 176 of 1868) in execution of the decree in which the property had been sold. The plaintiff brought the present suit in 1883 against the other members of the family to recover their proportionate share of the assessment for the years

LIMITATION ACT (XV OF 1877), Art. 99  
—continued.

1875-1878, during which period he had paid the whole assessment. He prayed for a sale of their interest in the land. Both the lower Courts held that the payment of assessment did not create a charge on the property, and that the plaintiff having omitted to sue within three years from the date of the payment made by him, the present suit was barred. On appeal by the plaintiff to the High Court *held*, confirming the lower Court's decree, that the suit was barred. The plaintiff paid the assessment as full owner of the property and it was entirely by his own action that the defendants had been excluded from the property, and did not pay their quotas of the assessment. Under those circumstances, the payments could not be regarded as salvage payments so as to make them a charge, according to equity, justice, and good conscience, upon the shares of the other co-owners. **ACHUT RAMCHANDRA PAI v. HARI KAMTI.**

[I L. R. 11 Bom. 313

2.—Art 99 and Art 132—*Government revenue, Suit to recover money paid on account of—Charge on immoveable property—Co-sharer, Payment of arrears of revenue by.* ] The plaintiffs and defendants were the proprietors of two separate plots of land, separately assessed with Government revenue, but covered by the same *towzi* number. Plaintiffs paid the Government revenue, due from the defendants in respect of their plot from September 1873 to June 1885, in order to prevent the two plots being brought to sale, and on the 28th September 1885 instituted a suit to recover the amount. It was contended on behalf of the plaintiff, that art 132 of sch. II of Act XV of 1877 applied to the facts of the case, and that the plaintiffs were therefore entitled to recover all amounts so paid within twelve years of date of suit. *Held* that as on the authority of *Kinnu Ram Doss v Muzaffer Hosain Shaha*, I L. R. 14 Calc. 809, the plaintiffs had no charge upon the property in respect of which the payment had been made, and as on the authority of *Ramdin v Kalku Persad*, L. R. 12 I. A. 12; I. L. R. 7 All. 502, art 132 only applied to cases where the money sought to be recovered is a charge upon the property, the limitation applicable to the case was that provided by art 99 and the plaintiffs' claim in respect of all payments made more than three years before suit was barred. **KHUB LAL SAHU v. PUDMANUND SINGH.**

[I. L. R. 15 Calc. 542

—, Art. 113.—*Exchange—Agreement that if either party were deprived of land received he should receive other land—Act XV of 1877, sch II, No. 113.* ] In 1871 the plaintiffs and the defendants executed a deed whereby they effected an exchange of certain lands, and each party agreed to resist by legal process or by bringing an action any claim or interference with the other in respect of the property exchanged, and to bear the costs which might be incurred in such legal proceedings in certain proportions, and that

LIMITATION ACT (XV OF 1877), Art. 113  
—continued

if as a result of such proceedings either of the parties were deprived of the lands exchanged or any part of them, the other should make it up out of certain of his own land. In 1881 the plaintiffs brought an action against a third party, who claimed title to some of the exchanged lands, and joined the defendants as defendants the latter admitting the plaintiffs' title. The plaintiffs were defeated in that suit in 1882. In 1885 (within three years from the time the defendants refused to give them other land) they sued on the deed of 1871 to have the exchange therein provided for carried out. *Held* by the Full Bench that the cause of action arose in 1882, when there was a loss to the plaintiffs in the sense contemplated in the deed, and the defendants were called upon specifically to perform their covenant, and that the present suit having been brought within three years after their refusal to perform it, was within the time fixed by art 113, sch II, of the Limitation Act (XV of 1877). *HORI TIWARI v. RAGHUNATH TIWARI*.

[I L. R. 10 All. 27]

—, Art 115.

See ART. 36.

[I. L. R. 11 Bom. 133]

1.—Art. 115 and s. 23 — Bond — Interest *post diem*—Non-payment of principal and interest at agreed date—Continuing breach—Successive breaches.] Upon failure to pay the principal and interest secured by a bond upon the day appointed for such payment, breach of the contract to pay is committed, and there is no "continuing breach" within the meaning of s. 23 nor "successive breaches" within the meaning of art. 115 of the Limitation Act (XV of 1877). *MANSAB ALI v. GULAB CHAND*.

[I. L. R. 10 All. 85]

2.—Art. 115 and s. 61 — Agent for purchase of Stores for Government, Suit by — Cause of action — — Suit against Secretary of State — Acknowledgment—Act XV of 1877, ss 19 and 20.] The plaintiff, a purchasing agent, sued the Secretary of State for India in Council to recover certain sums of money alleged to be due to him for the purchase of stores, etc., for the Second Cabul Campaign. This suit was brought more than three years after the termination of the plaintiff's agency, and more than three years after the last supply made by him as purchasing agent, but within a few months after the final refusal of the Commissariat Department to pay him the amount claimed: *Held*, that it was doubtful if art. 61 of the second schedule of Limitation Act would apply, as against the Secretary of State in Council for India, but even if not the suit was barred by art. 115. *DOYA NARAIN TEWARY v. SECRETARY OF STATE FOR INDIA*

[I. L. R. 14 Calc. 256]

LIMITATION ACT (XV OF 1877)—contd.

1—Art 116—*Suit for arrears of rent—Registered contract*] A suit to recover arrears of rent upon a registered contract is governed by sch II, art 116 of the Limitation Act. *UMESH CHUNDER MUNDUL v. ADARMONI DAS*.

[I L. R. 15 Calc. 221]

2.—Art 116 — *Suit on bond*] A sued as assignee of a bond (payable in 1872), hypothecating land in the mofussil. B, A's assignor, was a vakil practising in the High Court. B had obtained an assignment of the obligee's interest in the bond sued on, and also another bond for Rs. 3,000 between the same parties after the 1st July 1882, for Rs. 4,500 B had previously purchased the two bonds at a sale in execution of the decree of a Mofussil Court for Rs 5 each. A's assignment from B purported to be made to A in payment of certain debts owed to him by B. No interest had been paid on the bond and no tender had been made to the plaintiff. *Held* in a suit brought in 1884 that the creditor's personal remedy was barred by art. 116 of the Limitation Act. *RATHNASAMI v. SUBRAMANYA*.

[I L. R. 11 Mad. 56]

3.—Art. 116 — *Damages for non-payment of due date—Charge or hypothecated property—Successive or continuing breaches of contract.*] Damages given after the due date of a mortgage for non-payment of the principal money upon the due date, are damages for breach of contract, and not interest payable in performance of a contract; and under art 116, sch II of the Limitation Act (XV of 1877), a suit to recover such damages must be brought within six years from the time when the contract for the breach of which they are claimed was broken. It cannot be said that such damages are, from the date when the contract was broken, and even before they have been ascertained or decreed, a charge upon the property hypothecated, so as to make art. 116 inapplicable. *Price v. The Great Western Railway Co*, 16 L. J. Exch. 87; *Morgan v. Jones*, 22 L. J. Exch. 232; *Gordillo v. Weguelin*, 1 L. R. 5 Ch. D 287; *In re Kerr's Policy* L. R. 14, Eq. 331; *Lippard v. Rutlands*, 1 L. R. 14 Eq. 291, *Cook v. Fowler*, L. R. 7 E. and I. Ap. 27; and *Bishen Lyal v. Udit Narayan*, I. L. R. 8 All. 486, distinguished. In such cases there is one breach of the contract, namely, the non-payment on the date agreed upon; and there is no question of continuing or successive breaches. *Mansab Ali v. Gulab Chand*, I. L. R. 10 All. 85, referred to. *BHAGWANT SINGH v. DARYAO SINGH*

[I. L. R. 11 All. 416]

—, Art. 118 — *Suit for declaration that alleged adoption is invalid*] Where in a suit brought in 1885, for a declaration that an adoption alleged to have taken place in 1871 was null and void, the *factum* of adoption was disputed, and it was not shown that the alleged adoption became known to the plaintiff before 1881: *Held*, with

LIMITATION ACT (XV OF 1877), Art 118  
—continued.

reference to art. 118 of sch. II of the Limitation Act (XV of 1877), that the suit was within time *Jagadamba Chaudhrani v. Dakshina Mohun Roy Chaudhri*, I L. R. 13 Calc. 308, distinguished. *GANGA SAHAI v. LEKHRAJ SINGH*.

[I. L. R. 9 All 253]

—, Art. 120

See ART. 123.

[I. L. R. 12 Mad. 487]

1.—Art 120.—*Suit on written instrument which could not have been registered—Limitation Act, 1859, s. 1, cls. 9, 10, 16*] The period of limitation applicable under Act XIV of 1859 to suits upon written instruments which could not have been registered under the law in force at the time of execution of such instruments was six years under cl. 16 of s. 1 of the said Act. *VENKATACHALAM v. VENKATAYYA*.

[I. L. R. 11 Mad. 207]

2.—Art. 120.—*Act XIII of 1859, s. 2—Claim to recover an advance.*] Act XIII of 1859 being a penal enactment, the Limitation Act (sch. II, art. 120) is no bar to a claim under s. 2 to recover an advance made to a labourer. *IN RE KITTU*.

[I. L. R. 11 Mad 332]

3.—Art. 120 —*Suit for removal of trees.*] A suit by a zemindar for removal of trees planted in certain waste land of his village by persons who have no right to plant them, is governed by art. 120, sch II of the Limitation Act, and not by art 32, sch II of the Act. Where a defendant having a right to use property for a specified purpose perverts it to other purposes, and a suit has to be instituted for any relief in respect of any injurious consequences arising from such perversion, such a suit will be governed by art 32, sch II of the Limitation Act *Gangadhar v. Zihurriya*, I. L. R. 8 All. 446, distinguished. *MUSHARAF ALI v. IFFKHAR HUSAIN*.

[I. L. R. 10 All. 634]

4.—Art 120 and Art 10.—*Mahomedan law—Pre-emption—Conditional sale—Right of pre-emption among coparceners—Private partition of puttdari estate.*] A and B had certain proprietary rights in an 8-annas *putti* of a certain *mehal* C and D had no rights in that *putti*, but D had a small share in the remaining 8-annas *putti*. A private partition between the *puttis* having taken place. C and D's brother lent to B two sums of Rs. 200 and Rs. 199 by deeds of *bai-bil-wafa* dated the 12th and 21st June 1876. C and D subsequently instituted foreclosure proceedings, and on the 5th May 1884, were put into possession of B's share in the first mentioned *putti* in execution of a decree which they had obtained. On the 18th April 1885 A sued C and D to enforce his right of pre-emption. *Held*, that the suit was not barred by limitation, it being governed by either art 10.

W, D

LIMITATION ACT (XV OF 1877) Art. 120  
—continued

sch II of the Limitation Act (Act XV of 1877), which gave the plaintiff a year from the 5th May 1884, the date on which the mortgagee obtained possession, or by art 120, under which his right to sue accrued upon the expiry of the six months grace allowed to the mortgagee after the decree for foreclosure, and there would be six years allowed from that time *DIGAMBUR MISSER v. RAM LAL ROY*.

[I L R. 14 Calc 761]

5.—Art. 120 and Art 91 —*Suit for declaration of title—Incidental relief—Setting aside instrument.*] The period of limitation for suits to declare title is six years from the date when the right accrued, under the Limitation Act, 1877, sch II, art. 120, and this period is not affected by art. 91, through the effect of the declaration is to set aside an instrument as against the plaintiff. *PACHAMUTHU v. CHINNAPPAN*.

[I. L. R. 10 Mad 213]

6.—Art 120 and Art. 127.—*Suit for partition and account of joint property*] In a suit, commenced in 1865 by a member of a joint family for the declaration of his rights, partition not being claimed the order of Her Majesty in Council (1879) directed that the talukdar should cause and allow the villages forming the talukdari estate and the proceeds thereof to be managed and applied according to the trust declared in favor of the members of the family. The plaintiff in that suit afterwards obtained entry of his name as a co-sharer in the villages in the register kept under Act XVII of 1876, s. 56; and then on 14th December 1880 brought the present suit for his share upon partition, both in that estate as it stood in 1865, and also with the addition of villages since acquired out of profits, claiming an account against the talukdar. *Held*, that the suit, as one for partition and an account, was not barred by limitation under Act XV of 1877, art 120, and must be decreed. *PIRTHI PAL v. JOWAHIR SINGH*.

[I. L. R. 14 Calc 493]

[L. R. 14 I. A. 37]

—, Art 123 and Art 120 —*Executor de son tort—Suit for a share of Government promissory notes by an heir against one falsely professing to hold them under a will*] Sunita 1887 by a daughter to recover her share of Government promissory notes being *stridhanam* of her mother who died in 1880. The property in question had been in the possession of a son of the deceased, since her death. He claimed the property under a will, but the will was set aside by the Court as false in 1884. *Held*, that Limitation Act, sch II art 123, is applicable only to cases in which the defendant lawfully represents the estate of the deceased, and that the suit was accordingly barred by limitation. *SIRHAMMA v. NARAYANA*.

[I L. R. 12 Mad. 487]

LIMITATION ACT (XV OF 1877)—*contd.*

## —Art. 597

See ART. 120.

[I L R. 14 Calc. 493]

1.—Art. 127—*Limitation Act 1859, s. 1, cl. 13—Hindu law, Maintenance—Refusal of person liable to maintain—Cause of action* ] In a suit for maintenance brought in 1887 by a Hindu widow against the undivided family of her deceased husband, who had died about twenty-four years before suit, it appeared that her maintenance had not been made a charge on specific property. *Held*, that time began to run against the plaintiff's claim under the Limitation Act of 1859, only from the date of refusal on the defendant's part to maintain her. *Narayan Rao Ramchandra Pant v. Ramabai* (I. L. R. 3 Bom. 415), followed. *RAMANAMMA v. SAMBAYYA*

[I. L. R. 12 Mad. 347]

2.—Art. 127—*Suit for share of property alleged to be joint—Limitation Act 1859, s. 1, cl. 13—Property in possession of a managing member.* ] Suit for partition and possession of an undivided share of property sold to plaintiff by an aged *gosha* lady of the class of Canarese Muhammadans called Nava-yats. The property sold was the vendor's share as heiress of her father, brother, and sister, who died in 1856, 1866 and 1871, respectively, but it appeared that the property of the family had been in the possession of one managing member since 1856. *Held*, that the suit was not barred by limitation. *KHATIJA v. ISMAIL*.

[I. L. R. 12 Mad. 380]

3.—Art. 127.—*Suit for possession by purchaser from sharer in joint family.* ] Art. 127 of sch II of Act XV of 1877 does not apply to a suit where the plaintiff is a stranger, who has purchased a share in joint family property from one of the members thereof. *HORENDRA CHUNDRU GUPTA ROY v. AUNOARDI MUNDUL*.

[I. L. R. 14 Calc. 544]

4.—Art. 127—*Hindu law—Joint family—Joint estate—Partition—Partition of estate reserved undivided—Possession of reserved portion by one member of family—Adverse possession—Possession inference arising from—Burden of proof—Res Judicata as between defendants* ] The plaintiffs sued for part of a house as a portion of joint family property left undivided on the occasion of a general partition which had taken place about thirty-five years before the suit. The defendant had since then been in sole possession and enjoyment of the house in dispute. The Subordinate Judge dismissed the suit as barred by limitation, on the ground that the plaintiffs had failed to prove participation in possession or enjoyment within twelve years. On appeal, the Assistant Judge held that as no share had been demanded or refused, the defendant's possession was not adverse to the plaintiffs, and as the house in dispute had

LIMITATION ACT (XV OF 1877), Art. 127  
—*continued.*

been admittedly reserved from partition, art. 127 of the Limitation Act XV of 1877 did not apply. He therefore reversed the decree of the Subordinate Judge, and remanded the case for retrial on the merits. On appeal to the High Court. *Held* that the suit was barred. The fact that the house in question had admittedly remained undivided, did not prevent the operation of the Limitation Act, and art. 127 of Act XV of 1877 applied. That article applies equally to a portion of joint family property left undivided as to the whole estate, and twelve years' exclusion, known to the excluded sharer, binds him in the one case as in the other. What would bar the operation of the article in question would be a reserve of a part of the joint estate from partition, and a possession of that portion conceded to, and taken by, one of the sharers as the common property of himself and the other sharers. *RAMCHANDRA NARAYAN v. NARAYAN MAHADEV*.

[I. L. R. 11 Bom. 216]

See *TATYA v. ANAJI*.

[I. L. R. 11 Bom. 220 note]

and *VITHOBA v. NARAYAN*.

[I. L. R. 11 Bom. 221 note.]

5.—Art. 127.—*Joint family—Possession by one member of family—Neglect by plaintiff to take possession of his share notwithstanding request that he would do so—Adverse Possession.* ] The plaintiff and the defendant were brothers and members of an undivided family. The plaintiff was in Government service, and had been for a long time absent from his native place on duty, the family property remaining under the management of the defendant. In 1863 the defendant wrote to the plaintiff, requesting him to return and manage his share of the property, or to employ some one to manage it for him. Nothing however was done by the plaintiff in the matter, and the defendant continued in the possession. In 1882 the plaintiff sued the defendant for partition. The defendant pleaded that the suit was barred contending that he had been in adverse possession from the date of the letter. The Court of First Instance awarded the plaintiff's claim. The defendant appealed, and the lower Appellate Court reversed the lower Court's decree, holding that the suit was barred. On appeal by the plaintiff to the High Court. *Held*, that the suit was not barred. The above-mentioned letter of the defendant showed that up to the date at which it was written, the defendant had not been in possession of the property "as his own property to the exclusion of the plaintiff" and the mere circumstance that, subsequently to the date of the letter, the plaintiff had not participated in profits, would not, in the absence of other evidence, justify the inference that the plaintiff was then excluded. *DINKAR SADASHIV v. BHIKAJI SADASHIV*.

[I. L. R. 11 Bom. 365]



**LIMITATION ACT (XV OF 1877), Art. 127**  
—continued.

6.—Art. 127.—*Limitation Act, 1859, s. 1, cl. 13* —*Suit for share on partition of property* ] In 1803 *G* being in possession of the zemindari of *M* the permanent settlement was made with him and a *sanad* was granted to him as prescribed by Reg. XXV of 1802. In 1827 *C*, the only son of *G*, being in possession of the zemindari, got into debt and the zemindari was sold in execution of a decree and bought by Government. In 1835 the zemindari was granted to *J*, the son of *G*, by Government, and a *sanad* issued in the usual terms as prescribed by Reg. XXV of 1802. *J* died in 1864 leaving four sons, the three plaintiffs and *D*, his eldest son. *D* died in 1869 leaving an only son, the infant defendant. In 1869 the Court of Wards took charge of the estate on behalf of the infant defendant and allowed his uncle, plaintiff No. 1, to receive the rents of the zemindari as reuter. The infant defendant and his three uncles lived in the same house and participated in the joint family property until 1872, when the plaintiffs claimed to have the zemindari divided. By an agreement between the plaintiffs and the Court of Wards all the moveable and immovable property, except the zemindari taluk, was divided into four shares and distributed in 1874 between the plaintiffs and defendants. In 1881 the plaintiffs sued for partition of the zemindari, alleging that their cause of action arose in 1872, when the Court of Wards denied their right to a partition of the zemindari taluk. The defendants pleaded that the suit was barred by limitation. Held that the suit was not barred by limitation. **JAGANATHA v RAMBHADRA.**

[I. L. R. 11 Mad. 380

7.—Art. 127.—*Act XIV of 1859, s. 1, cl. 13* —*Joint family—Partition—Claim by absent member—Adverse possession—Exclusion—Participation in profits of joint property—Payment—Occasional residence of wife of absent member with joint family* ] The plaintiff and his four brothers (*G*, *S*, *R* and *B*) were members of a joint Hindu family. The only one of them who lived at home was *S*. In 1854 the family property, which had been mortgaged, was redeemed by the brothers, and after redemption it was placed under the management of *S* by the eldest brother, *G*. Subsequently, two of the brothers died while absent from the village; and the plaintiff, who was twenty years of age in 1854, joined the army in 1855. He did not return until 1876; but, during the interval, his wife used occasionally to visit her husband's native place, and during these visits resided in the family house with *S* and *G*. In 1872 *G* died. The plaintiff alleged that in 1876 he demanded his share, but was refused. In 1883 he filed this suit for partition. It was contended that the right of the plaintiff had become barred by the Limitation Act XIV of 1859, and was not revived by Act XV of 1877, which was in force at the date the suit was brought. The Court of First Instance awarded the plaintiff's claim. On appeal, the Assistant Judge reversed

**LIMITATION ACT (XV OF 1877), Art. 130**  
—continued.

the decree of the Court below, holding that under cl. 13 of s. 1 of the Limitation Act XIV of 1859 the plaintiff had lost his right to sue, and that such right could not be revived by the passing of the subsequent Limitation Acts IX of 1871 and XV of 1877. He was of opinion that the fact that the plaintiff's wife "had put up at *S*'s house for a few days, if it were a fact, did not help the plaintiff's title." Held by the High Court following *Ahmed v. Moro Keshav*, I. L. R. 11 Bom. 461 note, that the occasional residence of the plaintiff's wife with *S*, who was in possession of the property, might be a benefit out of the estate equivalent to a payment so as to satisfy the requirement of cl. 13 of s. 1 of Limitation Act XIV of 1859. If such a benefit had been received by the plaintiff within twelve years previously to the repeal of that Act, the plaintiff had not lost his right to sue at the date of the passing of Act IX of 1871; and that Act would, therefore, have applied to any suit brought by him while it was in force. By art. 127 of sch. II of the Limitation Act IX of 1871, the period of limitation dated from the time when the plaintiff claimed and was refused his share, which, according to the plaintiff's allegation, was in 1876. Act IX of 1871 was repealed by Act XV of 1877, which governed the present suit, unless the right to sue had expired under Act XIV of 1859. The Court remanded the case for a fresh decision on the question of limitation, having regard to the above observations **KANE BABE v. ANTAJI GANGADHAR.**

[I. L. R. 11 Bom. 455

**AHMED v. MORO KESHAV.**

[I. L. R. 11 Bom. 461 note

8.—Art. 127.—"*Joint family property*"—"Exclusion" from such property ] A Mahomedan family consisting of three brothers and their uncle jointly owned certain immovable property which the uncle managed. Two of the brothers effected a settlement of accounts with the uncle, with reference to the profits of the estate, the share of the three brothers was appropriated; and the money representing that share was deposited with the uncle. Subsequently the two who had effected the settlement withdrew their portion of the common share, and the third brother sued the uncle to recover a sum of money as his one-third portion. He alleged that he had been deceived by the defendant into supposing that his portion was included in the amount withdrawn by his brothers, but he did not base his suit upon any allegation of fraud. It was contended that art. 127, sch. II of the Limitation Act (XV of 1877) applied to the suit, limitation running from a date whereon the defendant had denied all liability in respect of the plaintiff's demand. Held that the amount claimed could not, under the circumstances, be regarded as joint family property, that the defendant's denial of the plaintiff's right to recover that amount was not an exclusion of the plaintiff from such property, and that,



LIMITATION ACT (XV OF 1877), Art. 127  
—concluded

consequently art 127 did not apply to the suit  
AHMAD ALI KHAN v. HUSAIN ALI KHAN.

[I. L. R. 10 All. 109]

9.—Art. 127.—*Limitation Act, 1859, s 1, cl. 13*  
—*Partition suit for share of joint family estate—*  
*Failure to prove participation in the family co-par-*  
*ternary within the period.*] In a suit brought in  
1881 for a share of joint family estate, the ques-  
tion whether the plaintiff's right to sue was barred  
by limitation under Act XIV of 1859, s. 1,  
cl. 13, depended on whether there had been any  
participation of profits between the plaintiff's  
father and the defendants, who with him were  
co-descendants from a common ancestor, after  
1837 down to which year the family was certainly  
joint. If in 1871 the period of limitation had  
expired, the Act IX of that year and the later  
Acts need not be referred to; for, if they altered  
the law, they would not revive the right of suit.  
Upon the evidence it was found that whatever  
might have been the father's intention when he  
settled in another village in 1837, the effect of  
what had been since done, or omitted, on both  
sides, was that in due time the right of suit had  
become barred under the first Limitation Act  
APPASAMI ODAYAR v. SUBRAMANYA ODAYAR.

[I. L. R. 12 Mad. 26]

[L. R. 15 I. A. 167]

10.—Art 127 and Art. 131.—*Pension, Suit*  
*for share of—Gift of pension. Effect of, as against*  
*right of heir by inheritance.*] A pension of the  
nature described in Act XXIII of 1871, (Pensions  
Act), s. 7, cl. (2) was drawn by a Mahomedan,  
in whose name alone it was recorded in the Gov-  
ernment registers, for himself and the other  
members of his family, who, up to the time of  
his death, received their shares from him. Shortly  
before he died, he executed a deed of gift in  
favor of his wife, which purported to assign to  
her the whole pension. No mutation of names  
was effected in the Government registers, but the  
deed of gift and the *sunnah*s in respect of which  
the pension had originally been granted, were  
handed over to the donee. After the death of  
the donor, one of his sisters brought a suit against  
his widow to establish her right (i) to receive the  
share in the pension which she had inherited from  
her father and received up to her brother's death;  
and (ii) as heir to her brother himself, to the  
share which he had inherited. In defence it was  
pleaded (*inter alia*) that the suit was barred by  
limitation. *Held* that it was doubtful whether  
in such a case and as between such parties the  
Limitation Act would be applicable at all; but  
that assuming it to be so, either art 127, or art.  
131 of the second schedule should be applied, and  
the plaintiff having received her share within  
twelve years, the suit was brought in time.  
SAHIB-UN-NISSA BIBI v. HAFIZA BIBI. HAFIZA  
BIBI v. SAHIB-UN-NISSA BIBI.

[I. L. R. 9 All. 213]

LIMITATION ACT (XV OF 1877)—contd.

—, Art. 128.—*Suit for arrears of maintenance*  
—*Suit on decree specifying no date for payment of*  
*future maintenance.*] A Hindu widow obtained a  
decree in 1876, which provided that she should  
receive future maintenance annually at a certain  
rate, but did not specify any date on which it  
should become due. In 1887 she filed the present  
suit claiming arrears of maintenance at the rate  
fixed in the decree of 1876: *Held* that the suit  
did not lie. *Sabhanatha Dikshatar v. Subba*  
*Lakshmi Ammal*, I L. R. 7 Mad. 80, distinguished.  
VENKANNA v. AITAMMA.

[I L. R. 12 Mad. 183]

1.—Art. 130.—*Suit for assessment of rent on*  
*lakheraj land after decree for resumption—Effect of*  
*decree as creating or not relationship of landlord*  
*and tenant.*] The plaintiff brought a suit in 1861  
against C for resumption of, and for declaration of  
his right to assess rent upon C's lands within his  
zemindari which C held as *lakheraj*. That suit  
was presumably instituted under Reg. II of  
1819, s. 30, which related only to resumption of  
*lakheraj* lands existing prior to 1790, but there  
was nothing to show conclusively under what law  
it was instituted, or whether the *lakheraj* grant  
was one subsequent or anterior to 1790. In that  
suit an *ex parte* decree was passed in 1863 that  
"the suit be decreed, and the land in dispute be  
declared to be *shukar*," i.e., liable to assessment.  
In a suit brought in 1886 against the representatives  
of C, after serving a notice upon them to pay rent  
for the land at a certain rate, to assess the land  
at the rate mentioned in the notice, and for the  
recovery of rent at that rate. *Held*, that the  
decree of 1863 had not the effect of creating the  
relationship of landlord and tenant between the  
parties, and therefore the suit, not having been  
brought within 12 years from the date of that  
decree, was barred by art 130 of the Limitation  
Act XV of 1877. BIR CHUNDER MANIKYA v.  
RAJMOHUN GOSWAMI.

[I. L. R. 16 Calc. 449]

2.—Art 130.—*Suit for assessment of rent on*  
*lakheraj land after decree for resumption—Effect of*  
*decree as creating or not relationship of landlord and*  
*tenant.*] The plaintiff in 1862 obtained a decree for  
resumption of land held under an invalid *lakhe-*  
*raj* title created before 1790, the decree declaring  
the land liable to assessment. In a suit brought  
more than twelve years after the decree against  
the representatives of the defendant in the suit  
of 1862 to assess the land. *Held*, that the decree  
of 1862 did not create the relationship of landlord  
and tenant between the parties, and that the suit  
was therefore barred under art 130 of the Limi-  
tation Act XV of 1877. NIL KOMUL CHUCKER-  
BUTTY v. BIR CHUNDER MANIKYA.

[I. L. R. 16 Calc. 450 note]

—, Art. 131.

See Art. 127.

[I. L. R. 9 All. 213]

LIMITATION ACT (XV OF 1877), Art 131—*concluded.*

1—Art 131.—*Execution of decree for maintenance—Decree for payment of an annuity without specifying date of payment—Default in paying such annuity—Enforcement of payment by execution of decree—Computation of time* ] A Hindu widow obtained a decree dated 7th September 1865, directing that a sum of Rs 36 should be paid to her every year on account of her maintenance. The judgment-debtors paid the annuity for some years. In 1881 the widow applied for execution of the decree, and recovered three years' arrears. In 1885 payments having again fallen into arrears, she again applied for execution, but her application was rejected as barred by limitation, having been made more than three years after the last preceding application. *Held*, that the application was not time-barred. The decree created a periodically recurring right. Though no precise date was specified in the decree for payment of the annuity, the judgment-debtors were liable to make the payment on the day year from its date, and thenceforward on the corresponding date year after year. The decree was, as to each year's annuity, to be regarded as speaking on the day upon which for that year it became operative, and separately for each year. The right to execute accruing on a particular day, limitation should be computed from that day should the judgment-debtor fail to obey the order of the Court. *Sakharum Dikshit v. Ganesh Sathe*, I. L. R. 3 Bom. 193, followed. *Sabhanatha Dikshatar v. Subba Lakshmi Ammal*, I. L. R. 7 Mad. 80, and *Yusufkhan v. Sirdar Khan*, I. L. R. 7 Mad. 83, distinguished. *LAKSHMIBAI BAPUJI OKA v. MADHAVRAV BAPUJI OKA*.

[I. L. R. 12 Bom. 65]

2.—Art. 131.—*Declaratory decree for share of rents and for mesne profits—Periodical payments.* ] A decree declaring that the plaintiff was entitled to receive every year from the defendant 12 per cent. of the rents and profits of a certain inam village, and awarding mesne profits from the date of suit, was held not to be an award of a periodical payment *in æternum*. The very word "mesne" implies a terminus *ad quem* as well as *à quo*, and in the absence of a special order the terminus was the date of the decree. *VINAYAK AMRIT v. ABAJI HAIBATRAY*.

[I. L. R. 12 Bom. 16]

3—Art 131 and Art 132.—*Claim for arrears of revenue by grantee from Government.* ] The right to the revenue on certain land having been granted to the trustees of a mosque, the said grant was confirmed by Government in 1866. In 1883, a suit was brought to recover arrears of revenue from the owners of the land. It was found that no payment of revenue had ever been made by the defendants to the plaintiff, and the suit was dismissed as barred by limitation under art. 144, sch. II of the Limitation Act. *Held*, that the suit was not barred, and that the plaintiff was entitled under arts. 131 and 132 of the Limitation Act to recover 12 years' arrears of revenue. *ALUBI v. KUNHI BI*.

[I. L. R. 10 Mad. 115]

LIMITATION ACT (XV OF 1877)—*contd.*

## —, Art. 132

See ART 99.

[I. L. R. 11 Bom. 313]

[I. L. R. 15 Cal. 542]

See ART 147

[I. L. R. 13 Bom. 90]

1.—Art 132.—*Charge on immoveable property—Mortgage—Suit for money lent* ] A lent B Rs 99, and B executed a document on the 24th July 1881, whereby he agreed to repay the amount with interest in the month of Baisakh, 1289 F. S. (April 1882), and further agreed that, if he did not pay the money as stipulated, he should sell his right to certain land and that A should take possession thereof, and that after A took possession of the land no interest should be paid by him (B) and that A should pay the rent of the landlord out of the profits of the land without any objection. A instituted a suit on the 31d August 1885, to recover the Rs 99. *Held*, that the document did not amount to a mortgage, nor did it create a charge under s. 100 of the Transfer of Property Act, and that the suit was barred by limitation, three years, and not twelve years under art 132 of the Limitation Act being the period applicable. *MADHO MISSEER v. SIDH BINAIK UPADHYA alias BENA UPADHYA*.

[I. L. R. 14 Cal. 687]

2.—Art 132.—*Registered hypothecation-bond—Personal remedy barred after six years* ] Art. 132 of sch. II of the Indian Limitation Act 1877, by which a period of twelve years is allowed to enforce payment of money charged on immoveable property, refers only to suits to enforce payment by sale of the property charged, and not to a claim to enforce the personal remedy on a registered bond by which immoveable property is pledged as security for the debt. *SESHAYYA v. ANNAMMA*.

[I. L. R. 10 Mad. 100]

3 Art 132.—*Suit for money charged upon immoveable property—Instrument purporting in general terms to charge all the property of obligor—Maxim "certum est quod certum reddi potest."* ] The obligor of a bond acknowledged therein that he had borrowed Rs. 153 from the obligee at the rate of Re. 1-8 per cent. per mensem, and promised to pay the principal with interest at the agreed rate upon a date named. The bond continued thus:—"To secure this money, I pledge, voluntarily and willingly, my wealth and property in favour of the said banker. Whatever property, &c., belonging to me be found by the said banker, that all should be available to the said banker. If, without discharging the debt due to this banker, I should sell, mortgage, or dispose of the property to another banker, such transfer shall be void. For this reason, I have of my free will and consent executed this hypothecation-bond that it may be of use when

LIMITATION ACT (XV OF 1877), Art 132  
—continued.

needed." The amount secured by the bond became due on the 6th May 1879. The bond was registered under the Registration Act as a document affecting immoveable property, and the obligor was a party to such registration. On the 9th May 1885, the obligee sued the heir of the obligor to recover the principal and interest due upon the bond by enforcement of lien against and sale of immoveable property belonging to the defendant: *Held*, that the words used in the bond as indicating the property which was intended to be subject to the charge were sufficiently specific and certain to include, and were intended to include, all the property of the obligor; that this being so, the maxim "*certum est quod certum reddi potest*" applied; that the bond created a charge upon the immoveable property of the obligor in respect of the principal and interest in question; that such principal and interest were monies charged upon immoveable property within the meaning of sch. II, art 132 of the Limitation Act (XV of 1877); and that so far as the claim was to enforce payment of such principal and interest by recourse to the immoveable property of the obligor, the suit was brought within time. *Ram Din v. Kalku Prasad*, I. L. R. 7 All. 502; *Gauri Shankar v. Surju* I. L. R. 3 All. 276; and *Tudman v. D'Epeneuil*, L. R. 20 Ch. D. 753, referred to RAMSIDDH PANDE v. BALGOBIND.

[I. L. R. 9 All. 158]

4.—Art. 32.—Construction of will.—Charge on immoveable property.] A will devising immoveables stated that the father of the devisee had lent a sum of money to the testator, and directed the devisee to repay the debt with interest. This was construed to be a charge on immoveables, and it was held that a suit, brought by the auction-purchaser of the creditor's claim, to recover the above-mentioned debt, was within art. 132 of the second schedule of Act XV of 1877; and having been brought within twelve years from the date when the debt was so charged was not barred by time. *GRISH CHUNDER MAITI v. ANUNDOMOYI DEBI*.

[I. L. R. 15 Calc. 66]

[L. R. 14 I. A. 37]

5.—Art. 132 and Art. 147.—Suit on a mortgage-bond—English mortgage—"Mortgage" and "Charge"—Transfer of Property Act, ss. 58, 60, 67, 83, 86, 87—89, 92, 93, 100.] A suit on a mortgage-bond to enforce payment by sale of premises hypothecated is governed by art. 132 and not art. 147 of the Limitation Act. *Braro Lal Singh v. Gour Charan Sen*, I. L. R. 12 Calc. 111, overruled; *Shib Lal v. Ganga Pershad*, I. L. R. 6 All. 551, dissented from. The clear distinction drawn for the first time between "mortgage" and "charge" in the Transfer of Property Act is not observed in the Limitation Act. *GIRWAR SINGH v. THAKUR NARAIN SINGH*.

[I. L. R. 14 Calc. 730]

LIMITATION ACT (XV OF 1877), Art. 132  
—continued.

6.—Art. 132 and Art. 147.—Transfer of Property Act (IV of 1882), ss. 58, 100—Hypothecation-bond.] The period of limitation for suits upon hypothecation-bonds, which contain no power of sale, or effect no transfer of property, executed before the Transfer of Property Act came into operation is twelve years under sch. II art. 132 of the Limitation Act of 1877. *Aliba v. Nannu* (I. L. R. 9 Mad. 218), followed *Per MUTTUSAMI AYYAR, J.*—"The transaction in suit appears to be of the kind described in s. 100 of the Transfer of Property Act, which defines how a charge is created; but it seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages." *RANGASAMI v. MUTTUKUMARAPPA*.

[I. L. R. 10 Mad. 509]

7.—Art. 134.—Mortgage—Sale of mortgagee's rights and interests for the recovery of arrears of revenue—Suit for redemption—Reg. XI of 1882, s. 29—Reg. XVII of 1806.] It was not intended that property which would pass on the sale by a mortgagee of his interest should come within the scope of art. 134, sch. II of the Limitation Act (XV of 1877). That article was intended to protect, after the expiration of twelve years from the date of a purchase, a person who happening to purchase from a mortgagee had reasonable grounds for believing, and did believe, that his vendor had the power to convey and was conveying to him an absolute interest and not merely the interest of a mortgagee. *Rudunath Doss v. Gibson and Co.* 14 Moore's I. A. 1; 6 B. L. R. 530; *Piercy Lal v. Salgu*, I. L. R. 2 All. 394, and *Kamal Singh v. Batul Fatima*, I. L. R. 2 All. 460, referred to. Contemporaneously with the execution of a registered deed of sale of zemindari property in 1835 for Rs. 4,000, the vendee executed a deed in favour of the vendors, which also was registered, and by which he agreed that if within ten years the vendors should pay Rs. 4,900 in a lump sum without interest, he would accept the same and cancel the sale, and that he should be in possession during that period. This transaction admittedly amounted to a mortgage by conditional sale. The mortgagee remained in possession, and his name was entered as that of proprietor in the Collector's register, in which no allusion was made to a mortgage. In 1840 his rights in this property were sold by auction for arrears of Government revenue due by him on account of other land, and apparently no notice was given by any one at or prior to the sale that it was the mortgagee's interest only which was about to be or was being sold. The property was purchased for Rs. 3,000 by S who took possession, and in 1845 sold it for Rs. 3,000 to T, who took possession, and in 1847 sold it for the same sum to C. On the occasion of each transfer, the name of the transferee was entered in the Collector's register as that of

**LIMITATION ACT (XV OF 1877), Art. 134**  
—continued.

proprietor. No application for foreclosure was made at any time. In 1885 the representatives of the mortgagors brought a suit against the representative of *C* for redemption of the mortgage and for mesne profits. The defendant pleaded (i) that the suit was barred by limitation under art. 134, sch II of Act XV of 1877, (ii) that the several transferees were innocent purchasers for valuable consideration without notice, who had purchased in each case from the person who was with the consent, express or implied, of the persons for the time being interested the ostensible owner, and had in each case, prior to the purchase taken reasonable care to ascertain that the transferor had power to make the transfer and had acted in good faith. *Held* that art. 134 of the Limitation Act did not apply to the case inasmuch as that article referred only to persons purchasing what was *de facto* a mortgage, having reasonable grounds for the belief and believing that it was an absolute title; and that, having regard to s. 29 of Reg XI of 1822, to the presumption that the several transferees knew the law and made inquiries as to the interest they were purchasing, and examined the register in which the deed constituting the transaction of 1835 a mortgage was registered, and also having regard to the fact that Rs 3,000 only were paid as purchase money in each case, and to the circumstance that it was doubtful whether a purchaser at a formal auction-sale such as that in question could be said to have purchased without notice an absolute interest from the mortgagee, it must be inferred that the transferees knew, or might, or ought to, have known, unless they wilfully abstained from inquiry, that the interest which they respectively were purchasing was merely that of a mortgagee. *Sobhag Chand Gulab Chand v Bhai Chand*, I.L.R. 6 Bom. 193, referred to. *Held* that as by Reg. XVII of 1806 mortgagors in such a case as the present were entitled to redeem within sixty years, the plaintiffs were entitled to a decree for redemption. *BHAGWAN SAHAI v. BHAGWAN DIN*.

[I. L. R. 9 All 97]

2—Art. 134—Clause of conditional sale in mortgage—Suit by mortgagee for declaration of the title—Decree ordering delivery of property to mortgagee in default of payment of mortgage-debt by mortgagors within one month—Default of payment by mortgagors—Effect of such default—Mortgaged property taken by mortgagee in execution of such decree not as mortgagee but absolutely—Subsequent suit for redemption.] In 1863 *B* and *C* mortgaged certain land to one *G* under a mortgage-deed, which provided that if the mortgage-debt was not paid at the stipulated time, the land should become the absolute property of *G* the mortgagee. In 1871 *G* filed an ejectment suit against *B* and *C* and one *H*, alleging that he had become owner of the land by operation of the above clause, and that he had subsequently let it to *H*, who now in collusion with the other two defendants (the

**LIMITATION ACT (XV OF 1877), Art. 134**  
—continued.

mortgagors), denied his title. The ejectment suit was subsequently converted into one for a declaration of *G*'s title as owner as against the mortgagors, *B* and *C*, who claimed a right to redeem. A decree was passed in 1872 ordering *B* and *C* to pay Rs. 100 to *G* within one month, or, in default, to deliver up to him possession of the land. The money was not paid and *V*, as purchaser from *G* got possession in execution of the above decree in August 1873. In September 1885, the plaintiff, as *B*'s heir and legal representative, filed a suit against *G* and *V* to redeem the property. The Court of First Instance dismissed the suit, holding that the plaintiff's claim was *res judicata* by virtue of the decree passed in 1872, and that the right to redeem was lost. On appeal the Court reversed this decision and passed a decree for redemption on payment of Rs 100 by the plaintiff within six months. The defendant *V* then applied to the High Court under its extraordinary jurisdiction. *Held*, that the suit was barred under art 134 of sch. II of the Limitation Act (XV of 1877)—*V* having purchased the land for value from *G* the ostensible owner, more than twelve years before suit. *VISHNU CHINTAMAN v. BALAJI BIN RAGHUJI*.

[I. L. R. 12 Bom. 352]

3.—Art. 134—Suit to redeem by assignee of equity of redemption—Title purchased at execution-sale] Suit, in 1885, by the assignee of the equity of redemption to redeem a mortgage of 1826. The mortgagees were put into possession under the mortgage and no interest was paid. In 1855 the mortgaged premises were sold at a Court-sale in execution of a decree against the mortgagees as if they formed part of their family property, and the defendant derived title from the execution-purchaser who had dealt with it as absolute owner. *Held*, that the suit was barred under the Limitation Act 1877, sch. II, art. 134. *MUTHU v. KAMBALINGA*.

[I L. R. 12 Mad. 316]

—, Art 135.

See ART. 144—ADVERSE POSSESSION.

[I L. R. 12 All 144]

—, Art. 135—Suit by mortgagee against mortgagor and purchasers from him—Regulation XVII of 1806—Transfer of Property Act (IV of 1882).] A mortgage by conditional sale before the operation of the Transfer of Property Act, 1882, on default made in payment, proceedings having been taken by the mortgagee under Reg. XVII of 1806, entitled the mortgagee to possession after the year of grace. On the mortgagor's right of possession being thus brought to an end without a suit for foreclosure, a right of entry accrued to the mortgagee whose suit for possession, unless brought within twelve years from the date "when the mortgagor's right to possession determined," was barred by art. 135 of sch II of Act XV of

LIMITATION (ACT XV OF 1877), Art. 138  
—continued

1877. This Regulation foreclosure was applied to a mortgage, dated 17th November 1865, between Hindus, with power of entry and sale, in the English form, of land in the 24-Pergunnahs District (which mortgage, therefore, received the same effect as a mortgage by conditional-sale), and the proceedings were perfect on or before 31st March 1873 as against the mortgagor, whose right of possession determined on the 17th February 1866. Parcels of the mortgaged land had been sold by the mortgagor down to August 1866, and the purchasers, not having been served with notice of the above proceedings under the Regulation, were not parties thereto, so that the relation of mortgagee and mortgagor continued to subsist, as between them and the mortgagee, notwithstanding the determination of the mortgagor's right of possession. In a suit brought in 1882 against these purchasers, as also against the mortgagor for foreclosure and possession, by a transferee, who had acquired the mortgagee's interest in 1879: *Held*, that the mortgagor's right of possession determined on the above date, and that the mortgagee's right of suing for possession having been extinguished on the expiration of twelve years from that time, *viz.*, on the 17th February 1878, such right was not revived by the subsequent creation of suits for foreclosure, on the coming into operation of the Transfer of Property Act, 1882; and that the title of the plaintiff made through the mortgagee, to sue the purchasers for possession of the mortgaged land, was barred by time under art. 135, as against them. The suit therefore was dismissed as against the purchasers; but as against the mortgagor, who made no defence, the right of possession in the mortgagee consequent on the proceedings under the Regulation in force till its repeal in 1882 supported the decree made against him by the Courts below, from which he had not appealed. *SRINATH DAS v. KHETTER MOHUN SINGH.*

[I. L. R. 16 Calc. 693

[L. R. 16 I. A. 85

1.—Art 38.—*Suit for possession by purchaser at sale in execution of decree.*] A purchaser at a sale in execution not having applied to the Court for possession under s. 318 of the Code of Civil Procedure, brought a regular suit to obtain possession of the property purchased. *Held* that, although a remedy might be open to the plaintiff under s. 318, still he was not precluded from bringing a regular suit, the remedies being concurrent. The words "the date of the sale," in the third column of art. 138, sch II of the Limitation Act, 1877, signify the date of the actual sale, and not that of the confirmation of such sale. *KISHORI MOHUN ROY CHOWDRY v. CHUNDER NATH PAL.*

[I. L. R. 14 Calc. 644

2.—Art. 138.—*Suit for purchaser at sale in execution of decree—Delivery of possession by Court.*] In 1867, R and G mortgaged certain lands to

LIMITATION ACT (XV OF 1877). Art. 138  
—continued.

GR by a registered deed of that date. In 1870, GR obtained a money-decree against R and G and in execution put up the mortgaged land for sale. The plaintiff purchased it without notice of the mortgage; and in February 1872, obtained possession through the Court. In the meantime, GR brought another suit upon his mortgage against his mortgagors. He obtained a decree, and in April 1872 ejected the plaintiff and obtained possession. In 1883 the plaintiff filed the present suit against R, G and GR to recover the lands: *Held*, that the plaintiff's suit was not barred by art. 138 of sch. II of the Limitation Act XV of 1877, inasmuch as the plaintiff had obtained possession through the Court within the twelve years preceding the spit *AGARCHAND GUMANCHAND v. RAKHMA HANMANT.*

[I. L. R. 12 Bom 678

1.—Art. 140.—*Claim to share in immoveable property under will*] The right to property left by will (assuming that the testator had power to dispose of it) falls into possession, by Hindu law, immediately upon the death of the testator, and therefore a claim, making title to shares in immoveable property under a will, is barred by time, unless brought within twelve years from the date of the testator's death under art 140 of Act XV of 1877, sch II. *MYLAPORE IYASAWMY VYAPOORY MOODLIAR v. YEO KAY.*

[I. L. R. 14 Calc. 801

[L. R. 14 I. A. 168

2.—Art. 140 and Arts 141 and 118 — *Suit by reversioner, for possession by setting aside adoption*] A Hindu, governed by the Mitakshara School of Law, died on the 12th May 1867, leaving him surviving a widow B and a brother R, who was admittedly the next reversioner. In July 1867 B purported to adopt a son D to A, and subsequently in September 1867, obtained a certificate under Act XL of 1858. In 1872 B obtained a loan from the plaintiff M of Rs. 9,000, and to secure its repayment executed a mortgage of seven *mouzahs* in favor of M as guardian of D. The money was advanced and mortgage executed at the instigation of R and with his consent, and upon his representation that D was the duly adopted son of A, and it was admitted that the money was specifically advanced for, as well as applied towards, the payment of decrees obtained against A in his lifetime and against his estate after his death. B died in 1878. On the 14th August 1880, M instituted a suit against D upon his mortgage, and in that suit he made S a party defendant as being the purchaser of the mortgagor's interest in one of the *mouzahs* included in his mortgage. On the 26th June 1882, M obtained a decree, declaring that he was entitled to recover the amount due by sale of the mortgaged *mouzahs*. In the proceedings taken in execution of that

**LIMITATION ACT (XV OF 1877), Art 140**  
—continued.

decree *M* was opposed by *L*, who was afterwards held to be a *benamidar* for *S*, who claimed that he had on the 8th November 1880, purchased five out of the seven *monzals* at a sale in execution of certain decrees against *R*. On the 29th February 1884, *L*'s claim was allowed, and on the 11th August 1884, *M* brought this suit against *L*, *S*, *R*, and *D*, and the decree-holders in the suits against *R*, for a declaration of his right to follow the mortgaged property in the hands of *S*. It was found as a fact that the adoption of *D* was invalid; that the advance by *M* to *B* was justified by legal necessity; and that *L* was the *benamidar* of *S*. It also appeared that *M* had himself become the purchaser of one of the mortgaged *monzals*. The lower Court gave *M* a decree declaring him to be entitled to recover the full amount of the mortgage-money from the five *monzals* in the hands of *S*. *L* and *S* appealed, and *M* filed a cross-appeal, alleging the adoption to be valid and binding on *S*. It was contended that *D* had acquired an absolute title by more than twelve years' adverse possession from the date of his adoption in 1867 before the purchase by *S* in 1880. *Held* that, as *B* died within twelve years of the alleged adoption, although under art. 118, sch II, Act XV of 1877 (which came into force before the adoption could become perfected by efflux of time) a suit for a declaration that an adoption was invalid should be brought within six years from the date when the adoption becomes known to the plaintiff, still having regard to the provisions of arts. 140 and 141, the next reversioner was not thereby prevented from suing to obtain possession within twelve years from the date of the widow's death or when the estate fell into possession, and therefore that *S* was not barred by limitation from disputing *D*'s title. *LALA PARBHU LAL v MYLNE*

[I. L. R. 14 Calc. 401]

—, Art. 141.

See ART. 141—ADVERSE POSSESSION.

[I. L. R. 10 All. 485]

—, Art. 141.—*Suit by Mahomedans for possession of immoveable property by right of inheritance to mother.* Plaintiffs sued for their share in the estate of their deceased father and mother. The defendants were the brother and a sister and a step-mother of the plaintiffs. As regards the claim of the plaintiffs to their shares in the estate of their mother, the defendants pleaded that the same was barred by limitation inasmuch as their mother died on the 22nd January 1873, and the suit was not instituted till the 29th of January 1885. The Court below finding that the mother died on the 22nd January 1873, held that art. 141, sch II, Limitation Act, barred the claim and dismissed the suit: *Held* that art. 141 of the Limitation Act does not apply to a suit by an heir-at-law for possession of immoveable property in that character; but to a suit by a

**LIMITATION ACT (XV OF 1877), Art 141**  
—continued.

Hindu or Mahomedan who prior to the death of a female, occupied the position of a remainderman, or reversioner or a devisee, and on the death of the female sues on the basis of that character. *HASHMAT BEGAM v MAZHAR HUSAIN*.

[I. L. R. 10 All. 343]

—, Art. 142.

See ONUS PROBANDI—LIMITATION AND ADVERSE POSSESSION.

[I. L. R. 16 Calc 473]

1—Art. 142.—*Symbolical possession.* On the 7th November 1868, certain property was purchased by one *G D B* at a sale held in execution of a decree obtained against one *J G*. On the 8th January 1873, the purchaser obtained a sale-certificate, and, on the 10th August 1873, was put into symbolical possession of the property through the Court. On the 3rd March 1875, the plaintiff in execution of a decree obtained against *G D B* purchased this property, symbolical possession of the property being given to him by the Court on the 31st March 1875. On the 7th August 1885, the plaintiff brought this suit to recover possession of this property, alleging that he had been dispossessed therefrom on the 13th July 1885, by the defendant No 2, who had taken an *izara* of the property from the son of *J G*. The defence set up was limitation: *Held*, that on the principle laid down in *Juggobundhu Mukerjee v Ram Chunder Bysack*, I. L. R. 5 Calc 584, the suit was not barred. *Krishna Lal Dutt v Radha Krishna Surkhet*, I. L. R. 10 Calc 402, overruled. *JOGOBUNDHU MITTER v PURNANUND GOSSAMI*.

[I. L. R. 16 Calc. 530]

2.—Art. 142.—*Dispossession* Where the plaintiffs were proprietors of land, but declined to engage for the land revenue, in consequence of which the defendants were admitted so to do, and to obtain possession: *Held*, that there was a dispossession of the plaintiffs within the meaning of art. 142, and that a suit by the plaintiffs brought after the expiration of the thirty years' settlement with the defendants was barred. *MUHAMMAD AMANULLA KHAN v. BADAN SINGH*.

[L. R. 16 I. A 148]

[I. L. R. 17 Calc 137]

—, Art. 144.

Col.

1. Adverse Possession ... 595

See Art. 95.

[I. L. R. 13 Bom 221]

See SALE FOR ARREARS OF REVENUE—INCUMBRANCES—ACT XI OF 1859.

[I. L. R. 14 Calc. 109]



LIMITATION ACT (XV OF 1877), Art. 144  
—continued.

(1) ADVERSE POSSESSION.

1.—Art. 144.—*Application of*] Art. 144 of Act XV of 1877 relating to adverse possession, only applies where no other article is specially applicable. MUHAMMAD AMANULLA KHAN v. BADAN SINGH.

[L. R. 16 I. A. 148

[I. L. R. 17 Calc. 137

2.—Art. 144.—*Onus probandi.*] Under art. 144 of the Limitation Act (XV of 1877), it is not for the plaintiff to prove that he has been in possession within twelve years before suit, but it is for the defendant to show that he has held adversely to the plaintiff for twelve years. NYAMTULA v. NANA VALAB FARIDSHA.

[I. L. R. 13 Bom. 424

3.—Art. 144.—*Stranger claiming interest in estate together with an undivided family—Inheritance among such owners*] In a family of three undivided brothers an estate was purchased by the eldest as manager, on whose application a fourth party, a sister's husband, was recorded in the revenue records as a co-proprietor with them. The latter even if he by joining in the purchase had become entitled to an undivided fourth share in the estate, did not thereby become a member of the undivided family, and the members of it would not have had a right to succeed to his fourth share which would have descended to his own heirs, the other three-fourths which he would not have inherited going by survivorship among the members of the family. A son of the eldest brother obtained, by the death of his father and uncles sole possession of the whole estate. *Held*, that he did not take the one-fourth share above mentioned by any right of inheritance, and that in the absence of proof that his possession of it was by authority of the fourth recorded co-proprietor, his possession must be presumed to have been adverse to the latter and to any one claiming through him. It followed that a suit to obtain from those claiming through the son, who was now dead, the one-fourth share, brought more than twelve years after possession taken by the son, by a purchaser, relying on a title through the fourth co-proprietor, was barred by limitation under art. 144 of the second schedule of Act XV of 1877. RAMALAKSHAMMA v. RAMANNA.

[I. L. R. 9 Mad. 482

COLLECTOR OF GODAVERY v. ADDANKI RAMANNA PANTULU.

[L. R. 13 I. A. 147

4.—Art. 144.—*Benamidars—Purchaser at sale for arrears of revenue.*] In a suit against a purchaser at a sale under Act XI of 1859, s. 13, the plaintiff claimed to have an incumbrance by virtue of two *mokurrari pattas* executed by the heirs of a last of a series of *benamidars*, and the question was whether those who had granted the *mokurrari* were entitled to all, or to any, and

LIMITATION ACT (XV OF 1877), Art. 144  
—continued.

(1) ADVERSE POSSESSION—continued.

what part of the land comprised in their grant, and as to this the most important fact was the actual possession or receipt of the rents, it being found that the last *benamidar* had actual ownership of one-fourth of the property comprised therein. *Held* that the incumbrance was good to the extent of such one-fourth share, and the twelve years bar commencing from the date of possession first held adversely, the suit was not barred by art. 144, Act XV of 1877. IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.

[I. L. R. 14 Calc. 109

[L. R. 13 I. A. 160

5.—Art. 144.—*Cause of action—Acts IX of 1871 and XV of 1877.*] R, a Hindu widow, granted a *jungleburi* tenure to certain tenants in respect of a *chur* belonging to her husband's estate. An *amulnama* was granted to the tenants signed by a *karpardaz* of R in respect of the tenure. R died in January 1861, and was succeeded by J and P, two daughters, the last of whom died on the 31st December 1880. On her death the grandsons succeeded to the estate. On R's death J and P got possession of all estate papers, and amongst them a *dowl* granted by the tenants in return for the *amulnama*. In 1865 proceedings were taken by the tenants to obtain *kabulats* on the footing of those documents, which proceedings came to an end in 1868. In 1873 J and P instituted suits against the tenants, alleging the *amulnama* and *dowl* to be forgeries, and seeking to enhance the rents payable to them, as well as to have it declared that R's acts did not bind them. In these suits it was found that J and P had all along been aware of the claim made by the tenants that they held a permanent tenure, and the suits were dismissed on the ground that it was too late for J and P, after the lapse of twelve years from R's death to raise the question. In 1884 D, a receiver, instituted a suit in the names of the grandsons to eject the tenants on amongst other grounds that the grandsons, reversioners, were not bound by R's acts, and that the *jungleburi* tenure was not binding on them; that the tenants were middlemen and had no right of occupancy; that at all events the plaintiffs were entitled to rent on the area of land then held by the defendants, as there had been large accretions to the amount covered by the *amulnama* and *dowl*. The defendants amongst other things pleaded limitation. *Held*, that the suit was barred by limitation. Adverse possession began to run on R's death (as J and P, who represented the estate, were then well aware that the tenants claimed to hold the lands under a permanent lease, and though J and P received rent, the possession of the tenants was adverse to them), and more than twelve years elapsed before Act IX of 1871 came into force, and therefore the defendants had then obtained a good title by adverse possession as against all the reversioners which could not be defeated by the provisions of the subsequent



LIMITATION ACT (XV OF 1877), Art. 144  
—continued

(1) ADVERSE POSSESSION—continued.

Limitation Acts of 1871 and 1877. DROBOMOYI GUPTA v DAVIS

[I L R. 14 Calc. 323]

6—Art 144.—*Limitation Act, 1877, art 141—Adverse possession against widow—Reversioners* ] The plaintiffs sued for possession of certain zemindari property as reversioners to the estate of one C, their right to sue having accrued as alleged by them on the death of the widow of C, which took place on 14th October 1884. The defendant alleging himself to be the adopted son of C, and being in possession of the property in dispute since the death, contended that the claim was barred. The Court of First Instance dismissed the claim as barred by art 118 of the Limitation Act, and on appeal the District Judge held that the claim was barred by defendant's adverse possession over the property for more than twelve years. On second appeal it was contended that the suit being by a Hindu entitled to possession as a reversioner on the death of a female, was governed by art 141 of the Act, and therefore not barred. *Held*, without deciding that question that, as on the facts found the adopted son held adversely to the widow, adverse possession which barred the widow barred also the reversioners and therefore the claim was barred. The *Shiva Ganga Case*, 9 Mooie's I. A. 543, was referred to. GHANDHARAP SINGH v. LACHMAN SINGH.

[I. L. R. 10 All. 485]

7.—Art 144.—*Hindu widow—Adopted son—Adverse possession against widow for more than twelve years, effect of, as against a subsequently adopted son—Title* ] Adverse possession against a Hindu widow for more than twelve years bars the rights of a subsequently adopted son. S a Hindu died, leaving a widow and a minor son. The minor died in 1856. Thereupon the defendant, a separated cousin of the minor, took possession of his property, got it entered in his own name in the revenue records, and received its income himself without giving the widow any share thereof. In 1872 the widow adopted the plaintiff, and he, too, was excluded by the defendant from the management and enjoyment of the property in question. In 1883 the plaintiff sued, as the adopted son of S, to recover possession of the property in dispute. *Held*, that the suit was barred, the defendant having held adversely to the widow for more than twelve years before the plaintiff's adoption. KRISHNAJI JANARDHAN v. MORBHAT.

[I. L. R. 13 Bom. 276]

8—Art. 144.—*Mortgagee becoming purchaser of share in mortgaged property.* ] A mortgagee of an entire undivided estate does not, by a subsequent purchase of a certain share therein from one not in actual possession at the time of conveyance, thereby change his character from

LIMITATION ACT (XV OF 1877), Art. 144  
—continued.

(1) ADVERSE POSSESSION—continued.

a mortgagee to that of an owner, but his possession continues as a mortgagee. B held an entire undivided estate under a mortgage (usufructuary) from C since 1273 (1866), and as such mortgagee in 1293 (1875) B purchased a share therein from D, who had not been in actual possession since the date of the mortgage. On the 20th January 1885, B brought a suit to recover possession of his purchased share. *Held*, that the subsequent purchase did not change the character of B from that of a mortgagee to that of an owner, and that his suit was barred by 12 years' limitation. NUNDO LAL ADDY v. JODU NATH HALDAR.

[I. L. R. 14 Calc. 674]

9—Art 144—*Co-sharer—Possession of one co-sharer when adverse—Mortgage—Mortgage by three co-sharers—Redemption by one of several mortgagors—Right of the other mortgagors to sue for redemption—Period of limitation for such suit.* ] In 1847 the property in dispute was mortgaged by three co-sharers D, A, and R. In 1859, R alone redeemed the property, and mortgaged it again to a third person. In 1882 the heirs of D and A brought a suit to redeem the whole of the property, or their portions of it. The defence to the suit was that it was barred by limitation, being brought more than twelve years after R had redeemed the property, and R's possession subsequently to such redemption having been adverse to the plaintiffs and their predecessors in title. *Held*, that the suit was not barred by limitation. When R redeemed the property, he held it, as regards his co-sharers' interests in it, as a lienor, and, as such, his possession was not adverse to them. It did not contradict, but rather implied and preserved, their ultimate proprietary right. In the case of a co-sharer holding after redemption, limitation is computed only from the date when the possession becomes adverse by the assertion of an exclusive title and submission to the right thus set up, in analogy to the provision which bars an excluded sharer generally after the lapse of twelve years from the time when he becomes aware of his exclusion. As long as possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession be referred to that right, rather than to a right which contradicts the ownership. RAMCHANDRA YASHVANT SARPOTDAR v SADASHIV ABRAJ SARPOTDAR.

[I. L. R. 11 Bom. 422]

10.—Art. 144.—*Suit for redemption or recovery of property on payment of a charge—Possession after redemption by one of several mortgagors.* ] The plaintiff sought to recover his father's share in two portions of family property, one of which had been mortgaged by the plaintiff's father and the father of the defendant

LIMITATION ACT (XV OF 1877), Art. 144  
—continued.

(1) ADVERSE POSSESSION—continued.

No 1 jointly, the other had been mortgaged by the plaintiff's father jointly with the father of defendant No. 1 and the husband of defendant No. 2. The first was redeemed by the father of defendant No. 1 alone in 1868; the second was redeemed by the defendant No. 1 more than twelve years before the suit. The parties were Mahomedans, and the plaintiff had a brother and three sisters, only one of whom (defendant No. 2) was a party to the suit. Defendant No. 1 contended that the suit was defective for want of parties, and that it was time-barred: *Held* that the plaintiff's brother and sisters ought to have been joined as co-plaintiffs, the defendant No. 1's possession after redemption not being adverse to them. If it was adverse at all, it was adverse to the whole of the plaintiff's branch of the family, so as to bar the right of the group altogether. But that was no reason why the co-owners should not be admitted as co-plaintiffs, and the suit go on upon its merits. *BHAUDIN v. ISMAIL*.

[I. L. R. 11 Bom. 425]

11.—Art. 144.—*Redemption of land by one of two co-mortgagors and re-mortgage thereof—Possession under second mortgage for more than 12 years.* A and B, two brothers, being entitled to certain land, mortgaged it in 1852 to C. In 1864 A redeemed the mortgage and re-mortgaged the land to D for the same amount. In 1885 the defendants (sons of A) redeemed the mortgage to D. In 1886 the plaintiff (son of B) sued defendants and the representatives of C and D to redeem a moiety of the land on payment of a moiety of the amount due on the mortgage of 1852. The defendants pleaded, *inter alia*, that the suit was barred by limitation as the land had been held adversely since the mortgage of 1864. *Held* that in the absence of proof that the land was held with an assertion of adverse title the plaintiff was entitled to a decree. *MOIDIN v. OOTHUMANGANNI*.

[I. L. R. 11 Mad. 416]

12.—Art. 144.—*Mortgage—Conditional sale—Foreclosure—Suit for possession—Reg. XVII of 1806, s. 8—Cause of action—Limitation Act XIV of 1859, s. 1 (12).* A suit for foreclosure was brought in 1886 upon a mortgage by conditional sale executed in 1846, the condition being for payment within five years from that date. The deed provided that, in default of payment within the prescribed period, the property mortgaged "will be foreclosed (*baibat*), and this mortgage-deed will be considered as an absolute sale-deed." Between 1846 and 1886 no foreclosure proceeding or other steps were taken by the mortgagee, and no admission of liability was made by the mortgagor: *Held* that, by reason of Act XIV of 1859 (Limitation Act), the plaintiff's remedy was barred during the currency of that Act, and that the time within which he

LIMITATION ACT (XV OF 1877), Art. 144  
—continued.

(1) ADVERSE POSSESSION—continued.

was entitled to maintain an action for foreclosure, if he had taken the proper proceedings, expired in 1863: *Held* also that even if foreclosure proceedings under Reg. XVII of 1806 had been taken, the cause of action was the original non-payment of the money on the due date, and the provisions of the Regulation could not create a fresh cause of action. *Denonath Gangooly v. Nurshing Proshad Doss*, 14 B. L. R. 87, referred to. *MURLIDHAR v. KANCHAN SINGH*.

[I. L. R. 11 All. 144]

13.—Art. 144.—*Hindu law—Joint family—Purchaser from one co-partner.* Plaintiffs being members of a joint Hindu family alleging division and a sale to them by other members of their share in the family property more than twelve years before suit, sued to eject a more recent purchaser. The plaintiffs failed to prove division as alleged. One of the members of the family who was in possession of the property to which the sale-deed related did not join in executing it: *Held* that the suit was barred by limitation, since the proposition that the possession of one co-partner is the possession of all for purposes of limitation has no application as between a purchaser from one of the co-partners and the other members of the family. *Ram Lakh v. Durga Charan Sen* (I. L. R. 11 Cal. 683), followed. *MUTTUSAMI v. RAMAKRISHNA*.

[I. L. R. 12 Mad. 292]

14.—Art. 144.—*Limitation Act, 1877, s. 10—Trust—Spiritual slavery of Disciple to Guru—Act V of 1843.* This was a suit brought in 1881 by the head of an adhinam for declarations that a math was subject to his control; that he was entitled to appoint a manager; that the present head of the math was not duly appointed and his nomination by his predecessor was invalid; and for delivery of possession of the moveable and immovable properties of the math to a nominee of the plaintiff. The claim extended also to religious establishments at Benares and elsewhere connected with the math. The math was founded by a member of the adhinam. Many previous heads of the math had agreed to be "slaves" of the head of the adhinam, but for over 60 years the head of the adhinam had exercised no management over the endowments belonging to the math, and in a suit (compromised) of the year 1854 the present pretensions of the head of the adhinam had been denied *in toto*. The defendant had succeeded in 1880 to the management of the math under the will of his predecessor, dated the same year, and was not a disciple of the adhinam: *Held*, that the suit was barred by limitation in respect of the personal claim to manage the endowments as to which no claim had been put forward for 60 years; that the suit was not barred by limitation in respect of the claim to set aside

## LIMITATION ACT (XV OF 1877), Art 44

—continued.

## (1) ADVERSE POSSESSION—continued.

the appointment of the defendant (who entered into possession in 1880 under a will, dated in the same year), or to see that a competent Dharmapuram man be appointed in spite of the total denial of the claims of the head of the adhinam in 1851. that the agreement of the head of the math to become the "slave" of his guru could have no legal operation since 1843, and that the adverse possession of the defendant from that year was fatal to any claim of the plaintiff under such agreement. GIYANA SAMBANDHA PANDARA SANNADHI v. KANDASAMI TAMBIRAN.

[I. L. R. 10 Mad. 375]

15.—Art 144 —Grant of profits of *deshmukhi ratan* in perpetuity—Hereditary *gumastas*—How far such grant valid after the death of the grantor.] By a *sanad* duly executed on the 20th August 1850. the plaintiff's father, Y, who was a *ratandur deshmukh* appointed the defendants and their heirs hereditary *ratan gumastas*, and granted, by way of remuneration for their services, Rs. 201 and a quantity of grain out of the annual *ratan* income in perpetuity. In consideration of certain sums obtained from the defendants, Y mortgaged the *ratan* property to the defendants, who subsequently sued Y upon the mortgage. That suit was referred to arbitration, and an award was duly made, and a decree upon the award was obtained by the defendants against Y. In 1859 execution of the decree was granted against Y. In 1864 the services connected with the *ratan* were discontinued by Government. In 1871 Y died. The defendants having kept the decree alive, sought in 1881 to execute the decree against the plaintiffs' eldest brother, who filed objections, but his objections were overruled, and execution was ordered to issue. The plaintiffs brought this suit in 1883 for a declaration that the defendants were no longer entitled to the allowance under the *sanad*, and for an injunction restraining the defendants from the execution of the decree against the *ratan*. The defendants contended (*inter alia*) that the *sanad* could not be cancelled, Y having granted it as full owner; and that the receipt, by the defendants, of the allowance had been adverse since 1864, when their services had ceased. Both the lower Courts decided in favour of the plaintiffs. On appeal by the defendants to the High Court, *held* confirming the decree of the lower Courts, that the plaintiffs were entitled to the declaratory decree and to the injunction prayed for. Although the management of the *ratan* was vested by the *sanad* in the defendants and their heirs in perpetuity under the title of *gumastas*, nevertheless the remuneration attached to the office by Y, was in derogation of his successor's rights, and was, therefore, at any rate in the absence of proof of custom, invalid against them. *Held* also, that, assuming the grant by Y to be invalid as against his successor, adverse possession would only run against the plaintiffs from the time of

## LIMITATION ACT (XV OF 1877), Art 44

—continued.

## (1) ADVERSE POSSESSION—continued.

his death in 1871. and the present suit having been filed within twelve years from that date was not barred. KRISNAJI v. VITHALRAY.

[I L R. 12 Bom. 80]

16.—Art. 144 —Suit against Government for *inam* lands and *mokasa amals*—Attachment under Act XI of 1852, effect of—Adverse possession—*Mokasa amals*, meaning of] In 1826 A obtained a decree on a mortgage, awarding him possession and enjoyment of certain *inam* property, consisting of lands and of cash allowances annually paid from the Government treasury called *mokasa amals*. A and his successors continued in possession down to 1852, when the *inam* was attached on behalf of Government pending an inquiry, under Bombay Act XI of 1852, into the title of the holders of the *inam*. The attachment remained in force till 1865, when Government finally decided that the *inam* property, with the exception of a certain portion, should be restored to those from whose possession it had been taken in 1852. Thereupon D the successor in interest of A, applied to the Collector to be restored to possession. The Collector refused. D therefore sued him for arrears of the *mokasa amals* and obtained a decree in 1868. Thereafter D did not receive any payment from the Government treasury. In 1883 D filed the present suit against Government to recover possession of the *inam* lands together with arrears of the *amals*: *Held* that even if the suit were cognizable by the Civil Court, it would be barred by limitation. The plaintiff's right to the periodical payments was barred by a total discontinuance of them for more than twelve years before the institution of the suit notwithstanding his decree for the *amals* in 1868, which might establish his right to them in that particular year. *Held*, further, that the claim to the lands was also time-barred, the Collector's possession being that of an adverse holder since 1865, when the attachment was ordered to be withdrawn. The land could not properly be said to be *in custodia legis*, Government having taken possession of it in its own right, and not on behalf of any rival claimants thereto. *Rao Karan Singh v. Baker Ali Khan*, I. L. R. 9 I. A. 99; I. L. R. 5 All. 1; *Shudhojirav v. Narkojirav*, 10 Bom. 228, and *Tukaram v. Sujan Gir Gurus*, I. L. R. 8 Bom. 585, distinguished. SHIVRAM DINKAR GHARPURAY v. SECRETARY OF STATE FOR INDIA.

[I. L. R. 11 Bom. 222]

17.—Art 144 —Suit for declaration of title] In a suit the parties to which were Nambudri Brahmans following the Marumakkatayam law, the plaintiff sued as the adoptive son of the last member of an otherwise extinct *mana* for a declaration of his title to certain lands as the sole heir of a devasom. He was in possession of the greater part of the land, but one *puamba* was alleged to be held adversely to him by a person

LIMITATION ACT (XV OF 1877), Art. 44  
—continued

(1) ADVERSE POSSESSION—continued.

not joined in the suit, and the tenants of parts of the remaining land had attained to the defendant. In 1875 a suit was brought by the defendant's brother and others against the plaintiff and others to set aside an alienation by the present plaintiff's predecessor in title, but the suit was dismissed without any decision as to the co-urama right of the then plaintiff; and the present plaintiff had no further notice of interference by the present defendant's mana. *Held*, that the claim was not barred and that the plaintiff was entitled to the decree sued for. **SUBRAMANYAN v PARAMASWARAN.**

[I. L. R. 11 Mad. 116]

18.—Art. 144.—*Manager of a Hindu temple—Shevaks or servants of an idol—Rights of manager and servants inter se*]. The plaintiff was the hereditary manager of the temple of Shri Ranchod Raju at Dakor. The defendants were the *shevaks* or ministers of the deity. The plaintiff sued to oust the defendants from a certain piece of land attached to the temple, alleging that the defendants had erected shops on the land, and appropriated the rents to their own use, although it had been already decided in a suit between the parties that the land was always to be kept open and unoccupied for the use of the temple. The *shevaks* contended that they had been in exclusive and uninterrupted possession of the land in dispute for more than twelve years, and that by reason of such user they had acquired a *quasi* proprietary title at least as against the manager of the temple. They therefore pleaded that the suit was barred by limitation: *Held*, that the defendants had not by occupation and user acquired any title as against the plaintiff who was the manager of the temple estate. They had come into occupation originally as servants and representatives of the deity, and during their occupation they could not by a wish change the nature of their possession. Both they and the plaintiff held the land for the same deity, and their rights could not be adverse to each other so as to give rise to a title by prescription. The only question then was as to which of them was the proper representative of the deity for the particular purpose of this suit, and that question had already been decided in a former suit in favour of the plaintiff. **MULJI BHULABHAI v. MANOHAR GANESH**

[I. L. R. 12 Bom. 322]

19.—Art. 144.—*Adverse possession of defendant supplemented by previous adverse possession of widow by whom defendant was adopted—Limitation Act XV of 1877, s. 3.* B died in 1865 without a son, leaving three widows, viz., L, A, and C, of whom L was the eldest and C the youngest. The plaintiff was unanimously selected by the three widows for adoption after the death of their husband. The unanimity continued down to May 1866; but on the 30th June 1866, L declared that

LIMITATION ACT (XV OF 1877), Art. 44  
—continued.

(1) ADVERSE POSSESSION—concluded.

if the plaintiff were adopted by C she would not consent to it. On the 1st July 1866, C, adopted the plaintiff without the consent of L. On the 12th August 1869, L adopted the defendant. On the 10th August 1881, the plaintiff filed this suit against the defendant alleging himself to be B's adopted son and as such claiming possession of B's property. He did not deny the *factum* of the defendant's alleged adoption on the 12th August 1869, which constituted (the plaintiff alleged) his cause of action. The defendant contended that he himself was the adopted son of B, having been adopted by L, the senior widow. He insisted that the plaintiff's adoption was invalid, having been carried out without the consent of L, the senior widow. He further contended that the plaintiff's claim to the property was barred by limitation, it having been in possession of himself (the defendant) and L for more than twelve years before this suit was filed. *Held* that the suit was barred by limitation (art. 144 of the Limitation Act XV of 1877), the defendant having been in adverse possession of the property for more than twelve years. The plaintiff's alleged adoption took place in July 1866. The defendant was adopted, and put into possession on the 12th August 1869. This suit was filed on the 10th August 1881, i.e., two days before the expiration of twelve years from the date of the defendant's adoption. Down to the date of the defendant's adoption, L had been either actually or constructively in exclusive possession of the property, such possession being distinctly adverse both to the plaintiff so far as he claimed to be the adopted son and to C, so far as she might claim to represent him during his minority. The question of limitation then depended on whether the defendant could supplement his own adverse possession since his adoption (which was deficient by two days) by the adverse possession of L, and this again depended on whether the defendant could be said to derive his liability to be sued from or through L so to bring himself within the definition of a defendant as provided by s. 3 of the Limitation Act XV of 1877. The Court was of opinion, that the defendant might be said to have derived his liability to be sued from L, and that the plaintiff's claim, therefore, became barred in 1878. **PADAJIRAO v. RAM-RAV.**

[I. L. R. 13 Bom. 160]

1.—Art. 147 and Art. 132.—*Suit on a mortgage bond—English mortgage—"Mortgage" and "Charge"—Transfer of Property Act, ss. 58, 60, 67, 83, 86, 87—89, 92, 93, 100*]. A suit on a mortgage-bond to enforce payment by sale of premises hypothecated is governed by art. 132 and not art. 147 of the Limitation Act. *Brojo Lal Sing v. Gour Charan Sen*, I. L. R. 12 Cal. 111, overruled; *Shib Lal v. Gangu Pershad*, I. L. R. 6 All. 551, dissented from. The clear distinction drawn for the first time between "mortgage" and "charge" in the Transfer of Property Act is not observed

**LIMITATION ACT (XV OF 1877), Art. 171B**  
—continued.

in the Limitation Act. Art 147 of the Limitation Act relates to a special kind of mortgages known as English mortgage and includes only that class of suits in which the remedy is either foreclosure or sale in the alternative. *GIRWAR SINGH v THAKUR NARAIN SINGH*.

[I. L. R. 14 Calc. 730]

2.—Art 147 and Art. 132.—*Mortgage as distinguished from a charge.* In 1867 the defendant borrowed Rs. 125 from the plaintiff and gave him a bond agreeing to pay interest at two per cent per month. The bond provided that the whole debt, including principal and interest, was to be repaid within four years from the date of its execution. It further stated that certain property had been mortgaged to the plaintiff as security for the loan, and that if the principal and interest were not paid within the time fixed, the plaintiff was to take up the management of the property. It also contained the following clause: "We will redeem the mortgaged property on the day on which we shall pay the amount of the principal and the amount of the interest that may be found due on making up the account." In 1886 the plaintiff sued the defendants to recover, by sale of the property, the sum of Rs. 250 as principal and interest due on the bond. It was contended that the bond created merely a charge upon the property in question, and was not a mortgage, and that the suit was barred by art. 132 of sch. II of the Limitation Act XV of 1877. *Held*, that the document was a mortgage, and that the suit was not barred, being governed by art. 147 and not by art. 132 of sch. II of the Limitation Act. *MOTIRAM v. VITAL*.

[I L. R. 13 Bom 90]

—, Art. 148.—*Mortgage—Redemption by co-mortgagor*—*Suit by other mortgagors against redeeming mortgagor for redemption of their shares* In 1828 one of several co-mortgagors redeemed an usufructuary mortgage executed in 1822 and obtained possession. The other mortgagors brought a suit against the heir of the redeeming mortgagors in 1886, for redemption of their shares in the mortgaged property: *Held* that the limitation applicable to the suit was that provided by art 148 sch. II of the Limitation Act (XV of 1877); that time ran not from the date of the redemption in 1828, but from the time when it would have run against the original mortgagee if he had been a defendant, i. e., the date of the original mortgage of 1822; and that the suit was therefore barred by limitation. *Umr-un-nissa v Muhammad Far Khan*, I. L. R. 3 All. 24. explained *Nura Bibi v Jagat Narain*, I L R 8 All. 324, and *Ram Singh v. Baldeo Singh*, Weekly Notes, All 1885, p. 300, referred to. *ASHFAQ AHMAD v. WAZIR ALI*.

[I. L. R. 11 All. 423]

—, Art. 166.  
*See s. 18.*

[I. L. R. 14 Calc. 670]

**LIMITATION ACT (XV OF 1877)—contd.**

—, Art 167.—*Minor—Purchase on behalf of a minor during minority—Agent of minor, omission of, to apply within thirty days to remove obstruction of third party in execution-proceedings—Minor's right to apply for possession within three years from the time he comes of age—Civil Procedure Code (XIV of 1882), s. 335* In 1877, at a sale held in execution of a decree, certain property was purchased on behalf of the applicant, who was then a minor, by the agent nominated by his guardian. An order for delivery of possession was made; but a third party having obstructed, the order was returned unexecuted. No further proceedings were taken by the agent. The applicant having come of age, applied for delivery of possession within three years from the date of his attaining majority, but more than thirty days after the date of the obstruction and more than thirty days after he came of age. The Subordinate Judge rejected the application as barred, being of opinion that the omission to apply, within thirty days from the date of the obstruction on the part of the applicant's agent, as well as the applicant's omission to do so within a similar period after he came of age, barred the applicant, whose remedy lay in a fresh suit: *Held* by the High Court that the application was rightly rejected. It was virtually an attempt to renew the old proceedings, and was barred by art. 167 of sch. II of the Limitation Act. If the applicant intended to proceed summarily under the Civil Procedure Code, he should have taken proceedings within a month after he came of age. *VINAYAKRAV AMRIT v. DEVRAY GOVIND*.

[I. L. R. 11 Bom 473]

—, Art 171B.

*See* Art. 178.

[I. L. R. 10 All. 270]

1.—Art 171B.—*Appeal—Death of defendant-respondent—Civil Procedure Code, ss. 368, 582* Art. 171B. sch. II of the Limitation Act (XV of 1877) applies to applications to have the representative of a deceased defendant-respondent made a respondent, *BALDEO v. BISMILLAH BEGAM*.

[I. L. R. 9 All. 118]

2.—Art. 171B.—*Death of defendant-respondent—Application by plaintiff-appellant to have representative of deceased substituted as respondent—Civil Procedure Code, ss 3, 368, 582* *Held* by the Full Bench (MAHMOOD, J, dissenting) that art 171B of the second schedule of the Limitation Act does not apply to the death of a respondent, whether plaintiff or defendant in the original suit; and that art 178 applies to an application made by a plaintiff appellant to bring upon the record the representative of a deceased defendant-respondent *Narain Dass v. Lajja Ram*, I L. R. 7 All 693, and *Balkrishna Gopal v Bal Joshi Sadashib v. Joshi*, I L R. 10 Bom 663, referred to *Baldeo v. Bismillah Begam*, I L. R. 9 All. 118, and *Rameshar Singh v. Bisheshar*

LIMITATION ACT (XV OF 1877), Art 171B  
—continued.

*Singh*, I L R. 7 All. 734, overruled. *Held* by MAHMOOD, J., *contra*, that the word "defendant" in art 171B includes a defendant-respondent, and, reading art 171B with cl. 2 of s. 3 in conjunction with ss. 368 and 582 of the Civil Procedure Code, includes also a plaintiff-respondent; and that an application made by a plaintiff-appellant more than sixty days after the defendant-respondent's death to have the representative of a deceased made a respondent is barred by limitation, and the appeal is liable to abatement. *Soshi Bhusan Chand v. Grish Chunder Taluqdar*, I. L. R. 11 Calc. 694, referred to. *DEBI DIN v. CHUNNALAL*.

[I L. R. 10 All. 264]

3.—Art. 171B and Art. 178.—*Death of plaintiff-respondent—Application by defendants appellants for substitution of legal representative—Civil Procedure Code, ss. 3, 368, 582* The judgment of the majority of the Full Bench in *Narain Das v. Lajja Ram*, I. L. R. 7 All. 693, only decided that art 171B, sch. II, of the Limitation Act of 1877, did not apply to an application by a defendant-appellant to have the representative of a deceased plaintiff-respondent made a respondent. Art 178 applies to such applications. So *held* by the Full Bench, MAHMOOD, J., dissenting: *Held* by MAHMOOD, J., that by reason of s. 3 (read with ss. 368 and 582) of the Civil Procedure Code the word "defendant" in art 171B of the Limitation Act necessarily includes a plaintiff-respondent. *Soshi Bhusan Chand v. Grish Chunder Taluqdar*, I. L. R. 11 Calc. 694, referred to. *CHAJMAL DAS v. JAGDAMBA PRASAD*.

[I. L. R. 10 All. 260]

—, Art. 175.

See DECREE—ALTERATION OR AMENDMENT OF DECREE.

[I. L. R. 14 Calc. 348]

See LIMITATION ACT 1877, ART. 179—ORDER FOR PAYMENT AT SPECIFIED DATE.

[I L. R. 14 Calc. 348]

—, Art. 175C

See ABATEMENT OF SUIT—APPEALS.

[I. L. R. 11 All. 408]

See PARTIES—SUBSTITUTION OF PARTIES—RESPONDENTS.

[I L. R. 11 All. 408]

1.—Art. 178.—*Decree—Execution—Attachment set aside—Time occupied in suing to declare property liable to attachment.* An application for execution of a decree having been made in 1880, certain land was attached as being the property of the judgment-debtor (deceased). His children thereupon claimed the land and the attachment was raised. Upon this, the judgment-creditor sued to

LIMITATION ACT (XV OF 1877), Art 178  
—continued.

establish his right to sell the land in execution and obtained a decree in 1882, which was confirmed on appeal in 1883. In 1885, the judgment-creditor again applied for attachment and sale of the same land. *Held*, that the application could not be considered as one for the revival of former proceedings, that art. 178 was not applicable to it, and that the application was barred by limitation. *Basant Lal v. Batul Bibi*, I. L. R. 6 All. 23, distinguished. *NARAYANA v. PAPPI BRAHMANI*.

[I. L. R. 10 Mad. 22]

2.—Art. 178.—*Application to bring decree into conformity with judgment—Civil Procedure Code 1882, s. 206.* Applications to the Court under s. 206 of the Code of Civil Procedure are not governed by the Limitation Act. *JIVRAJI v. PRAGJI*.

[I. L. R. 10 Mad. 51]

3.—Art 178 —*Application under Civil Procedure Code, s. 583—Application for refund of money levied under decree reversed on appeal.* *Semble*: An application for refund of moneys levied in execution of a decree subsequently reversed on appeal is not governed by art. 179 but by art. 178 of sch. II of the Limitation Act. *KURUPAM ZAMINDAR v. SADASIVA*.

[I. L. R. 10 Mad. 66]

4.—Art. 178 —*Decree, application to correct errors in Civil Procedure Code (Act XIV of 1882), s. 206—Practice.* An application under s. 206 of the Civil Procedure Code (Act XIV of 1882) to correct errors in a decree, not being one within the purview of art 178, sch. II of the Limitation Act XV of 1877, is not governed by any limitation, and can be made at any time such errors are discovered. *Gaya Prasad v. Siker Prasad*, I. L. R. 4 All. 23, dissented from. *SHIVAPA v. SHIVPANCH LINGAPA*.

[I. L. R. 11 Bom. 284]

5.—Art 178 —*Sale in execution of decree—Interest of purchaser—Second sale of same property in execution of subsequent decree—Interest of purchaser at such subsequent sale subject to interest of purchaser under prior sale—Registered certificate of second sale—Act VIII of 1859—Civil Procedure Code (XIV of 1882), s. 294—Purchase by decree-holder at execution-sale—Right to set aside such purchase.* In 1884 the plaintiff brought the present suit against the defendant to recover possession of a certain house which he had purchased at a sale held on the 15th March 1880, in execution of a money-decree obtained against one C. He obtained a certificate of sale on the 3rd January 1880, which was registered on the 13th of the same month. The defendant had previously purchased the same property at a sale held on the 22nd November 1875, in execution of a decree obtained by him as mortgagee against the said C. The defendant had obtained a certificate of sale and was put into



# LIMITATION ACT (XV OF 1877), Art. 178 —continued.

possession, but had not then registered the certificate. He subsequently obtained another certificate, which was registered in June, 1882. In a suit by the plaintiff for possession, it was contended that, under s. 294 of the Civil Procedure Code (Act XIV of 1882), the defendant took nothing by his purchase, as he was the holder of the decree in execution of which the property was sold: *Held*, that this objection could not now be made, as the right of the judgment-debtor (C) and of the plaintiff, as purchaser of his rights, to have the defendant's purchase set aside on this ground, had been barred by limitation long before this suit was brought. The purchase by the defendant was not void *ab initio*, but only voidable "on the application of the judgment-debtor or other person interested in the sale." *Javerbhai v. Haribai*, I L R 5 Bom 575. Further, such an application was a matter in execution, falling under s. 244 of the Civil Procedure Code, and therefore, even if not barred before the passing of the Limitation Act XV of 1877, would be barred by art. 178 of that Act not later than 1st October 1880. CHINTAMANRAV NATU v. VITHABAI.

[I. L. R. 11 Bom. 588]

6.—Art 178 —Limitation Act 1877, s. 8—*Mesne profits, Decree for—Execution of Decree—Application for assessment of mesne profits—Joint decree-holders—Minor, Right of, to execute whole decree when remedy of major joint-decree-holder is barred*.] In execution of a decree for possession of certain lands and for mesne profits, dated the 15th August 1878, possession having been obtained in August 1880, two decree-holders, one of whom was a minor, applied on the 4th April 1882 for ascertainment of the amount of such mesne profits. Upon that application the Amin was directed to ascertain the amount due, but after repeated reminders had been sent him, and no report being submitted, the execution case was struck off the file on the 9th October 1882. The minor judgment-creditor having attained his majority on the 17th April 1885, an application was made by both decree-holders for execution of the decree by ascertainment of the amount of mesne profits, and for the recovery of the amount when so ascertained. The judgment-debtors pleaded limitation: *Held*, that the application was not an application for execution of the decree. The decree was divisible into two parts, and the present application must be treated as for the purpose of obtaining a final decree regarding the mesne profits, the previous decree having been in that respect merely interlocutory—*Baroda Sundari Dabia v. Fergusson*, 11 C L R. 17; and *Dildar Hossein v. Mucedunnissa*, I L R. 4 Calc. 529, followed; *Hem Chunder Chowdhury v. Brojo Soondury Dabee*, I L R. 8 Calc. 89, dissented from. *Held*, also, that the provisions of art. 178 of sch. II of the Limitation Act apply to an application by a decree-holder to make a decree complete. (*Baroda Soondury Deba v. Fergusson*, 11 C. L R. 17, upon this point dissented from);

W., D.

# LIMITATION ACT (XV OF 1877), Art. 178 —continued.

and further that s. 8 of that Act had no application to the case, and that therefore so far as the application of the major decree-holder was concerned his remedy was barred, as his application should have been made within at least three years from the date of the delivery of possession of the lands decreed. *Held*, further, that under s. 7 of the Limitation Act, the remedy of the minor decree-holder was not barred, as the other decree-holder could not give a valid discharge without his concurrence—(*Ahamudden v. Grish Chunder Chammunt*, I L R. 4 Calc 350, distinguished). and that, under s. 231 of the Code of Civil Procedure, he was entitled to execute the whole decree, as though the remedy of the major decree-holder was barred his right was not extinguished. ANANDO KISHORE DASS BAKSHI v. ANANDO KISHORE BOSE.

[I. L. R. 14 Calc. 50]

7—Art 178.—*Civil Procedure Code*, s. 206—*Amendment of decree*.] Art. 178 of sch. II of the Limitation Act (XV of 1877) applies only to applications made to a Court to exercise powers which, without being moved by such application, it is not bound to exercise, and not to applications made to a Court to do acts which it has no discretion to refuse to do. It does not govern an application under s. 206 of the Civil Procedure Code, for amendment of a decree, so as to bring it into conformity with the judgment, it being the bounden duty of a Court, of its own motion, to see that its decrees are in accordance with the judgments and to correct them if necessary. *Gaya Prasad v. Sikri Prasad*, I L R. 4 All. 23, dissented from. *The petition of Kishan Singh*, Weekly Notes, All 1883, p. 262. *Kylasa Goundan v. Ramasami Ayyan*, I L R. 4 Mad. 172, and *Vithal Janardan v. Vithojirao Puttajirav*, I L R. 6 Bom. 586, referred to. DARBO v. KESHO RAI.

[I. L. R. 9 All. 364]

8—Art. 178.—*Execution of decree—Decree payable by instalments—Instalment, Default in payment of.*] When a decree or order makes a sum of money payable by instalments on certain dates, and provides that, in default of payment of any instalment, the whole of the money shall become due and payable and be recoverable in execution, by art. 178, sch. II of the Limitation Act limitation begins to run from the date of the first default, unless the right to enforce payment in default has been waived by subsequent payment of the over-due instalment on the one hand and receipt on the other. R obtained a decree against D C and K G for a sum of money on 21st June 1880. On 25th May 1882, an order was made in terms of the petition of both parties, providing that the amount of the decree should be paid by five instalments, the first instalment being due in July 1882, and that in default of payment of any instalment the whole amount should be due and recoverable in execution. Default was made in payment of the first instalment, nor was there



**LIMITATION ACT (XV OF 1877), Art. 178**  
—continued.

any subsequent payment of that or any other instalment. On 30th July 1886, *R* applied for execution of the four last instalments, alleging that the first had been paid; *Held*, that the application was barred by limitation under art. 178, sch. II, Limitation Act, 1877. *Hurronath Roy v. Maheroollah Moollah*, B. L. R. Sup. Vol. 618; 7 W. R. 21; *Dalsook Rutton Chand v. Chugan Narrun*, I. L. R. 2 Bom. 356; *Shib Dat v. Kalna Persad*, I. L. R. 2 All 443; *Chen Bas Shahu v. Kadum Mundul*, I. L. R. 5 Cal 97; *Asmutullah Dalal v. Kali Churn Mitter*, I. L. R. 7 Cal. 56; *Nil Madhub Chuckerbutty v. Ram Sadoy Ghose*, I. L. R. 9 Cal. 857; *Ram Kulpo Bhattacharya v. Ram Chunder Shome*, I. L. R. 14 Cal 352, and *Chunder Komal Das v. Bisassurree Dassie*, 13 C L R. 243, referred to. *MON MOHUN ROY v. DURGA CHURN GOOEE*.

[I. L. R. 15 Cal. 502]

**9.—Art. 178.—Death of plaintiff-respondent—No application for substitution—Application by defendant-appellant for hearing of appeal.]** *Held* by the Full Bench that inasmuch as art. 178 and not art. 171B of the second schedule of the Limitation Act applied to the case of a deceased respondent whether plaintiff or defendant in the suit, an application by a defendant-appellant to have his appeal heard in the absence of any representative of the deceased plaintiff-respondent could not be allowed until the period prescribed by art. 178 had expired without the legal representatives of the deceased applying to be brought on the record in his place. *RAM SARUP v. RAM SAHAJ*.

[I. L. R. 10 All 270]

**10.—Art. 178.—Sanction to prosecution—Application for such sanction—Criminal Procedure Code, s. 195.]** Rules of limitation are foreign to the administration of criminal justice, and it is only by express statutory provision that any rule of limitation could be made applicable to criminal cases, art. 178, sch. II, Limitation Act (XV of 1877), must be construed with reference to the wording of the other articles, and can relate only to applications *ejusdem generis*. A suit was instituted for possession of certain land on which stood a factory. In proof of the claim the plaintiffs filed in Court a *sarkhat* or lease, which was pronounced by the Munsif to be a forgery. Plaintiffs appealed up to the High Court, where on the 24th June 1886, the Munsif's decree was affirmed. Defendant then applied to the Munsif for sanction to prosecute the plaintiffs for the offence of using a forged document knowing the same to be forged. The Munsif refused to sanction the prosecution prayed for; but on application to the Sessions Judge, such sanction was granted. On application to revise the Sessions Judge's order granting sanction, it was contended that, after the lapse of nearly three years, sanction to prosecute should not have been granted. *Held* that there is no fixed period of limitation for making applications for sanction

**LIMITATION ACT (XV OF 1877), Art. 178**  
—continued

under s. 195 of the Criminal Procedure Code  
*QUEEN-EMPRESS v. AJUDHIA SINGH*.

[I. L. R. 10 All. 350]

**12.—Art. 178.—Application to rescind leave to sue—Decree—Order.]** The granting of leave to sue is neither a decree nor an order, and the period of limitation for an application to rescind it is that provided by art. 178 of the Limitation Act XV of 1877, viz., three years. *KESSOWJI DAMODAR JAIRAM v. LUCKMIDAS LADHA*.

[I. L. R. 13 Bom. 404]

**12.—Art. 178 —Civil Procedure Code, s. 345—Sale in execution set aside—Application by purchaser for refund of purchase-money—Accrual of right to apply—Delay—Costs.]** A suit by a judgment-debtor whose *ser* land had been sold in execution of a decree, to have the sale declared void and illegal, on the ground that the *ser* was incapable of sale, was decided on appeal by the High Court on the 13th June 1884. On the 11th June 1887, the purchaser at the sale applied, under s. 315 of the Civil Procedure Code, for a refund of the purchase-money. *Held* that the limitation applicable was that provided by art. 178 of sch. II of the Limitation Act (XV of 1877) that the right to apply accrued on the passing of the High Court's decree, and the application was therefore not barred by limitation, but that looking to the great delay there had been on the part of the applicant, he should not be allowed any costs. *GIRDHARI v. SITAL PRASAD*.

[I. L. R. 11 All. 372]

—, Art. 179.

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**(1) PERIOD FROM WHICH LIMITATION RUNS.**

**(a) GENERALLY.**

**1 —Art. 179.—Decree specifying a certain time for execution—Construction—Consent precedent.]** The plaintiff obtained a decree on the 25th July

LIMITATION ACT (XV OF 1877), Art 179  
—continued.

(1) PERIOD FROM WHICH LIMITATION  
RUNS—continued.

(a) GENERALLY—concluded.

1882, which directed that he should give the defendant possession of certain parcels of land at the end of next *Margashirsha* (i.e., 9th January 1883), and that, on his doing so, the defendant should remove certain hedges and sheds, and restore the land in suit to the plaintiff. On the 9th December 1885, the plaintiff applied to execute the decree. The defendant resisted the application as being time-barred. He contended that the plaintiff having failed to deliver up the land in his possession within the time specified in the decree, he had lost his right to execute the decree. *Held*, that the application was not time-barred. The specification of the end of *Margashirsha* had merely the effect of postponing the operation of the decree till that time, and the plaintiff had three years from that date within which he might seek execution. The mention of a term when a particular right is to become enforceable, is not a condition precedent, whether the enforcement be otherwise subject to a condition or not. *NARAIN CHITKO JUVEKAR v. VITHUL PARSHOTAM*.

[I. L. R. 12 Bom 23]

2.—Art 179.—*Execution of decree determining rights of rural religious sects—Decree, whether executory or declaratory—How far a sect bound by decree against some of its members.* In a suit determined in 1840, in which various members of the Vadagalai sect residing in a certain village were plaintiffs and various members of the Tengalai sect residing in the same village were defendants, it was held that an image of a priest revered by the latter sect was not entitled to a place in a certain temple of the village, or to public worship in a certain street, or to procession in the streets of the village; and it was directed that, if the defendants continued to make the image an object of public worship, it should be removed. In 1838 various members of the Vadagalai sect, asserting that the members of the Tengalai sect had acted in contravention of the decree in the above suit, filed an execution-petition therein, praying that various members of the Tengalai sect be arrested, and "that the image of their priest, which they attempt to worship publicly, be removed until they obey the terms of the decree." It appeared that, in 1863, the District Magistrate had granted an application to restrain the Tengalais from acting contrary to the above decree. The execution-petition was dismissed by the District Court. *Held*, the petition was rightly dismissed, since the execution of the decree was barred by limitation, and the decree, if it was capable of execution at all, could not be executed against the parties to the present petition. *SADAGOPACHARI v. KRISHNAMACHARI*.

[I. L. R. 12 Mad. 356]

LIMITATION ACT (XV OF 1877), Art. 179  
—continued.

(1) PERIOD FROM WHICH LIMITATION  
RUNS—continued.

(b) CONTINUOUS PROCEEDINGS.

3—Art 179.—*Execution of decree—Arrears of Rent, Decree for—Beng. Act VIII of 1869 s. 58—Application for execution—Suspended proceedings, Effect of* ] *G* obtained an *ex-parte* decree in 1882 for a sum less than Rs. 500 as arrears of rent. Execution was taken out on the 19th May 1885. On the 28th June *C*, the judgment-debtor, applied to have the decree set aside whereupon the application for execution was struck off. On the 21st November *C*'s application for a re-hearing was rejected. On the 3rd February 1886, *G* applied for the execution of his decree. *Held* that the decree-holder was entitled to execution, the application of the 3rd February being a continuation of the proceedings commenced on the 19th May, which had been suspended by the order of the Court of the 20th June. *CHANDRA PRODHAN v. GOPI MOHUN SHAHA*.

[I. L. R. 14 Calc. 385]

*CHANDRA KANT BANERJEE v. SURJI KANTO RAI CHOWDHURY*.

[I. L. R. 14 Calc. 387 note]

4.—Art 179.—*Decree—Execution—Attachment set aside—Time occupied in suing to declare property liable to attachment not excluded from computation* ] An application for execution of a decree having been made in 1880, certain land was attached as being the property of the judgment-debtor (deceased). His children thereupon claimed the land and the attachment was raised. Upon this, the judgment-creditor sued to establish his right to sell the land in execution and obtained a decree in 1882, which was confirmed on appeal in 1883. In 1885, the judgment-creditor again applied for attachment and sale of the same land. *Held* that the application was barred by limitation. *Basant Lal v. Batul Bibi*, I. L. R. 6 All 23, dissented from. *NARAYANA v. PAPPI BRAHMANI*.

[I. L. R. 10 Mad. 22]

(c) WHERE THERE HAS BEEN AN APPEAL.

5—Art 179.—*Appeal against part of decree—Execution against judgment-debtors who were not joined in the appeal.* By a decree of a Court of First Instance, dated the 16th August 1880, Rs. 15 260-5-6 was found due against *A*, and Rs. 20,099-2-6 against *A* and *B* jointly, the suit being dismissed as against two other defendants who were alleged to have been sureties. The plaintiff appealed against so much of this decree as dismissed the suit against the alleged sureties, not making either *A* or *B* parties respondents; this appeal was dismissed on the 1st May 1882. On the 27th April 1883 plaintiff applied for execution against *A* and *B*. *Held* that the application was barred under art. 179 of the Limitation Act. *RAGHUNATH PERSHAD v. ABDUL HYE*.

[I. L. R. 14 Calc. 28]

LIMITATION ACT (XV OF 1877), Art. 179  
—continued.

(1) PERIOD FROM WHICH LIMITATION  
RUNS—continued.

(c) WHERE THERE HAS BEEN AN APPEAL—  
concluded

6.—Art. 179.—*Presentation of appeal—Civil Procedure Code (Act XIV of 1882), s. 541—Execution of decree.* The words "appeal presented" in the Limitation Act, 1877, mean an appeal presented in the manner prescribed in s. 541 of the Code of Civil Procedure. The words "where there has been an appeal," in art. 179, cl. 2, of sch. II, of the Limitation Act, 1877, mean where a memorandum of appeal has been presented in Court. In execution of a decree against which an appeal has been presented, but rejected on the ground that it was after time, limitation begins to run from the date of the final decree or order of the Appellate Court. *AKSHOY KUMAR NUNDI v. CHUNDER MOHUN CHATHATI.*

[I. L. R. 16 Cal. 250]

7.—Art. 179.—*Appeal against whole decree by one defendant only—Execution of decree—Execution against judgment-debtor who did not appeal.* A plaintiff obtained on the 14th September 1881 a decree against two defendants, the decree as against the first defendant being one for partition; and as against the second defendant (who had set up a julkar right on the lands claimed to be partitioned, and had contended that partition could not be had, and had obtained a partial decree, but had been ordered to pay partial costs to the plaintiff), being one for costs. The first defendant alone appealed against this decree, but unsuccessfully, his appeal being dismissed on the 18th January 1884. The decree-holder applied for execution of his decree as against the second defendant for costs in December 1886: *Held* that the application was not barred, for that limitation ran from the 18th January 1884. *NUNDUN LAL v. RAI JOYKISHEN.*

[I. L. R. 16 Cal. 598]

8.—Art. 179.—*Appeal against part of decree—Execution against judgment-debtors whose interests were not sought to be affected by the appeal* In a suit for land against several defendants, plaintiff obtained, on 14th June 1884, a decree against the shares of defendants Nos. 3 and 4, the shares of defendants Nos. 5 and 9 being exonerated. The decree-holder appealed against that portion of the decree which exonerated the shares of defendants Nos. 5 and 9, defendants Nos. 3 and 4 being brought on to the record of the appeal as respondents. The appeal having been dismissed, the decree-holder applied on 20th October 1887 for execution against the shares of defendants Nos. 3 and 4: *Held*, the application for execution was barred by the Limitation Act, 1877, sch. II, art. 179. *MUTHU v. CHELLAPPA.*

[I. L. R. 12 Mad. 479]

LIMITATION ACT (XV OF 1877), Art. 179  
—continued.

(1) PERIOD FROM WHICH LIMITATION  
RUNS—concluded.

(d) WHERE THERE HAS BEEN A REVIEW.

9.—Art. 179.—*Rejection of application for review—Time during which review was pending—Application for refund of moneys levied under decree reversed on appeal.* Where a review of judgment has been applied for, and, after notice to the other side, refused, the period during which such application was pending cannot be excluded in computing the period of limitation for execution of the decree under art. 179 (3) of sch. II of the Limitation Act. *Semble.* An application for refund of moneys levied in execution of a decree subsequently reversed on appeal is not governed by art. 179 but by art. 178 of sch. II of the Limitation Act. *KURUPAM ZEMINDAR v. SADASIVA.*

[I. L. R. 10 Mad. 66]

(2) NATURE OF APPLICATION.

(a) GENERALLY.

10.—Art. 179.—*Execution of decree—Limitation—Effect of dismissal of application for execution duly made.* If an application for execution of a decree is duly made so as to satisfy the terms of art. 179, paras. 4 and 5, of sch. II of Act XV of 1877, but is dismissed, such dismissal does not prevent the application from furnishing a point of time for the beginning of a new term of limitation. *SHANKAR BISTO NADGIR v. NAR-SINGHRAO RAMCHANDRA.*

[I. L. R. 11 Bom. 467]

(b) IRREGULAR OR DEFECTIVE APPLICATIONS.

11.—Art. 179.—*Omission to describe the property to be attached.—Civil Procedure Code, 1882, s. 245—Limitation.* A decree-holder, on the 8th July 1885, applied for execution of a decree dated the 10th July 1873, omitting to set out specifically in such application a description of the immoveable property sought to be attached. On the 24th July he applied for and obtained one month's time to file a list of these properties; and on the 7th August, after filing the list, applied for the attachment and sale of such properties. The judgment-debtor contended that execution was barred by limitation: *Held*, that the omission to file on the 8th July the list describing specifically the properties sought to be attached, was a mere defect of description which could be remedied under s. 245 of the Code of Civil Procedure by allowing an amendment to be made; and further that the two applications of the 8th and 24th July should be considered as one entire application dating from the date of the 8th July. *Mahomed v. Abedoolah*, 12 C. L. R. 279, followed. *MACGREGOR v. TARINI CHURN SIRCAR.*

[I. L. R. 14 Cal. 124]

See the Full Bench Case of *ASGAR ALI v. TROILOKYA NATH GHOSE.*

[I. L. R. 17 Cal. 631]

LIMITATION ACT (XV OF 1877), Art 179  
—continued.

(2) NATURE OF APPLICATION—continued

(b) IRREGULAR OR DEFECTIVE APPLICATIONS—continued.

12—Art 179.—*Application for execution against wrong person—Decree against a minor—Application for execution against minor's mother personally, but not as his guardian.* On the 31st July 1879, a decree was passed against N, a minor, represented by his mother and guardian C. In December 1880 the first application for execution was made. Through mistake execution was sought against C herself, as 'widow of B,' and not as guardian of the minor N. That application was granted, and certain property belonging to the minor was attached. On the 29th November 1883, the second application for execution was made against the minor as represented by his guardian C. The present application for execution was made on the 3rd December 1884. This application was rejected as time-barred by the District Court on appeal, on the ground that the first application having been made against a wrong person, could not be taken into account; that, therefore, it could not keep the decree alive and that the present application was barred. *Held*, reversing the decision of the lower Court, that the decree holder ought not to be deprived of the fruit of his decree on account of a technical defect in his application of 1880. The minor was substantially and for all practical purposes represented by his mother. *HARI v. NARAYAN.*

[I. L. R. 12 Bom. 427]

13—Art 179.—*Application for execution withdrawn by decree-holder—Civil Procedure Code, ss. 373, 374, 647.* S. 647 of the Civil Procedure Code makes ss. 373 and 374 applicable to proceedings in execution of decree. *Kifayat Ali v. Ram Singh*, I L R. 7 All. 359, and *Pirjade v. Pirjade*, I. L. R. 6 Bom. 681, followed. *Tara Chand Megraj v. Kashinath Trimbak*, I L R 10 Bom. 62, and *Ramanandan Chetti v. Periatambi Shervar* I. L. R. 6 Mad. 250, dissented from. A first application for execution of a decree was withdrawn by the decree-holder on account of formal defects, the Court returning the application, but without giving permission to the decree-holder to withdraw with leave to take fresh proceedings. *Held*, that, with reference to the second paragraph of s. 373 read with s. 647 of the Code, the decree-holder was precluded from again applying for execution; but that, even assuming that permission to apply again could be inferred from the action of the Court in returning the application, s. 374 was applicable so as to make a subsequent application presented five years after the decree barred by limitation, with reference to art 179 of the Limitation Act. *SARJU PRASAD v. SITA RAM.*

[I. L. R. 10 All. 71]

14.—Art 179.—*Application for relief outside the decree—"Step in aid of execution"* The application for execution contemplated in cl. (4) of art 179 of sch II of the Limitation Act

LIMITATION ACT (XV OF 1877), Art. 179  
—continued.

(2) NATURE OF APPLICATION—concluded.

(b) IRREGULAR OR DEFECTIVE APPLICATIONS—concluded.

(XV of 1877) must be one made in accordance with law, and asking to obtain some relief given by the decree, and to obtain it in the mode that the law permits. A decree provided that the defendant should pay the plaintiff Rs. 156 within one month, and that on receipt of this sum the plaintiff should execute a deed of sale to the defendant. The decree was dated 29th January 1881. The first application for execution was made on the 24th January 1884, but dismissed for plaintiff's default. The plaintiff made a second application dated 22nd January 1887, praying to be put in possession of a certain house which was not awarded by the decree. This application was rejected. On the 23rd June 1887, the plaintiff made a third application for execution of the decree. *Held*, that this application was barred by limitation, having been made more than three years after the date of the first application. The intermediate application was not an application for execution, nor a step in aid of execution, of the decree, inasmuch as it asked for what the decree did not give. It could not, therefore, keep the decree alive under art. 179, sch II of the Limitation Act (XV of 1877). *PANDARINATH BAPUJI v. LILACHAND HATIBHAI.*

[I. L. R. 13 Bom. 237]

(3) STEP IN AID OF EXECUTION.

(a) GENERALLY.

15.—Art. 179.—*Application for execution by benamidar—Application not in accordance with law.* In a suit brought for a declaration of the plaintiff's right to hold certain property free of a mortgage decree, which had been purchased by one G on 13th August 1878, in execution of which decree several applications were made to have the name of G substituted for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree, or any order made for substitution of the name of G until 18th July 1885, when after notice under s. 232 of the Civil Procedure Code G's name was substituted as decree-holder, and execution taken out against the mortgaged property. G was found to be only a *benamidar* so far as his purchase of the mortgage-decree was concerned: *Held*, that G being merely a *benamidar*, the applications made by him for execution of the decree and for substitution of his name as decree-holder under s. 232 of the Civil Procedure Code were not applications made in accordance with law within the terms of art. 179 of the Limitation Act 1877, so as to prevent the operation of the Law of Limitation. Execution of the mortgage-decree was therefore barred. *Abdul Kureem v. Chukhun*, 5 C. L. R. 253; *Denonath Chuckerbutty v. Lalit Coomar Gangopadaya*, I. L. R. 9 Calc. 633; 12 C. L. R. 145; and *Mis. Ap. 453 of 1885*, unreported, followed. *Purna Chandra Roy v. Abheya Chandra Roy*, 4 B. L. R. Ap. 40, and

LIMITATION ACT (XV OF 1877), Art. 179  
—continued.

(3) STEP IN AID OF EXECUTION—continued.

(a) GENERALLY—concluded.

*Nadir Hossein v Pearoo Thorildarinee*, 14 B L R. 425, dissented from. The mortgage-decreee having become inoperative, the plaintiff A. though a purchaser *pendente lite*, was no longer bound by it, and the defendant therefore was not entitled to enforce the mortgage as against him. *GOUR SUNDER LAHIRI v. HEM CHUNDER CHOWDHURY GOUR SUNDER LAHIRI v. HAFIZ MAHAMED ALI KHAN*.

[I. L. R. 16 Calc. 355]

(b) RESISTANCE TO LEGAL PROCEEDINGS.

16.—Art 179.—*Application to take a step in aid of execution—Opposing application to set aside sale in execution of decree* [The appearance of a decree-holder by his pleader to oppose an application made by the judgment-debtor to set aside a sale in execution of the decree is not an application within the meaning of art. 179 of sch. II of the Limitation Act to take a step in aid of execution. The application contemplated by that article is an application to obtain some order of the Court in furtherance of the execution of the decree. *UMESH CHUNDER DUTTA v. SOONDER NARAIN DEO*.

[I. L. R. 16 Calc. 747]

(c) SUITS AND OTHER PROCEEDINGS BY DECREE-HOLDER.

17.—Art. 179.—*Execution of decree—Certificate by decree-holder of payment out of Court—Civil Procedure Code, ss 257, 258* [Held, following *Tarini Das Bandyopadhyaya v. Bishtoo Lal Mukhopadaya*, I. L. R. 12 Calc. 608. (TYRRELL, J. doubting), that an application made by a decree-holder, the object of which is that the receipt of certain sums of money paid out of Court may be certified, is a "step in aid of execution," such as will keep the decree alive, within the meaning of the Limitation Act (XV of 1877), sch. II. No. 179 (4). *Gansham v. Makha*, I. L. R. 3 All. 320 referred to. *MUHAMMAD HUSAIN KHAN v. RAM SARUP*.

[I. L. R. 9 All. 9]

18.—Art 179.—*Application to sell attached property subject to a mortgage*. [A judgment-creditor applied on the 22nd May 1882, for execution of a decree, dated 7th November 1881, and certain property of the judgment-debtors was attached. Thereupon a claim was preferred by a mortgagee, and on the 10th August 1882, the judgment-creditor admitted the claim and applied that the property might be sold subject to the claimant's mortgage, and the proceeds if any paid over to him in part satisfaction of his decree. On the 20th June 1885, another application was made for execution, and on the 29th November 1886 a third application was made. To the latter application objection was taken, and it was contended that the decree was barred by reason of more than

LIMITATION ACT (XV OF 1887), Art. 179  
—continued.

(3) STEP IN AID OF EXECUTION—concluded.

(c) SUITS AND OTHER PROCEEDINGS BY DECREE-HOLDER—concluded.

three years having elapsed between the application of the 22nd May 1882, and that of the 20th June 1885. Held, that the application of the 10th August 1882, by the judgment-creditor to allow the sale of attached property subject to the mortgage of the claimant was "a step in aid of execution of the decree" within the meaning of art 179 sch. II, Act XV of 1877, and that execution of the decree was therefore not barred. *LAL-RADDI MULLICK v. KALA CHAND BERA*.

[I. L. R. 15 Calc. 363]

19.—Art 179.—*Application for copy of decree*. [The application by a decree-holder for a copy of a decree with intent to apply for execution is not a step in aid of execution within the meaning of cl 4 of art. 179 of sch. II of the Limitation Act, 1871. *GOPILANDHU v. DOMBURU*.

[I. L. R. 11 Mad 336]

(4) ORDER FOR PAYMENT AT SPECIFIED DATE.

20.—Art 179.—*Application for execution of decree—Order on petition to pay by instalments—Civil Procedure Code, s. 210* [An application to execute a decree dated 30th August 1880, was made on 25th May 1881. While the application was pending, the judgment-debtor presented a petition to be allowed to pay the debt by instalments, and the decree-holder consenting to this, the Court made the following orders "According to the application of both parties it is ordered that the case be struck off, and the decree be returned." The details of the instalments mentioned in the petition were endorsed on the decree by one of the *amlahs* of the Court, but it did not appear when or by whose order this was done. In an application for execution in accordance with this arrangement made on 7th March 1885. Held, that the order was not one recognising or sanctioning the arrangement within the meaning of s 210 of the Civil Procedure Code, inasmuch as the Court at the time it made the order had no power to make any order for instalments, any application for that purpose being then barred by art. 175 of Act XV of 1887. The application for execution was, therefore, barred under art. 179 as not having been made within three years of 25th May 1881. *Jhoti Sahu v. Bhuvan Gar*, I. L. R. 11 Calc. 143, dissented from. *ABDUL RAHMAN SODAGUR v. DULLARAM MARWARI*.

[I. L. R. 14 Calc. 348]

21.—Art. 179.—*Execution of decree—Maintenance—Decree for payment of an annuity without specifying date of payment—Default in paying such annuity—Enforcement of payment by execution of decree—Computation of time*. [A Hindu widow obtained a decree, dated 7th

# LIMITATION ACT (XV OF 1877), Art. 179 —continued.

## (4) ORDER FOR PAYMENT AT SPECIFIED DATE—concluded.

September 1865, directing that a sum of Rs 36 should be paid to her every year on account of her maintenance. The judgment-debtors paid the annuity for some years. In 1881 the widow applied for execution of the decree and recovered three years' arrears. In 1885 payments having again fallen into arrear, she again applied for execution, but her application was rejected as barred by limitation, having been made more than three years after the last preceding application. *Held*, that the application was not time-barred. The decree created a periodically recurring right. Though no precise date was specified in the decree for payment of the annuity, the judgment-debtors were liable to make the payment on the day year from its date, and thenceforward on the corresponding date year after year. The decree was, as to each year's annuity, to be regarded as speaking on the day upon which for that year it became operative, and separately for each year. The right to execute accruing on a particular day, limitation should be computed from that day should the judgment-debtor fail to obey the order of the Court. *Sukharum Dikshit v. Ganesh Sutha*, I L R 3 Bom 193, followed *Sabhanatha Dikshitar v. Subba Lakshmi Ammal*, I L R 7 Mad 80 and *Yusuf Khan v. Sardar Khan*, I L R 7 Mad 83, distinguished. *LAKSHMI BAI BAPUJI OKA v. MADHAVRAV BAPUJI OKA*.

[I L R. 12 Bom 65]

## (5) JOINT DECREES

### (a) JOINT JUDGMENT-DEBTORS

22.—Art. 179—*Death of judgment-debtor—Execution—Execution against one of several representatives of a sole debtor—Death of such representative—Subsequent application for execution against other representatives—Practice*.] An application for execution against one of the representatives of a sole judgment-debtor saves limitation against another representative. Accordingly where the plaintiff, on the death of his sole debtor, sued out execution on the 18th June 1881, under a *darkhast*, No. 718 of 1878, against V, one of the three sons of the debtor, and the execution-proceedings continued till the death of V in March, 1884, whereupon the plaintiff applied on the 28th May 1884, to put M and N, the brothers of V on the record as his representatives. *Held*, that the application was not too late against M and N regarded as joint representatives with their brother V of their father. The original judgment-debtor *Ramany Sewak Singh v. Hingu Lal*, I L R. 3 All. 517. *KRISHNAJI JANAYDAN v. MURARRAY*.

[I L R. 12 Bom. 48]

—, Art 180.—*Judgment entered up under s 86 of the Indian Insolvent Act (Stat. 11 and 12 Vic. cap 21) Execution of such judgment.* C was adjudicated an insolvent in October 1866, and on

# LIMITATION ACT (XV OF 1877), Art. 180 —continued.

the 19th August 1868, judgment was entered up against him under s 86 of the Indian Insolvent Act (Stat. 11 and 12 Vic. cap 21) for Rs. 16 40 6 48. In 1886 it was ascertained by the Official Assignee that certain property belonging to the insolvent's estate was available for the creditors of the estate, and on his application an order for execution against the said property was made on the 5th April 1886, by the Insolvent Court under s. 86 of the Insolvent Act. It was contended that execution was barred by limitation. *Held*, that execution on the judgment was not barred. *Per SARGENT, C. J*—The policy of the Indian Insolvent Act is that the future property of the insolvent should be liable for his debts. That intention would be to a great extent defeated, if judgment entered up by the order of the Insolvent Court under s. 86, which is the machinery provided for effecting that object, could only be executed within a limited time. Limitation Acts should not be deemed applicable to judgments entered up under s. 86 unless their language clearly requires it. A judgment entered up under s. 86 of the Insolvent Act, although a judgment of the High Court is not a judgment entered up in the exercise of the ordinary original civil jurisdiction, nor could the right to enforce the judgment be lawfully released by any person, and therefore art 180 of the Limitation Act did not apply. *Per WEST, J*.—Formerly in England as well as in India the policy of the Insolvent Acts was to make the insolvent perpetually responsible. In England, however, by Statute 32 and 33 Vic. cap 83, bankruptcy was substituted for insolvency, and all pending cases of insolvency were ordered to be closed within prescribed periods. In construing that statute it has been declared that after the given time the insolvent was free from all responsibility, and that after his death his estate was free also. Thus the lien on an insolvent debtor's whole future property has disappeared from English law: but this has been effected by direct legislation. In India there has been no legislation with regard to judgments of the Insolvent Court, but it has been decided that such a judgment is to be deemed a decree of the High Court, and executed as such. It must, therefore, be subject to the same rules as other decrees of the High Court in the absence of any special exception. Art 180 of the Limitation Act is, therefore, applicable to such a judgment. The Insolvent Act did not contemplate its being entered up otherwise than as a judgment of the Supreme Court, and, as such, it ranked as a judgment of a chartered Court in the exercise of the ordinary original civil jurisdiction. The same description may be applied to it now: and hence the execution is limited, as in the case of other judgments and decrees of the High Court. The principle of perpetual liability to execution can no longer be deemed a principle. The English law has discarded it: the Indian law has made all judgments subject to limitation, and amongst them judgments of the



# LIMITATION ACT (XV OF 1877), Art 180 —concluded.

Insolvent Court. Article 180 therefore applies. But the right to enforce the judgment in the present case did not accrue to the Official Assignee until the order of the Insolvent Court to take out execution was made. That order was not made until April, 1886, and, therefore, the right to execution which arose on the date of that order, was not barred by art. 180 of the Limitation Act XV of 1877. IN THE MATTER OF CANDAS NARRONDAS OFFICIAL ASSIGNEE (TURNER) v. PURSHOTAM MUNGALDAS NATHUBHOY

[I. L. R. 11 Bom. 138]

*Held* (on appeal to the Privy Council)—The Limitation Act XV of 1877, sch II, art. 180, applies to a judgment of a Court for the relief of insolvent debtors entered up in the High Court, in accordance with s. 86 of the Statute 11 and 12 Vic., cap. 21. Although a Court held under the latter statute determines the substance of the questions relating to the insolvent's estate, the proceedings in execution and the judgment are the High Court's. The judgment is entered up in the ordinary course of the duty cast upon the High Court by the law, not by way of special or extraordinary action, but in the exercise of its ordinary original civil jurisdiction. The latter expression in the charter of 28th December 1865, being opposed to the "extraordinary" jurisdiction, which the High Court may assume, at its discretion, upon special occasions and by special orders, includes all such jurisdiction as is exercised by the High Court in the ordinary course of law without any step taken to assume it. When an order has been made, under s. 86 of the Statute 11 and 12 Vic., cap. 21, that execution be taken out, a present right accrues to the Official Assignee to apply for it; and, therefore, art. 180 of sch. II assigning, in reference to judgments of High Courts exercising ordinary original jurisdiction, a starting point of time depending on the accrual of the right to enforce them, is the article applicable. IN THE MATTER OF CANDAS NARRONDAS; NAVIVAHU v. TURNER.

[I. L. R. 13 Bom. 520]

[L. R. 16 I. A. 165]

## LIS PENDENS.

1.—*Auction-purchaser bound by lis pendens.* *K* brought a suit against *P* to recover possession of certain land. Whilst that suit was pending in the Court of First Instance the right, title, and interest of *P* in the land were sold in execution of a decree against him at the instance of a judgment-creditor and purchased by *G*. Subsequent to *G*'s purchase *K*'s suit was dismissed by the Court of First Instance; but *K* appealed, and the Appellate Court reversed the decree of the Court below and gave judgment in *K*'s favor. *G*, who was not made a party to the appeal, thereupon instituted a suit against *K* to eject him and obtained possession of the land: *Held*, that the

## LIS PENDENS—continued.

doctrine of *lis pendens* applied, and that *G* was not entitled to maintain the suit. *Held*, further, that it made no difference to the application of the doctrine that the decree of the Court of First Instance was in favor of *G*'s predecessor in title, for the decree was open to appeal, and the decree in the suit was that passed by the Appellate Court, the proceedings in the Appeal Court being merely a continuation of those in the suit; and as *G*'s purchase was made whilst that suit was pending, *G* was still bound by the decree of the Appellate Court. *Anundo Moyee Dassce v. Dhondro Chunder Mookerjee*, 14 Mooie's I. A. 101; 8 B. L. R. 122; 16 W. R. P. C. 19, distinguished. GOVIND CHUNDER ROY v. GURU CHURN KURMOKAR.

[I. L. R. 15 Calc. 94]

2.—*"Continuous suit"*—*Transfer of Property Act (IV of 1882), s. 52* *A*, on the 9th September 1883, sold certain immoveable property to *S* for Rs. 98-12 by means of a conveyance which was not registered. On the 29th September 1883 *S* instituted a suit against *A* on that conveyance to obtain possession of the property. On the 5th October 1883, when that suit was pending, but before the summons was served on *A*, *A* by a duly registered conveyance sold the same property to *R* for Rs. 198-8. In the suit filed by *S* *A* filed a written statement, but did not further contest it, and *S* obtained a decree and got possession of the property. In a suit subsequently brought by *R* to obtain possession of the property from *S* upon the ground that his registered conveyance was entitled to priority over the unregistered document of *S*, it was contended that, *R*'s purchase having been made whilst *R*'s suit was pending his title could not prevail against that of *S*: *Held*, that the doctrine of *lis pendens* did not apply to the facts of the case, as at the time of *R*'s purchase there was no contentious suit or proceeding in existence, the summons in *S*'s suit not having been then served. RADHASYAM MOHAPATRA, *alias* MADUN MOHUN MOHAPATRA v. SIBU PANDA.

[I. L. R. 15 Calc. 647]

3.—*Mortgage—Purchase, without notice, of land declared liable for mortgage-debt by a decree* *In 1864 A mortgaged four shops to the plaintiff's father. Subsequently, however, A's father brought a suit, and obtained a decree declaring that two of these shops were not included in the mortgage. In 1869 the plaintiff's father, (the mortgagee), sued A upon the mortgage, and prayed in the same suit that certain other land not included in the mortgage-deed might be held liable for his debt in lieu of the two shops. He obtained a decree on the 29th November 1869, which ordered Rs. 1,291 to be paid "on the liability of the land in the plaint mentioned." No steps were taken by the plaintiff to execute this decree for seven years. On the 18th August*



**LIS PENDENS**—*concluded.*

1876, *A* sold to the defendant, by a registered deed of sale, a portion of the land so declared liable, and the defendant entered into possession without notice of the plaintiff's decree. The plaintiff now sued to obtain a declaration that the land was liable to be sold in execution of his decree of 1869. Both the lower Courts dismissed his suit. On appeal to the High Court: *Held*, that the defendant was a purchaser for value, without notice of the plaintiff's decrees and took the land unaffected by the plaintiff's equitable lien created by the decree. There was no *lis pendens*. The *litis contestatio* had ceased. The decree, which was a final one, had terminated the litigation between the parties, and now only remained to be executed. There was, moreover, in this case the further circumstance that nothing had been done in the suit after the decree and during the seven years which elapsed between it and the defendant's purchase in 1876. **VENKATESH GOVIND v. MARUTI.**

(I. L. R. 12 Bom. 217)

4—*Transfer of Property Act (IV of 1882), s. 52—When a suit becomes contentious—Priority of registered mortgage* ] As soon as the filing of the plaint is brought to the notice of the defendant, the proceeding becomes contentious, and any alienation subsequent to that is subject to the doctrine of *lis pendens*. A mortgage was executed on 25th June and was registered. On the same day, a prior mortgagee filed a suit against the mortgagors on an unregistered mortgage of the same land: he obtained a decree and attached the mortgage property. *Held*, that the registered mortgagee was entitled to priority and his mortgage was not affected by the rule of *lis pendens*. **ABBOY v. ANNAMALAI.**

(I. L. R. 12 Mad. 180)

5—*Transfer of Property Act (IV of 1882), s. 52—Partition suit for—Decree by consent.* ] Pending a suit for partition of land, &c, two of the parties to the suit sold part of the land in question to a stranger who was not brought on to the record. After the execution of the sale-deed the parties to the suit entered into a compromise and a decree was passed by consent accordingly. In a suit by the purchaser for possession of the land sold to him: *Held*, the purchaser was not bound by the decree passed by consent. **VYTHI-NADAYAN v. SUBRAMANYA.**

(I L R 12 Mad. 439)

**LOAN.***See* LIMITATION ACT, 1877, ART. 59.

(I. L. R. 13 Bom. 338)

**LUNATIC.**

*Civil Procedure Code, 1882, s. 453—Right to sue—Suit by a next friend of a lunatic—Adjudication of lunacy under Act XXXV of 1858.* ] *A*

**LUNATIC**—*continued.*

suit for partition was brought by *A* as next friend of *B*, a lunatic. Subsequent to the institution of the suit, *B* was adjudged to be of unsound mind under Act XXXV of 1858, and *A* was appointed a manager of the lunatic's estate: *Held*, that *A* had no right to sue, as next friend of the lunatic, under Chapter XXXI of the Code of Civil Procedure (Act XIV of 1882). The provisions of that chapter apply only in cases where there has been an adjudication of lunacy under Act XXXV of 1858 previously to the institution of the suit: *Held*, also, that, independently of the provisions of Chapter XXXI of the Code of Civil Procedure, on principles of equity, *A* had no right to sue in respect of the immoveable property of a lunatic: *Held*, further, that the adjudication of lunacy under Act XXXV of 1858 and *A*'s appointment as manager of the lunatic's estate subsequent to the institution of the suit did not cure the original invalidity of his proceedings in the suit. **TUKARAM ANANT JOSHI v. VIREAL JOSHI.**

(I. L. R. 13 Bom. 656)

**MADRAS ABKARI ACT (MADRAS ACT I OF 1886)**

—, ss. 9, 11, 55.] Under the Madras Abkari Act 1886, a permit is not necessary where toddy is carried from the licensee's trees to his shop within the limits of his farm, or where the licensee having a general permit, the persons carrying the toddy are in his employment. **QUEEN-EMPRESS v. SAMBOJI.**

(I. L. R. 11 Mad. 472)

—, ss. 29, 55 (c) — *Rule forbidding delegation by licensee of authority to draw toddy* ] Under s. 29 of the Madras Abkari Act, the Governor in Council made and published a rule on 8th February 1887, whereby it was declared that no licensee could delegate his authority to draw toddy, unless under exceptional circumstances, to any person. *B*, the son of a licensee drew toddy with his father's permission. He was convicted under s. 55 (c) of the Act: *Held*, that the rule was *ultra vires* and the conviction bad. **QUEEN-EMPRESS v. BELLARA.**

(I L R 11 Mad. 250)

—, ss. 55 (a), 59—*Rules notified by Government under Abkari Act—Rules for "immediate" removal of toddy* ] Toddy-drawers failing to remove their toddy to a shop or distillery "within a reasonable time" after it is drawn, are punishable under s. 55 (a) of the Abkari Act, though their licenses do not refer to the Government notification, made under the Act, prescribing its immediate removal. **QUEEN-EMPRESS v. JAMU.**

(I. L. R. 12 Mad. 450)

**MADRAS ACT 1864—II.**• *See* MADRAS REVENUE RECOVERY ACT,

**MADRAS ACT 1865—VII.**

—, s. 1.—*Water-cess—Overflow from Government works—Water supplied or used for purposes of irrigation.* Surplus water from Government irrigation works flowed on to land of the plaintiffs which they were in the habit of cultivating with dry crops and stagnated there rendering such cultivation impossible. The plaintiffs did not want the water to flow on to their land but being unable to exclude it planted paddy as the best crop to cultivate under the above circumstances. Water-cess was levied on the plaintiffs under color of Act VII of 1855. *Held*, the water was not supplied or used for purposes of irrigation within the meaning of Act VII of 1865, s. 1. and the plaintiffs were not liable to pay the water-cess. **VENKATAPPAYYA v. COLLECTOR OF KISTNA**

[I. L. R. 12 Mad 407]

—, 1865—VIII.

*See* MADRAS RENT RECOVERY ACT.

—, 1869—III.

*See* CONTEMPT OF COURT—PENAL CODE, s 174.

[I L R 12 Mad. 297]

*See* SERVICE OF SUMMONS

[I L R 11 Mad 137]

—, 1873—III. s 12.

*See* MUNSIF, JURISDICTION OF.

[I L. R. 11 Mad 110]

—, 1878—V. s. 123.

*See* MADRAS MUNICIPAL ACT.

[I. L. R. 10 Mad. 38]

—, 1882—V.

*See* MADRAS FOREST ACT

—, 1884—I.

*See* MADRAS MUNICIPAL ACT (I OF 1884).

—, 1884—IV

*See* MADRAS DISTRICT MUNICIPALITIES ACT.

—, 1886—I.

*See* MADRAS ABKARI ACT.**MADRAS BOAT RULES.**

*Boat Rules in Madras Ports—Refusal to carry cargo without reasonable excuse.* By the Boat Rules of a certain port it was provided, (1) that all licensed boats must carry such number of passengers and quantity of goods as should be

**MADRAS BOAT RULES—concluded.**

expressed in the license; and (2) that the owner of a licensed boat who should refuse to let his boat on hire without assigning reasonable and satisfactory grounds for such refusal should be liable to a penalty. *Held*, that a refusal by a person in charge of a licensed boat to receive goods on board unless a tallyman was sent with them, on the ground that he could not count was not a reasonable and satisfactory cause. **QUEEN-EMPRESS v. KAMANDU.**

[I L. R. 10 Mad. 121]

**MADRAS BOUNDARY ACT (XXVIII OF 1860.)***See* LIMITATION ACT 1877, s 14

[I L. R. 11 Mad 309]

*See* MINOR—REPRESENTATION OF MINOR IN SUITS.

[I. L. R. 11 Mad 309]

*See* RES JUDICATA—PARTIES—SAME PARTIES OR THEIR REPRESENTATIVES.

[I. L. R. 11 Mad. 309]

—, ss 21, 25, 28—*Appeal, Nature of—Arbitrator's award—Duty of Collector—Irregularity in procedure* The appeal allowed by s 28 of the Madras Boundary Act XXVIII of 1860, is one from a decision recorded in the presence of the parties and duly intimated to them as required by s 25 of the said Act. The omission by the Collector to pass a decision in accordance with an arbitrator's award and to furnish a copy to the parties as required by s. 21 of the Boundary Act is fatal to the award. The power given by s 21 being a judicial power, a Collector must exercise his independent judgment and should not refer the award for acceptance to the Board of Revenue and Government, nor should he adjudicate when, as agent to the Court of Wards, he represents one of the rival claimants. **SESHAMA v SANKARA.**

[I. L. R. 12 Mad. 1]

**MADRAS CIVIL COURTS ACT (MADRAS ACT III OF 1873), s. 12.***See* MUNSIF, JURISDICTION OF.

[I. L. R. 11 Mad. 140]

*See* VALUATION OF SUIT—SUITS

[I. L. R. 11 Mad. 140, 266]

—, s 16—*Suit by reversioner to recover land granted to Hindu widow—Presumption as to death of widow from absence, not a question of succession or inheritance.* Plaintiff sued as reversioner to recover certain land granted in lieu of maintenance to a Hindu widow. The widow had left her village sixteen years before suit and had not been heard of since. *Held*, that the question whether a presumption arose that the widow was dead was not a question regarding succession or inheritance

**MADRAS CIVIL COURTS ACT (MADRAS ACT III OF 1873), s. 16—concluded.**

to be decided according to Hindu law within the meaning of s. 16 of the Madras Civil Courts Act, 1873. *BALAYYA v. KISTNAPPA*.

[I. L. R. 11 Mad. 448]

**MADRAS DISTRICT MUNICIPALITIES ACT (MADRAS ACT IV OF 1884)**

—, s. 173—*Obstruction of public street* ] S. 173 of the District Municipalities Act, 1884 (Madras), provides that no person shall deposit anything so as to cause obstruction to the public in any street without the written permission of the Municipal Council. *Held*, that the depositing by any person of an article in the street without the permission of the Municipal Council amounted to an obstruction. *QUEEN-EMPRESS v. BOLAPPA*

[I. L. R. 11 Mad. 343]

—, s. 198 and ss 191, 192, 193 —*Butchers' licenses—Private market, meaning of* ] A Municipal Council, under the Madras District Municipalities Act, refused to give licenses to certain persons keeping butchers' shops not used as slaughter-houses except on the condition that they should remove to a fixed market. *Held* that butchers' shops are not 'private markets' within the meaning of the Act and that the action of the Municipal Council was *ultra vires*. *QUEEN-EMPRESS v. BAODUR BHAI*.

[I. L. R. 10 Mad. 216]

**MADRAS FOREST ACT (MADRAS ACT V OF 1882).**

—, s. 6.—*Tree patta—Occupier of land* ] The holder of a tree patta is a *known occupier of land* within the meaning of s. 6 of the Madras Forest Act. REFERENCE UNDER THE MADRAS FOREST ACT

[I. L. R. 12 Mad. 203]

—, s. 10

See APPEAL—MADRAS ACTS.

[I. L. R. 11 Mad. 309]

See JURISDICTION OF CIVIL COURT—STATUTORY POWERS, PERSONS WITH.

[I. L. R. 12 Mad. 105]

See MUNSHI, JURISDICTION OF.

[I. L. R. 12 Mad. 105]

See SPECIAL APPEAL—ORDERS SUBJECT TO APPEAL.

[I. L. R. 12 Mad. 309]

—, s. 14 and s. 39 —*Limitation Act (VI of 1877), ss 5, 6—Period of Limitation—Power to excuse delay* ] Delay in preferring an appeal under the Madras Forest Act beyond the period

**MADRAS FOREST ACT (MADRAS ACT V OF 1882) s. 14—concluded.**

prescribed by s. 14 of that Act, may be excused under s. 5 of the Indian Limitation Act, 1877. REFERENCE UNDER MADRAS FOREST ACT.

[I. L. R. 10 Mad. 210]

1—s. 21.—*Tree patta—Trespass* ] The holder of a patta of certain trees on land which had been declared a reserved forest was convicted of trespass under the Madras Forest Act on proof that he continued to gather the produce of the trees. *Held*, that the conviction was bad for want of proof that the petitioner's claim had been duly disposed of, or that he had not preferred his claim within the period required by law. *QUEEN-EMPRESS v. RAMI REDDI*.

[I. L. R. 12 Mad. 226]

2—s. 21 and ss 4, 7, 16 —*Making fresh clearing, Offence of—Omission of order prohibiting felling of trees pending rehearing of a case* ] A claim put forward to part of certain land notified for reservation under the Madras Forest Act originally rejected, was held to be valid by the District Court on appeal. The High Court set aside the decision of the District Court and directed that the appeal be reheard. Pending the rehearing, a lessee of the claimant felled trees on the land and was charged under s. 21 (a) with the offence of making a fresh clearing prohibited by s. 7 of the Act. The Magistrate acquitted him on the ground that there was no order in writing served on him by the Forest Department prohibiting him from felling trees pending the rehearing. *Held*, that the acquittal was wrong. *QUEEN-EMPRESS v. NARASIMMAYYA*.

[I. L. R. 12 Mad. 338]

—, Rule 12 of rules under Forest Act—*Removal of leaves from classified trees* ] The mere removal of leaves from classified trees on unreserved land does not constitute a breach of Rule 12 of the Madras Forest Act, 1882. *QUEEN-EMPRESS v. SIVANNA*.

[I. L. R. 11 Mad. 139]

**MADRAS MUNICIPAL ACT (MADRAS ACT OF 1878)**

—, s. 123 —*Tax on buildings—Hospital built by Government—Standard of hypothetical rent* ] Under s. 123 of the City of Madras Municipal Act, the gross annual rent at which a building might reasonably be expected to let from month to month, or from year to year, is, for the purpose of assessment to house-tax under the Act, to be deemed to be the annual value of such building. The Lying-in-Hospital at Madras, built and supported by Government, having been assessed by the President of the Municipality as on a rental of Rs 1,000 a month, the Magistrates on appeal reduced the assessment, finding that Rs 7,920 would be a reasonable rent, having regard to the letting value of the buildings in the neighbour-

**MADRAS MUNICIPAL ACT (MADRAS ACT V OF 1878), s 123—concluded.**

hood; but, at the request of the Municipality, they referred the following question to the High Court —Whether (as contended by Government) the property in question should be valued and assessed on the rent, which, on the property being offered in the open market without reserve, a person desirous of securing it would have to pay; or whether (as contended by the Municipality) it should be valued and assessed on the highest reserve rent which an owner of the property offering it in the open market would reasonably demand, and below which sum he would not be willing to let: *Held*, that the standard value was what the hypothetical tenant requiring the building for use as a hospital would be willing to pay, rather than rent a less suitable building and adapt it to his requirements at his own expense, and that in this sense the contention of the Municipality was correct. SECRETARY OF STATE *v.* MADRAS MUNICIPALITY.

[I. L. R. 10 Mad. 38]

—, ss. 317, 318—*President of Municipal Commissioners—Discretion as to necessity of cleansing tank likely to prove injurious to health* [By s 317 of the City of Madras Municipal Act, 1878, the President of the Municipal Commissioners was invested with a discretion as to the necessity of cleansing and filling up tanks and wells and draining of stagnant water likely to prove injurious to the health of the neighbourhood, and by s. 318 was empowered on neglect of the owner to comply with a requisition to do the necessary work, to get the work done and to recover the costs in the manner provided for the collection of taxes. No appeal was allowed by the Act against the President's decision: *Held*, in a suit by the Municipal Commissioners to recover from the defendants the cost of draining and cleansing a tank, that it was not open to the defendants to prove that the tank was not likely to prove injurious to the health of the neighbourhood. MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS *v.* PARTHASARADI.

[I. L. R. 11 Mad. 341]

**MADRAS MUNICIPAL ACT (MADRAS ACT I OF 1884).**

—, s. 103, and sch. A, class 1 (A), (B)—*Exercise of calling—Investment of funds of society—Benefit Society.* [The business of investing the funds of a society for interest is a calling within the meaning of s. 103 of the Madras Municipal Act, 1884. A society established to provide by the subscriptions of its members for pensions for their widows and children is a benefit society within the meaning of sch. A, class 1 (A) of the said Act. Where the context discloses a manifest inaccuracy, the sound rule of construction is to eliminate the inaccuracy and to execute the true intention of the legislature. JENNINGS *v.* PRESIDENT, MUNICIPAL COMMISSION, MADRAS.

[I. L. R. 11 Mad. 253]

**MADRAS MUNICIPAL ACT (MADRAS ACT I OF 1884)—concluded.**

—, sch. A.—*Liability of Mutual Assurance company to taxation* [The investment for interest of the funds of a Mutual Insurance Company by its Directors constitutes "carrying on business for gain" and the premia paid by insurers and the profits from investments thereof constitute the "capital" of the company within the meaning of sch. A of the City of Madras Municipal Act, 1884. MADRAS EQUITABLE ASSURANCE COMPANY *v.* PRESIDENT, MUNICIPAL COMMISSION, MADRAS.

[I. L. R. 11 Mad. 238]

**MADRAS REGULATION.**

—, 1802—XXV. s 11.

*See* MUNSIF, JURISDICTION OF.

[I. L. R. 12 Mad. 188]

—, 1802—XXIX ss. 5, 7, 10, 16, 8.

*See* MUNSIF, JURISDICTION OF.

[I. L. R. 12 Mad. 188]

1.—s. 7—*Office of karnam in a zemindari village, Succession to—Female claimant—Incapacity of next heir.* [The karnam of a zemindari village having died, leaving a widow his heir, the zemindar appointed her to the office of karnam. The nearest male sapinda of the deceased karnam (from whom he was divided) sued to establish his right to the office of karnam. *Held* (1) that a woman cannot hold the office of karnam. *Held* further (2) that when the immediate heir is incapacitated, the nearest male sapinda of the deceased karnam is entitled to succeed to the office. CHANDRAMMA *v.* VENKATRAJU.

[I. L. R. 10 Mad. 226]

2.—s. 7.—*Karnam in zemindari village—Title to office.* [The holder of a karnam's office in a zemindari village being incapacitated, resigned the office in 1863, leaving a minor son, the plaintiff. The brother of the late holder was then appointed to the office, and held it till 1877, when he died. Plaintiff was then nominated by the zemindar, but did not enter on the office. In 1879, the zemindar being dead, defendant No 2 was appointed by the zemindar's widow and entered on the office. *Held*, that under Regulation XXIX of 1802, s 7, defendant No 2 being the heir of the last holder was the lawful holder of the office. SUBBARAYUDU *v.* GANGARAJU.

[I. L. R. 11 Mad. 196]

—, 1804—V.

*See* MINOR—REPRESENTATION OF MINOR IN SUITS.

[I. L. R. 11 Mad. 309]

*See* RES JUDICATA — PARTIES — SAME PARTIES OR THEIR REPRESENTATIVES.

[I. L. R. 11 Mad. 309]

**MADRAS REGULATION V OF 1804—**  
*concluded.*

—, s. 14.

*See* SALE FOR ARREARS OF REVENUE—  
SETTING ASIDE SALE—OTHER  
GROUNDS

[I. L. R. 10 Mad 44]

—, s. 20.

*See* SALE FOR ARREARS OF REVENUE—  
SETTING ASIDE SALE—IRREGULA-  
RITY.

[I. L. R. 12 Mad 445]

*See* SALE FOR ARREARS OF REVENUE—  
SETTING ASIDE SALE—OTHER  
GROUNDS.

[I. L. R. 10 Mad 44]

—, 1816—IV.

*See* MUNSIF, JURISDICTION OF.

[I. L. R. 11 Mad. 375]

—, 1831—X ss. 1, 2, 3.

*See* SALE FOR ARREARS OF REVENUE—  
SETTING ASIDE SALE—OTHER  
GROUNDS

[I. L. R. 10 Mad 44]

**MADRAS RENT RECOVERY ACT**  
**(MADRAS ACT VIII OF 1865.)***See* CASES UNDER SALE FOR ARREARS OF  
RENT - MADRAS ACT VIII OF 1865.*See* SMALL CAUSE COURT, MOFUSIL—  
JURISDICTION—MOVEABLE PRO-  
PERTY

[I. L. R. 11 Mad. 264]

—, ss. 3, 4 and 7 — *Contents of patta—Date of tender of patta.* A landlord within three days of the end of the fasli tendered to a tenant by way of *patta* a document containing a statement of account of rent payable in respect of the current fasli. *Held*, that the document tendered was a good *patta*, and that under local custom a valid tender of a *patta* may be made at the end of the fasli. *NARAYANA v MUNI.*

[I. L. R. 10 Mad. 363]

—, s. 4.

*See* s. 3.

[I. L. R. 10 Mad. 363]

*See* LEASE—CONSTRUCTION

[I. L. R. 11 Mad. 200]

1.—s. 9.—*Joint shrotriyamdars—Distinct contract by tenant in respect of a share.* The plaintiff was one of two joint *shrotriyamdars*. In Fasli 1288 the defendant accepted a *patta* from and executed a *muchalka* to him in respect of the half share of the plaintiff. The plaintiff sued to**MADRAS RENT RECOVERY ACT**  
**(MADRAS ACT VIII OF 1865), s 9—*contd.***enforce acceptance of a *patta* and execution of a *muchalka* for Fasli 1290 and for arrears of rent: *Held*, that the suit lay without joinder of the other joint *shrotriyamdar* *PURUSHOTTAMA v. RAJU.*

[I. L. R. 11 Mad. 11]

2.—s. 9.—*copy of patta—Tender of patta* A landholder tendered to his tenant a notice stating that his *patta*, of which the particulars were given, had been prepared and calling on him to come within a month to the *zamin* cutcherly to fetch the *patta* and execute the *muchalka*: *Held*, that there was sufficient tender of a *patta* to support a suit under s. 9 of the Madras Rent Recovery Act. *MARUTHAPPA v. KRISHNA.*

[I. L. R. 12 Mad. 253]

3.—s. 9.—*Omission to tender patta—Rent claimed by landlord not having tendered legal patta* A landlord not having tendered a legal *patta* to his tenant, made a demand on him as for rent, and, on his refusal to pay, attached his holding. The tenant, to release the attachment, paid the sum demanded under protest on 23rd September 1885. On 22nd March 1886 the tenant filed a suit on the small cause side of the District Munsif's Court to recover the amount so paid: that suit was dismissed for want of jurisdiction on 2nd September 1886. On the last-mentioned date the tenant filed the present suit on the same cause of action. *Held* that the landlord not having tendered a legal *patta* was not in a condition to establish any right to recover rent directly or by way off set-off. *KULLAYAPPA v. LAKSHMI-PATHI.*

[I. L. R. 12 Mad. 467]

—, s. 9 and ss 10. 11] A summary suit by landlord to enforce the acceptance of a *patta* under the Madras Rent Recovery Act should not be dismissed on a finding by the Appellate Court that the *patta* tendered was not a proper *patta*. The Appellate Court ought to pass the decree which the Court of First Instance should have passed. *NAGARAJA v. KASIMSIA.*

[I. L. R. 11 Mad. 283]

5.—s. 9 and ss 9, 79, 80.—*Yeomiah lands—Unregistered holder rendering service and granting pattas—Estoppel by acquiescence of persons entitled to the yeomiah holding.* A *yeomiahdar* died, leaving a brother, who was then out of India. Shortly before his death, he made an invalid assignment of his holding to a third person who performed the service, and granted *pattas* of the land. The holding was resumable on failure of the service. The brother of the late *yeomiahdar* returned after three years and obtained registration of his title. He now filed this suit to enforce acceptance of *pattas* tendered by

**MADRAS RENT RECOVERY ACT**  
(MADRAS ACT VIII OF 1865), s. 9—*concluded*,

him to the rayats, who had already accepted *pattas*, from and executed *muchalkas* to, the assignee. *Held*, that the suit was not maintainable as under the circumstances the plaintiff's conduct justified the tenant's belief that the assignee was entitled to collect rent from them until the assignment was questioned by the plaintiff, and notice of his title given to them. *KHADAR v. SUBRAMANYA*,

[I. L. R. 11 Mad 12

—, s. 11—*Water-cess—Tenants—Cultivation improved by water taken from landlord's tank*] A landlord has a right to charge water-cess when his tenant cultivates a wet crop on dry land or a second wet crop on wet land by means of water taken from the landlord's tank. *THAYAMMAL v. MUTTIA*.

[I. L. R. 10 Mad 282

—, s. 13—*Persons entitled to proceed under Act—Attachment, Validity of.*] A granted two villages in perpetuity to B under a deed, reserving a certain rent to himself which was to be recovered "according to the Act" if it fell into arrear. The rent remained unpaid for two years, and A obtained an attachment for the whole arrear under the Madras Rent Recovery Act. *Held*, (1) that A was entitled to proceed as landlord under the Madras Rent Recovery Act, (2) that the attachment held good for such amount of rent as was recoverable under that Act. *Ramasami v. Collector of Madura* (I. L. R. 2 Mad, 67) discussed. *RAMACHANDRA v. NARAYANASAMI*.

[I. L. R. 10 Mad 229

—, s. 17—*Attachment and sale of the tenants' interest in the land for arrears of rent—Declaration of invalidity of attachment.*] When default has been made in the payment of rent and the saleable interest of the defaulting tenant in the land is attached, the attachment cannot be declared invalid in a summary suit under s. 17 of the Rent Recovery Act. *THAYAMMA v. KULANDAVELU*.

[I. L. R. 12 Mad. 465

—, s. 18—*Attachment and sale of the tenants' interest in the land for arrears of rent.*] Under s. 38 of the Madras Rent Recovery Act, a landlord cannot attach the saleable interest of a defaulting tenant in the land, until the expiry of the current revenue year. *THAYAMMA v. KULANDAVELU*

[I. L. R. 12 Mad. 465

—, ss. 39 and 40.

See RIGHT OF SUIT—LANDLORD AND TENANT, SUITS CONCERNING.

[I. L. R. 10 Mad. 368

**MADRAS RENT RECOVERY ACT**  
(MADRAS ACT VIII OF 1865)—*concluded*.

—, s. 78

See s. 9.

[I. L. R. 12 Mad 467

See LIMITATION ACT 1877, s. 11.

[I. L. R. 12 Mad 467

See RIGHT OF SUIT—LANDLORD AND TENANT, SUITS CONCERNING.

[I. L. R. 10 Mad. 368

**MADRAS REVENUE RECOVERY ACT**  
(MADRAS ACT II OF 1864)

—, ss. 25, 27.

See SALE FOR ARREARS OF REVENUE—SETTING ASIDE SALE—IRREGULARITY.

[I. L. R. 12 Mad. 445

—, s. 35.

See SALE FOR ARREARS OF REVENUE—DEPOSIT TO STAY SALE.

[I. L. R. 11 Mad. 452

—, ss. 41 and 42—*Sale for arrears of Revenue—Land subject to kanam—Purchaser's title not subject to kanam holder's rights*] Where land subject to a *kanam* was sold for arrears of revenue due by the pattadar and owner, and the *kanam* holder claimed to retain possession as against the purchaser on the ground that his rights were not affected by the sale. *Held*, that reading ss. 41 and 42 of Madras Act II of 1864 together, the purchaser's title was not subject to the *kanam*. The contracts referred to in s. 41 of the Act are those which do not create a charge on the proprietary right in the land sold. *KELAN v. MANIKAM*.

[I. L. R. 11 Mad. 330

1—s. 59—*Limitation—Sale of land subject to mortgage—Suit by mortgagor*] Land which was subject to a mortgage having been sold for arrears of revenue under Act II of 1864 (Madras) the mortgagee's assignee sued to enforce the terms of the bond by sale of the land more than six months after the date of the sale of the land. *Held*, that the suit was barred by s. 59 of the said Act. *YELLAYA v. VIRAYA*.

[I. L. R. 10 Mad. 62

2.—s. 59—*Suit to set aside a sale for arrears of revenue—Fraud—Limitation Act 1877, Art 95.*] Suit, in July 1885, to set aside a sale of land of the plaintiff, sold in July 1884 as if for arrears of revenue under Act II of 1864 (Madras), on the ground that the sale had been brought about by fraud and collusion between the purchaser and the village officers; the plaintiff had knowledge of the alleged fraud more than six months

# MADRAS REVENUE RECOVERY ACT (MADRAS ACT II OF 1864)—concluded.

before suit. *Held*, that the law of limitation applicable to the case was s. 59 of Act II of 1864, and not s. 95 of the Limitation Act, and that the suit was therefore barred. *Venkatipathi v. Subramanya* (I L. R. 9 Mad 557) explained. *Bair Nath Sahu v. Lalla Sital Prasad* (2 B. L. R. F. B. 1) and *Lala Mohurak Lal v. The Secretary of State for India* (I L. R. 11 Calc. 200) considered. *VENKATA v. CHENGADU*.

[I. L. R. 12 Mad. 168]

## MAGISTRATE, JURISDICTION OF. Col.

1. Powers of Magistrates . . . 637
  2. Commitment to Sessions Court . . . 638
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—MAGISTRATE WITH POWERS OF  
APPELLATE COURT.

[I. L. R. 16 Calc. 779]

### (1) POWERS OF MAGISTRATES.

1.—*Criminal Procedure Code Amendment Act (III of 1884)*, s. 8 (6)—*European British subject—Trial by District Magistrate with a jury—Procedure in a trial by jury*—*Criminal Procedure Code*, s. 307—*Power of District Magistrate dissenting from verdict to submit the case to High Court*. The effect of cl. 6 of s. 8 of Act III of 1884 (*Criminal Procedure Code Amendment Act*) is to confer upon the District Magistrate precisely the same authority as the Sessions Judge has, under s. 307 of the *Criminal Procedure Code*, to submit to the High Court a case in which he disagrees with the verdict of a jury so completely that he considers a reference necessary. The expression "trial by jury" as used in cl. 6 of s. 8 does not only refer to proceedings up to the time when the jury pronounce their verdict, but refers generally to cases triable with a jury as contradistinguished from cases tried with the help of assessors or in any other manner mentioned in the *Criminal Procedure Code*. *QUEEN-EMPRESS v. MCCARTHY*.

[I L. R. 9 All. 420]

2.—*Criminal Procedure Code*, 1882, ss. 155, 202, and 203—*Magistrate's power to direct a local investigation by the police—Complaint of an offence cognizable by a magistrate—Examination of complainant.* S. 155 of the *Code of Criminal Procedure* (Act X of 1882) deals only with the powers of police-officers. It confers no power or authority on Magistrates to direct a local investigation by the police, or call for a police report. It is not a proper course for a Magistrate, when a complaint is made before him of an offence of which he can take cognizance, to refer the complaint to a police-officer. He is bound to receive the complaint, and after examin-

# MAGISTRATE, JURISDICTION OF— continued.

## (1) POWERS OF MAGISTRATES—concluded.

ing the complainant to proceed according to law. *IN RE JANKIDAS GURU SITARAM*.

[I. L. R. 12 Bom. 161]

3.—*Power to send boy to Reformatory School, Criminal Procedure Code*, s. 399—*Reformatory Schools Act*, 1876, ss. 2, 7. The *Reformatory Schools Act*, 1876, provides only for male juvenile offenders being sent to reformatory schools by magistrates of the first class, and s. 399 of the *Code of Criminal Procedure* 1882, so far as it authorises a magistrate not of the first class to direct that a male juvenile offender be sent to a reformatory, is repealed. *Held*, therefore, when a Second Class Magistrate directed a boy to be sent to a reformatory under s. 399 of the *Code of Criminal Procedure* that the order was illegal. *QUEEN-EMPRESS v. MADASAMI*.

[I. L. R. 12 Mad. 94]

## (2) COMMITMENT TO SESSIONS COURT.

4.—*Criminal Procedure Code (Act X of 1882)*, s. 349. Under s. 349 of the *Criminal Procedure Code* a Second Class Magistrate, transmitted a case to the District Magistrate, being of opinion that a more severe punishment was deserved than he was empowered to inflict. The District Magistrate returned the record to the Second Class Magistrate, directing him to commit the case to the Sessions Court. The committal directed was duly made. The High Court refused to interfere in the matter, holding that the proceedings of the Second Class Magistrate were not illegal, and that there was nothing done which took away the jurisdiction of the Second Class Magistrate to commit. *QUEEN-EMPRESS v. CHANDU GOWALLA*.

[I. L. R. 14 Calc. 355]

See *QUEEN-EMPRESS v. HAVIA TELLAPA*.

[I L. R. 10 Bom. 196]

5.—*Criminal Procedure Code*, 1882, ss. 209 and 210—*Discharge of accused—Magistrate, Obligation of, to commit when prima facie case is made out against accused*. Under ss. 209 and 210 of the *Criminal Procedure Code* (Act X of 1882) a Magistrate holding a preliminary inquiry ought to commit the accused to the Court of Session when the evidence is enough to put the party on his trial, and such a case obviously arises when credible witnesses make statements which, if believed, would sustain a conviction. *QUEEN-EMPRESS v. NAMDEV SATVAJI*.

[I L. R. 11 Bom. 372]

6.—*Penal Code*, ss. 75, 411—*Punishment not within jurisdiction of Magistrate.* Where an offence under s. 411 read with s. 75 of the *Penal Code* appears to be deserving of a greater punishment than the Magistrate trying it can award,



**MAGISTRATE, JURISDICTION OF—**  
*concluded.***(2) COMMITMENT TO SESSIONS COURT—**  
*concluded.*

the best course for him to adopt is to commit the accused for trial to the Court of Session. *QUEEN-EMPRESS v. KHALAK.*

[I. L. R. 11 All 393]

**(3) SPECIAL ACTS.**

7.—*Bombay Land Revenue Act (Bombay Act V of 1879), ss 125, 214, and 215—Boundary marks—Rules 101 and 111, cl. 3 (a)* ] The accused was charged before a Second Class Magistrate with digging earth within a space of two cubits of an earthen boundary-mark, in contravention of Rule 101 of the Rules made by Government under s. 214 (g) of the Bombay Land Revenue Code (Act V of 1879) The Magistrate convicted the accused under Rule 111, cl. 3 (a), and sentenced him to a fine of one rupee: *Held*, that the conviction and sentence were illegal. S. 125 of the Land Revenue Code does not give jurisdiction to any Magistrate to try a person accused of injuring a boundary-mark. *QUEEN-EMPRESS v. IRAPPA.*

[I. L. R. 13 Bom. 291]

**MAHOMEDAN LAW.**

*See JURISDICTION OF CIVIL COURT—CASTE.*

[I. L. R. 13 Bom. 429]

*See PARDANISHIN WOMEN.*

[I L R 12 Mad. 380]

*See RIGHT OF SUIT—CASTE QUESTIONS*

[I. L. R. 13 Bom 429]

**MAHOMEDAN LAW—ACKNOWLEDGMENT.**

*—Inheritance—Legitimacy—Acknowledgment of sonship* ) *Per* EDGE, C. J., and STRAIGHT, J.—The rules of the Mahomedan law relating to acknowledgment by a Mahomedan of another as his son are rules of the substantive law of inheritance. Such an acknowledgment, unless certain impediments exist confers upon the person acknowledged the status of a legitimate son capable of inheriting. Where there is no proof of legitimate birth or of illegitimate birth, and the paternity of a child is unknown, in the sense that no specific person is shown to be the father, then the acknowledgment of him by another who claims him as a son affords a conclusive presumption that he is the legitimate child of the acknowledged, and places him in that category. Such a status once conferred cannot be destroyed by any subsequent act of the acknowledged or of any one claiming through him. *Per* MAHMOOD, J. Although, according to the Mahomedan law, *ikhar* or acknowledgment in general stands upon much the same footing as an admission as defined in the Evidence Act, acknowledgments of parent-

**MAHOMEDAN LAW—ACKNOWLEDGMENT—concluded.**

age and other matters of personal status stand upon a higher footing than matters of evidence and form a part of the substantive Mahomedan law. So far as inheritance through males is concerned, the existence of consanguinity and legitimate descent is an indispensable condition precedent to the right of succession, and such legitimate descent depends upon the existence of a valid marriage between the parents. Where legitimacy cannot be established by direct proof of such a marriage, acknowledgment is recognized by the Mahomedan law as a means whereby marriage of the parents or legitimate descent may be established as a matter of substantive law. Such acknowledgment always proceeds upon the hypothesis of a lawful union between the parents and the legitimate descent of the acknowledged person from the acknowledger and there is nothing in the Mahomedan law similar to adoption as recognized by the Roman and Hindu system, or admitting of an affiliation which has no reference to consanguinity or legitimate descent. A child whose illegitimacy is proved beyond doubt, by reason of the marriage of its parents being either disproved or found to be unlawful, cannot be legitimatised by acknowledgment. Acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time, with reference to the legitimacy of the child's birth, is a matter of uncertainty. *Ashraf-ood-Dowlah Ahmed Hossein Khan v. Hyder Hossein Khan*, 11 Moore's I A. 91, *Muhammad Ismat Ali Khan v. Lalli Begum*, L R 9 I A 8, 1. L. R. 8 Calc. 422, and *Sadat Hossein v. Mahomed Yusef*, L R. 11 I A 31, 1. L. R. 10 Calc. 663, referred to. *MUHAMMAD ALLAHDAD KHAN v. MUHAMMAD ISMAIL KHAN.*

[I L R. 10 All 289]

**MAHOMEDAN LAW—CUSTOM**

*See* MAHOMEDAN LAW—ENDOWMENT

[I L R 12 Bom. 555]

**MAHOMEDAN LAW—DIVORCE.**

1—*Shiah School—Muta Marriage—Gift of term* ] In a suit brought by a Mahomedan of the Shiah sect against his wife, belonging to the same persuasion, for a declaration that the relationship of husband and wife had terminated, and that he was not liable to pay maintenance to her which he had been directed to do by an order passed under the provisions of the Code of Criminal Procedure, on the allegation that the marriage was of a *muta* form, and that he, on the 22nd February 1882, had made *hiba-i-muddat* (gift of the term) of whatever period there then might remain unexpired, the wife pleaded *inter alia* that her husband was not competent to dissolve the marriage tie within the contracted period without her consent, and that, if under the Mahomedan law the consent was unnecessary, the Court was bound, in administering justice, equity and good conscience, to modify the strict law in

**MAHOMEDAN LAW—DIVORCE—*concl'd.***

this respect: *Held* that, although the ordinary law of divorce does not exist in respect of marriages by the *muta* form, they can nevertheless be terminated by the husband giving away the unexpired portion of the term for which the marriage was contracted, and the consent or acceptance on the part of the wife is not necessary for the dissolution of the marriage. **MAHOMED ABID ALI KUMAR KADER v. LUDDEN SAHIBA.**

[I. L. R. 14 Cal. 276]

**2—What amounts to divorce—Revocable divorce]**

Under Mahomedan law no special expressions are necessary to constitute a valid divorce, nor, except when the repudiation is final, need the words be repeated thrice. If the divorce pronounced is liable to be, but is not, revoked within the period of *iddut*, it becomes final. **IBRAHIM v. SYED BIBI.**

[I. L. R. 12 Mad. 63]

**MAHOMEDAN LAW—DOWER**

—*Suit by husband for restitution of conjugal rights—Duty of wife to cohabit with husband—Non-payment of dower.* Suit by a Mahomedan to recover possession of his wife, the defendant. Defendant pleaded that she was not bound to return to plaintiff until plaintiff paid Rs. 42 prompt for dower, which plaintiff promised to pay by the marriage contract and had not paid. The lower Courts following **Eidan v. Mazhar Hussain** (I. L. R. 1 All. 483), dismissed the suit: *Held*, on appeal, that defendant could not refuse cohabitation on the plea that her dower had not been paid. **Abdul Kadir v. Salma** (I. L. R. 8 All 149), followed. **KUNHI v. MOIDIN.**

[I. L. R. 11 Mad 327]

**MAHOMEDAN LAW—ENDOWMENT.**

1—*Wakfnama—Wakf—Perpetuity—Ultimate trust in favour of charity* [M, the father of the three defendants, executed an instrument purporting to be a *wakfnama* in favour of his heirs and descendants, generation after generation. The office of *mutwals* he reserved for himself for life, and, in the event of his death, he appointed his wife and youngest son *E mutwals*, with certain powers of delegation, upon the following conditions:—The said *mutwals* having received the annual income of the property, and having defrayed the expenses of repairs and the taxes, &c., were to divide the balance into four equal shares, and to make over one share to his son *S* and his descendant after descendant for their expenses; one share, in like manner, to his son *H*; one share, in like manner, to his son *E*; and as to the remaining share, to pay one-half thereof to his wife, *A*, for expenses; and one-half thereof to his sister, for expenses. The deed then proceeded:—“If any one from among my heirs and (? or) descendant after descendant should die, then the said *mutwals* shall make his or her funeral outlays according to our

W., D.

**MAHOMEDAN LAW—ENDOWMENT—*continued.***

custom and usage; and as to what may remain as a balance, they shall duly distribute and give the same to my heirs and descendants according to the book of God.” Further as follows:—“May God forbid it! If from among my heirs and descendants there shall be left no one surviving then, as regards the income of the whole of the property endowed for religious and charitable purposes, the same, for the sake of God, is duly to be distributed and given to Mahomedan *fakirs* and indigent people.” Then followed a direction that the property was not to be sold or mortgaged. On the 25th February 1883, the first two defendants mortgaged the properties comprised in the *wakfnama* to the plaintiff for Rs. 3,000. The plaintiff brought the present suit against the said two defendants to enforce the mortgage. The third defendant was made a defendant at his own request, and alleged that the mortgage had been made without his consent. He submitted whether, having regard to the terms of the deed, the plaintiff had any claim as mortgagee: and he contended that in no case could the mortgage operate, except against the shares of the first two defendants. The plaintiff contended that the *wakfnama* was invalid, and that upon the death of M the property comprised in it devolved upon his three sons as heirs, and also that, assuming the *wakfnama* to be valid, the first two defendants took an estate of inheritance under it which they were at liberty to alienate and mortgage: *Held*, following **Fatmabibi v. Advocate-General of Bombay**, I. L. R. 6 Bom. 42, that the deed of the 17th May 1871 was valid as a *wakfnama*. *Semble*, that the mortgaged property being *wakf*, the plaintiff acquired no right under his mortgage which would extend beyond the lifetime of his mortgagees. In such property no one has any interest as the heir of the appropriator. It is neither the subject of ownership nor inheritable, but each object of the charity who brings himself or herself within the terms of the endowment is entitled to receive the benefit which the founder has marked out for him, **AMRUTLAL KALIDAS v. HUSSEIN.**

[I. L. R. 11 Bom. 492]

2.—*Wakf—Settlement in favour of the settlor's family without any ultimate trust for charity—Nature of trust necessary whether express or implied* [A Mahomedan cannot settle his property in *wakf* on his own descendants in perpetuity without making an *express* provision for its ultimate devolution to a charitable or religious object. A Mahomedan executed a deed, called a *wakfnama*, by which he settled his property in *wakf* on his two wives and daughters and their descendants in perpetuity. For the management and devolution of this property he laid down the following rules:—(1) that if one of the *awlad* (or daughters) of either wife died, the share of that person should go to the wife and the survivors of her *awlad*; that after the

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# MAHOMEDAN LAW — ENDOWMENT — continued.

death of a wife her share should go to her surviving *aulad*, that if a wife and her *aulad* ceased to exist, their share should go to the other wife and her *aulad*; that on the failure of *aulad* and *aflad* of both wives, the next of kin of the settlor should receive the property, and he added that in this way the management should go on from generation to generation; (2) that neither of the said two wives, nor any one of the *aulad* of the wives, should alienate by sale, gift or mortgage either their shares or any part of the property. A portion of this property, consisting of two *nafars*, was set apart for such purposes as the building of his own tomb, the saying of prayers, the recitation of the Koran, &c.; and he directed that in case the produce of the two *nafars* proved insufficient for these purposes, his wives and daughters and their descendants should contribute out of the property settled in *wakf* on them. *Held*, that, with the exception of the two *nafars* set part for religious purposes, the rest of the settlement was not a valid *wakf*, as it was solely for the benefit of the settlor's family, and contained no express provision for the ultimate devolution of the property to any religious or charitable object. NIZAMUDIN GULAM v. ABDUL GAFUR.

[I L. R. 13 Bom. 264]

3.—*Succession to management of endowment—Sajjadanshin, khilafat and mutavalli, offices of—Primogeniture, custom of—Eldest son's right to hold the offices—Wakf, inheritance to—Predecessor in the office to appoint his successor, right of.* About three hundred and fifty years ago one S, the ancestor of the parties to the suit, came to Surat and settled there and became the *qurmushid* (religious preceptor) of the Mahomedan community at that place. During his lifetime as well as after his death, moveable and immoveable property was from time to time dedicated to the religious office he and, after his decease, one or other of his descendants successively occupied. The plaintiff was the eldest, and the first defendant the second son of H, the last incumbent of the said office. In 1865 H being ill, executed a *tawfiyatnama* appointing the plaintiff his executor and successor. Subsequently, H having recovered, cancelled the same and appointed the first defendant his successor by three successive *tawfiyatnamas*, the last being dated 3rd September 1881, a few days before H's death. The first defendant accordingly entered into possession and management of the office of *sajjadanshin* (or priest) and *khilafat* (deputy), and assumed the position of *mutavalli* (or manager) of the *wakf* property of the family. In 1882 the plaintiff brought the present suit to have it declared that on him, as the eldest son, had devolved the office of *sajjadanshin* and *khilafat* held by the family, and not on his younger brother, the defendant, and that he alone was entitled, as *mutavalli*, to take possession of and manage the *wakf* property. The plaintiff relied

# MAHOMEDAN LAW — ENDOWMENT— concluded.

firstly, on the appointment made by his father in 1865, and, secondly, on the fact of his being the eldest son of the last incumbent, to whom, he maintained, both by law and custom belonged the succession to the offices in question, so long, at least, as such eldest son was in other respects a fit and proper person to succeed, which in his own case was not contested. The defendant denied that either by law or custom was the eldest son, as such, entitled to succeed, and relied on the fact of his appointment by his father: *Held*, that the plaintiff had made out no case of a right to succeed his father in the offices in question. Not under the deed of appointment, because that was made by his father when he believed he was dying, and was subsequently on recovery cancelled, and was therefore inoperative, on similar principles to those which apply to the case of a *donatio mortis causa*, nor, secondly, under the general Mahomedan law, because that law is strongly against attaching any right of inheritance to an endowment, nor, thirdly, by reason of any custom, because no such custom as that contended for was established on the evidence. The evidence went to show that the eldest son did not uniformly succeed, and that even when he succeeded, he did so by right of appointment and not by right of primogeniture. ABDULA EDRUS v. ZAIN SAYAD HASSAN EDRUS.

[I L. R. 13 Bom. 555]

# MAHOMEDAN LAW—GIFT.

Col.

1. Validity . . . 644

See LIMITATION ACT 1877, ART. 91

[I L. R. 11 All. 456]

# (1) VALIDITY.

1.—*Mapillas—Gift to take effect at an indefinite future time* Gifts to take effect at an indefinite future time are void under Mahomedan law. CHEKKONEKUTTI v. AHMED.

[I. L. R. 10 Mad. 190]

2.—*Gift without delivery of possession—Hiba-bil-waz, or gift on stipulation—Possession necessary for such a gift—Registration not equivalent to delivery of possession so as to validate gift.* By a deed of gift duly executed and registered, a Mahomedan woman gave certain property to the plaintiff's father. The deed stated that the plaintiff's father had always protected the donor, and that she gave him the property in full confidence that he would continue to do so: *Held*, that the gift, if not a simple gift, was, at any rate, a "gift on stipulation," and that such a gift, in order to be valid, required that seizin should be given to the donee. The registration of a deed of gift between Mahomedans does not cure the want of delivery by the donor. MOGULSHA v. MAHAMAD SAHIB.

[I. L. R. 11 Bom. 517]

MAHOMEDAN LAW—GIFT—*continued.*(1) VALIDITY—*continued.*

8.—*Pension—Gift of Musha—Undivided part—Ascertained share—Transfer of possession—Mutation of names—Delivery of title deeds—Bengal Civil Courts Act (VI of 1871), s. 24—Pension Act XXIII of 1871, s. 7, cl. 2.* A pension of the nature described in Act XXIII of 1871, (Pensions Act), s. 7. cl. (2) was drawn by a Mahomedan, in whose name alone it was recorded in the Government registers, for himself and the other members of his family, who, up to the time of his death, received their shares from him. Shortly before he died, he executed a deed of gift in favour of his wife, which purported to assign to her the whole pension. Mutation of names was effected in the Government registers, but the deed of gift and the *sanads*, in respect of which the pension had originally been granted, were handed over to the donee. After the death of the donor, one of his sisters brought a suit against his widow to establish her right (i) to receive the share in the pension which she had inherited from her father and received up to her brother's death, and (ii) as heir to her brother himself, to the share which he had inherited. It was contended on her behalf that the deed of gift was in any case ineffectual as an assignment of more than the donor's own interest, and further that it was invalid even as an assignment of his own share, inasmuch as, under the Pensions Act, the pension could not be made the subject of gift, and under the Mahomedan law it was "*musha*" and not transferable, and actual delivery or transfer of possession was, under the same law, essential to the completion of the gift, but no such delivery or transfer had been effected: *Held*, that the deed of gift was not a good assignment in law of the interest of the plaintiff, who was not a party thereto, and the defendant could take nothing more than the donor's own interest: *Held* that whatever might be the Mahomedan law apart from the Pensions Act, under s. 7 of the Act the pension or any interest in it was capable of being alienated by way of gift, the subject of the gift being not the cash, but the right to have the pension paid: *Held*, that there was no force in the contention that the gift became void, because the right was not divided. Inasmuch as in the case of a right to receive a pension the rights of the individuals who are the heirs became at once divided and separate at the death of the sole owner: and in this case the shares were definite and ascertained and required no further separation than was already effected upon the sole owner's death: *Held*, that the rule of the Mahomedan law as to the invalidity of gifts purporting to pass more than the donor was entitled to, was based upon the principle of "*musha*" or undivided part, and had no application to cases where the donor's interest itself was separate, and that even if it were the strict Mahomedan law that where a man having a definite ascertained interest in a pension, and intending at any rate to pass his interest to his wife, purported to give her more than he was entitled to, he

MAHOMEDAN LAW—GIFT—*continued.*(1) VALIDITY—*continued.*

failed to give her any interest at all, s. 24 of the Bengal Civil Courts Act (VI of 1871) did not make it obligatory to apply the strict Mahomedan law as to gifts in transactions of modern times: *Held*, that although, according to the Mahomedan law, possession was necessary to perfect a gift where the nature of the transaction was such that possession was possible, possession of a right to receive pension could only be given by handing over the documents of the title connected with the pension or assigning the right to receive the pension; that the gift in this case was perfect as soon as the deed was executed and handed over with the other papers to the donee: and that the mutation of names was merely a thing which would follow on the perfection or the title, and did not in itself go to make or form part of the title. *SAHIB-UN-NISSA BIBI v. HAFIZA BIBI; HAFIZA BIBI v. SAHIB-UN-NISSA BIBI.*

[I L. R. 9 All. 213]

4.—*Gift in contemplation of death—Will—Disposition in favour of heir—Consent of other heirs* A Mahomedan executed in favour of his wife an instrument which purported to be a deed of gift of all his property. At the time when he executed this instrument he was suffering from an illness likely to have caused him to apprehend an early death, and he did, in fact, die of such illness upon the same day. There was no evidence that any of his heirs had consented to the execution of the deed. After his death, his brother sued the widow to set aside the deed as invalid: *Held*, that the instrument, though purporting to be a deed of gift, constituted, by reason of the time and other circumstances in which it was made, a death-bed gift or will, subject to the conditions prescribed by the Mahomedan law as to the consent of the other heirs, and, those conditions not having been satisfied, it not only fell to the ground, but the parties stood in the same position as if the document had never existed at all. *WAZIR JAN v. ALTAF ALI.*

[I. L. R. 9 All 357]

5.—*Mahomedan law of gift—Possession not delivered at the time, but afterwards obtained—Musha, mixed, or common property, with shares undistinguished.* A *hibanama* gave an undivided share in *mokurari* and *zemindari* holdings, besides other property not reduced into possession, the whole of which had, as a matter of title, devolved upon the donor as a member of a family of which the donees were also members: *Held*, that the *hibanama* did not infringe the Mahomedan doctrine of *musha*, as an attempt to make a gift of an undivided share in property capable of division; it having been settled that one of two sharers may give his share to the other before division, whence it followed that one of three sharers might give his share to the other two. *Ameena Bibi v. Zeifa Bibi*, 3 W. R.

MAHOMEDAN LAW—GIFT—*continued*.(1) VALIDITY—*continued*.

37, referred to and approved. *Held*, also, that as the donor had done all that she could do to perfect the contemplated gift, which was attended with complete publicity, and as the donees had afterwards obtained possession, the fact of the donor's having been out of possession, and therefore not having delivered it, did not, of itself, invalidate the gift. In regard to the principle and the analogy in other systems of law to be found in the cases relating to voluntary transfers (where, if the donor should not have done all that he could have done to perfect his intended gift, he cannot be compelled to do more) the Hindu case of *Kali Das Mullick v. Kanhya Lal Pundit*, L R. 11 I. A. 218; I L. R. 11 Calc. 121, was referred to, MAHOMED BUKSH KHAN v. HOSSEINI BIBI.

[I. L. R. 15 Calc. 684]

[L. R. 15 I. A. 81]

6.—*Hiba-bil-uwaz*—Gift made in consideration of services rendered—Donor not in possession—Possession not delivered to donee] The fundamental conception of *hiba-bil-uwaz*, or a gift for an exchange as understood in the Mahomedan law, is that it is a transaction made up of two separate acts of donation, i.e., of mutual or reciprocal gifts of specific property between two persons, each of whom is alternately donor and donee. It does not include the case of a gift in consideration only of natural love and affection or of services or favours rendered. Nor does such a gift fall under the category of *hiba-bil-uwaz* in its improper sense of sale; but it is an ordinary gift subject to all the conditions as to validity which the Mahomedan law provides. A gift of immovable property not at any time in the possession of the donor, but in that of a trespasser, and consequently never delivered by the donor to the donee, is void under the Mahomedan law. *Kasim Hossein v. Sharif-un-nissa*, I L. R. 5 All. 285; *Sahib-un-nissa Bibi v. Hafiz Bibi*, I L. R. 9 All. 213, and *Shaukh Ibrahim v. Shaukh Suleman*, I. L. R. 9 Bom. 146, distinguished, *Mohin-ud-din v. Manchershah*, I. L. R. 6 Bom. 650. *Mullick Abdool Guffoor v. Muleka*, I. L. R. 10 Calc. 1112, and *Hazara Begum v. Hossein Ali Khan*, 12 W. R. 498, referred to. RAHIM BAKHSU v. MUHAMMAD HASAN.

[I. L. R. 11 All. 1]

7.—*Want of Possession*—Essentials for valid gift] Delivery and seizin are, under the Mahomedan law, the essence of a gift, and, therefore, no right of any description passes without them. A donor, therefore, must be in possession. *Mohin-ud-din v. Manchershah*, I. L. R. 6 Bom. 650, referred to and followed. Accordingly where the plaintiffs claimed to recover possession under a deed of gift alleged to have been passed to them by a Mahomedan donor for the use of a *masjid*, but it appeared that neither the donor nor the donees were ever in possession before or after

MAHOMEDAN LAW—GIFT—*continued*.(1) VALIDITY—*continued*.

the gift. *Held*, that the gift was invalid, the language of the texts of Mahomedan law distinctly laying down that in a gift seizin is necessary and absolutely indispensable to the establishment of a proprietary right. *Kali Dass Mullick v. Kanhya Lal Pundit*, I. L. R. 11 Calc. 121, distinguished. MEHERALI v. TAJUDIN

[I. L. R. 13 Bom. 156]

8.—*Gift of life estate*—*Want of possession in donee*] A grant of a life estate is invalid under the Mahomedan law. The grantee in such a case would take an absolute estate. A Mahomedan executed a deed by which he settled his property in *wakf* on his two wives and daughters, and their descendants in perpetuity. For the management and devolution of this property he laid down the following rules (1) that if one of the *aulad* (ordughters) of either wife died, the share of that person should go to the wife and the survivors of her *aulad*; that after the death of a wife her share should go to her surviving *aulad*; that if a wife and her *aulad* ceased to exist, their share should go to the other wife and her *aulad*; that on the failure of *aulad* and *afad* of both wives, the next of kin of the settlor should receive the property; and he added that in this way the management should go on from generation to generation: (2) that neither of the said two wives nor any one of the *aulad* of the wives should alienate by sale, gift or mortgage either their shares or any part of the property: *Held* that the settlement was invalid as a deed of gift to the settlor's next-of-kin after the determination of the life estates granted to his wives and daughters: firstly, because the donor had not parted with possession of the property till his death, and secondly, because the grant of a life estate is quite inconsistent with the Mahomedan law, the grantee in such a case taking an absolute estate. NIZAMUDIN GULAM v. ABDUL GAFUR.

[I. L. R. 13 Bom. 264]

9.—*Hiba, or deed of gift*—Gift by husband to wife—*Possession*—*Continued receipt of rents by husband*—*Husband, manager for wife*—Gift of "*mushaa*" or *undivided part*—*Subsequent partition*] In 1871 *H G*, a Mahomedan, executed a formal *hiba* or deed of gift, to his wife, the defendant, of a house belonging to himself, but let out to tenants and duly registered the deed. In 1876-77 he caused the house to be transferred into the name of his wife in the municipal and *fazandari* books. After the execution of the deed of gift, and down to the time of his death in 1884, *H G* continued to collect the rents as before, and they were entered in his books and drawn upon for family purposes in the same manner as they had always been. In 1881-82, *H G* had an account of the rents of the house prepared in his wife's name from 1871-72 up to date: *Held*, that the above circumstances afforded sufficient evidence of posses-

## MAHOMEDAN LAW—GIFT—concluded.

## (1) VALIDITY—concluded.

sion having been given to the defendant, either in 1871 or 1876, to satisfy the requirements of Mahomedan law. *H G*, being the husband of the defendant, would naturally continue to collect the rents as her manager, even when he regarded himself as having parted with the ownership to his wife, which the above mentioned circumstances sufficiently showed that he did. In 1883 *H G* executed a second *hiba*, duly registered, to the defendant, of an undivided moiety of the house in which he and the defendant resided, and to which *H G* and his brother were entitled in equal shares. No partition had been made between *H G* and his brother when *H G* died: *Held*, that the gift was invalid, as being a gift of a "*mushâa*", or undivided part, in a thing susceptible of partition. *Quære*—Whether, if there had been partition subsequently to the deed, that would or would not have operated to validate the gift. *EMNABAI v. HAJIRABAI*.

[I. L. R. 13 Bom. 352]

10.—*Claim to possession of property under deed of sale—Consideration—"Mushâa"—Effect of possession following upon gift to render it valid* [The law relating to the invalidity of gifts of "*mushâa*", i.e., the prohibition of the gift of an undivided part in property capable of partition, ought to be confined within the strictest rules; and the authorities on the Mahomedan law show that possession taken under a gift, even although that gift might with reference to "*mushâa*" be invalid without it, transfers effectively the property given, according to the doctrines of both the Shia and the Sunni schools. Possession once taken under a gift is not invalidated, as regards its effect in supporting the gift, by any subsequent change of possession. The subject of the gift was shares in revenue-paying villages, with land, houses, and moveables. Of the greater portion of this property, the donor, a mother giving them to her daughter, had only so far possession that she was in receipt of the rents and profits. In the deed of gift she declared (thereby making an admission whereby her heir and all claiming through him were bound) that she had made the donee her daughter, possessor of all the properties; and she directed that the gift should be carried into effect by the daughter's husband, who was manager of estates on behalf of both mother and daughter before then. *Held*, in a suit for the possession of the property, on a sale by the heir of the donor, brought by the vendees against him, and joining as defendants the heirs of the daughter then deceased, that sufficient possession had been taken on behalf of the daughter to render the gift effectual, and to defeat the claim as against her heirs. *MUHAMMAD MUMTAZ AHMAD v. ZUBAIDA JAN*.

[I. L. R. 11 All. 460]

[L. R. 16 I. A. 195]

## MAHOMEDAN LAW—GUARDIAN.

1.—*Guardianship of female minor—Female minor, Right to custody of—Mahomedan law, Shia Sect—Act IX of 1861—Act XL of 1888, s. 27* [A Mahomedan father of the Shia sect is entitled to the custody of a daughter above the age of seven years as against the mother. The decision in *Fuseehun v. Kajo*, I. L. R. 10 Calc. 15, has no application to a case where the father is seeking to get the custody of his daughter. IN THE MATTER OF THE PETITION OF MAHOMED AMIR KHAN. LARDLI BEGUM v. MAHOMED AMIR KHAN

[I. L. R. 14 Calc. 615]

2.—*Power of Guardians—Sale by guardian of property to which ward's title was in dispute, and for the benefit of the latter.* [By the Mahomedan law, guardians are not at liberty to sell the immoveable property of their wards, the title to which property is not disputed, except under certain circumstances specified in Macnaghten's Principles of Mahomedan Law, Chapter VIII, cl. 14. But, where disputes existing as to the title to revenue-paying land, of which part formed the wards' shares, sold by their guardian, were thereby ended, and it was rendered practicable for the Collector to effect a settlement of a large part of the land, a fair price moreover having been obtained, the validity of the sale was maintained in favour of the purchaser as against the wards for whose benefit the transaction was. Although the sale-deed incorrectly stated the purpose of the sale to have been to liquidate debts, a statement repeated in a petition to the Collector, asking that settlement of the shares sold should be made with the purchaser, yet, on the transaction being afterwards impeached by the wards, *held*, that it was open to the guardian to prove the real nature of the sale, and to show that it was one beneficial to them. *KALI DUTT JHA v. ABDUL ALI*.

[I. L. R. 16 Calc 627]

[L. R. 16 I. A. 96]

## MAHOMEDAN LAW—PRE-EMPTION.

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## (1) RIGHT OF PRE-EMPTION.

## (a) CO-SHARERS.

1.—*Conditional sale—Right of pre-emption among coparceners—Private partition of puttdari estate* [A and B had certain proprietary rights in an 8 annas *putti* of a certain *mehal*. C and D had no rights in that *putti*, but D had a small share in the remaining 8 annas *putti*. A private partition between the *puttis* having taken place, C and D's brother lent to B two sums of Rs. 200 and Rs. 199 by deeds of *bai-bil-wuflu* dated the



**MAHOMEDAN LAW — PRE-EMPTION—**  
*continued.*

(1) RIGHT OF PRE-EMPTION—*continued.*

(a) CO SHARERS—*continued.*

12th and 21st June 1876. *C. and D* subsequently instituted foreclosure proceedings, and on the 5th May 1884, were put into possession of *B's* share in the first mentioned *putti* in execution of a decree which they had obtained. On the 18th April 1885, *A* sued *C* and *D* to enforce his right of pre-emption. *Held*, that though the coparcenary could not be said to have ceased to exist, or those who were coparceners be said to have become strangers to one another, yet, there being a finding that the *puttis* were separate, it was not necessary, in order to establish *A's* preferential right, that a partition by metes, and bounds should be shewn to have taken place; but that a private partition, if full and final between the parties, would have the same effect as the most formal partition on the right of pre-emption, and that *A's* claim must, therefore, succeed  
DIGAMBUR MISSER v. RAM LAL ROY.

[I. L. R. 14 Calc. 761]

2.—*Recorded co-sharers—Benami purchase of shares—Sale by co-sharer—Claim for pre-emption resisted by person claiming to be co-sharer by virtue of benami transaction—Equitable estoppel.* A secret purchase *benami* of shares in a village does not constitute the purchaser a co-sharer for the purposes of pre-emption either under the Mahomedan law or under the provisions of a *wayib-ul-arz*, so as to enable him upon the strength of the interest so acquired to defeat an otherwise unquestionable pre-emptive right preferred by a duly recorded shareholder who had no notice direct or constructive of his title, and asserted immediately upon his purchase of a share, for the first time, in his true character. *Ramecoomar Koondoo v. Macqueen*, L. R. I. A Sup Vol., 49, referred to. *BENI SHANKAR SHELHAT v. MAHPAL BAHADUR SINGH*.

[I. L. R. 9 All. 480]

3.—*Perpetual lease—Sale.* Where a co-proprietor does not part with his entire interest in land by an absolute sale, but merely grants a lease of it, even though it be a *mourasi* lease, the doctrine of pre-emption will not apply. *Mooreooly Ram v. Hurree Ram*, 8 W. R. 106, and *Ram Golan Singh v. Nursing Sahoy*, 25 W. R. 43, followed. *DEWANUTULLA v. KAZEM MOLLA*.

[I. L. R. 15 Calc. 184]

4.—*Joint Purchase by co-sharer and stranger, Effect of—Specification of share in a deed of sale, Effect of.* Under the rule of Mahomedan law, if a sharer in an estate alienates his interest to a co-sharer and a stranger, the purchasing sharer, by joining an outsider in the purchase, forfeits his right as a sharer, and another co-sharer has the right of pre-emption. *Lalla Nobut Lall v. Lalla Jewan Lall*, I. L. R. 4 Calc. 831, distinguished

**MAHOMEDAN LAW — PRE-EMPTION—**  
*continued.*

(1) RIGHT OF PRE-EMPTION—*continued.*

(a) CO-SHARERS—*continued.*

*Held*, also, that, in the case of a joint-purchase made by two persons of shares in two villages, in one of which one of the purchasers was already a sharer, at one entire consideration, the specification in the deed of sale of their respective shares in the aggregate purchase would not affect the rule. *Manna Singh v. Ramadhin Singh*, I. L. R. 4 All. 252. *SALIGRAM SINGH v. RAGHUBARDYAL*.

[I. L. R. 15 Calc. 224]

5.—*Wajib-ul-arz—Pre-emptor out of possession of his share—His own share lost by him pending appeal.* The plaintiff instituted this suit to enforce her right of pre-emption in respect of a share in a village of which she alleged herself to be a co-sharer with the vendors. The defendants to the suit were the vendors, the vendees, and others who were rival claimants for pre-emption in the share sold. The rival pre-emptors alone defended the action on the ground, among others, that the plaintiff was not in possession of her own share in the village out of which she alleged that her right to claim pre-emption arose. The Court of First Instance dismissed her suit. On appeal the District Judge in effect dismissed her claim as against the defendants who were the rival pre-emptors, but gave the plaintiff a right to obtain the share if the other pre-emptors did not avail themselves of the decree which they had obtained in their action. On the 12th of January 1887, plaintiff's second appeal was admitted, and on the 20th January plaintiff's share, in the village out of which her claim to pre-emption in respect of the share sold arose, was sold in execution of a decree in another suit. The respondent contended that as since the appeal the share out of which plaintiff alleged that her right arose was sold, she could not get any decree now in her favour. *Held*, that this Court as a Court of Appeal has only got to see what was the decree which the Court of First Instance should have passed, and if the Court of First Instance had wrongly dismissed the claim, the plaintiff cannot be prejudiced by her share having been subsequently sold in execution in another suit; such a sale could not have affected her right to maintain the decree, if she had obtained a decree in her favour in the Court of First Instance, either on review or on appeal, nor could it have been made the ground of appeal. Further, plaintiff being out of possession of her share at the time she instituted the suit for pre-emption was immaterial: the Court should have ascertained whether the plaintiff was at the date of suit entitled in law to the share out of which her right of pre-emption was alleged to have arisen: *Held*, by MAHMOOD, J., that the passage from Hamilton's Hedaya by Grady, p. 562, means that in the pre-emptive tenement the pre-emptor should have a vested ownership and not a mere expectancy of inheritance or a reversionary or any kind of



# MAHOMEDAN LAW — PRE-EMPTION— continued.

## (1) RIGHT OF PRE-EMPTION—concluded.

### (a) Co-SHARERS—concluded.

contingent right, or any interest falling short of full ownership. *SAKINA BIBI v. AMIRAN.*

[I. L. R. 10 All 472]

6.—*Wajib-ul-arz — Construction — “Karibi,” meaning of* ] The word “karibi” used by itself in the pre-emptive clause of a *wajib-ul-arz* to indicate shareholders “near” to the vendor, is ambiguous and inadequate to express the intentions of the shareholders. The pre-emptive clause in the *wajib-ul-arz* of a village gave a right of pre-emption, in cases of sale by shareholders, first to “*bhai kakiki*” (own brothers), next to “*karibi*” (near), and next to co-sharers in the same *thoke* as the vendor: *Held*, that although the word “*karibi*” must be read in connection with the preceding word *bhai* the words “*bhai karibi*” could not reasonably be confined to consins, but must be construed as meaning “*bhai buand*” or “*bhai log*,” so as to include all near relatives, both male and female: *Held*, also, that a vendor’s father’s brother’s widow, holding a share in the village absolutely and as heir of her deceased husband, was entitled to pre-emption in preference to the vendees, who were only sharers in the same *thoke* as the vendor. *KHUMAN SINGH v. HARDAT*

[I. L. R. 11 All. 41]

### (b) WAIVER OF RIGHT, OR REFUSAL TO PURCHASE.

7.—*Omission to give notice of demand within reasonable time. Effect of—Co-sharers, Pre-emption between* ] The *wajib-ul-arz* of a village provided that a co-sharer wishing to sell his share must give notice to the other co-sharers, and that first a nearer co-sharer and next a more distant co-sharer should have a right of pre-emption. Where, such notice having been given, the co-sharer receiving notice took no action thereon within a reasonable time,—*held* that as his inaction would lead the vendor to conclude that he would not interfere or become a purchaser, it was equivalent to declining to purchase. *MUHAMMAD WILAYAT ALI KHAN v. ABDUL RAB.*

[I. L. R. 11 All 108]

## (2) PRE-EMPTION AS TO PORTION OF PROPERTY.

8.—*Wajib-ul-arz—Rival suits—Decree not to allow either claimant to pre-empt part only of the property over which he has a pre-emptive right.* ] Where two rival pre-emptors, each having an equal right to claim pre-emption under a *wajib-ul-arz*, bring suits to enforce their rights in the absence of anything in the *wajib-ul-arz* to the contrary the rule of Mahomedan law must be observed, and however the property may be divided by the decree of the Court between the suc-

# MAHOMEDAN LAW — PRE-EMPTION— continued.

## (2) PRE-EMPTION AS TO PORTION OF PROPERTY—concluded.

cessful pre-emptors, the Court must take care that the whole share must be purchased by both pre-emptors, or on the default of one by the other, or that neither of them should obtain any interest in the property in respect of which the suits were brought. In two rival suits for pre-emption, the Court gave one claimant a decree in respect of a three-annas share, and the other a decree in respect of a two-annas six pies share of certain property, each decree being conditional on payment of the price within thirty days. The Court further directed that in case of either pre-emptor making default of payment within the thirty days, the other should be entitled to pre-empt his share on payment of the price thereof within fifteen days of such default. Both pre-emptors made default of payment within the thirty days. One of them within the further period of fifteen days, paid into Court the price of the share decreed in favour of the other and claimed to pre-empt such share. *Held* (affirming the judgment of *MAHMOOD, J*) that the claim was inadmissible, since to allow it would have the effect of defeating the rule of law that a pre-emptor must buy the whole, and not part only of the property which he is entitled to pre-empt. *ARJUN SINGH v. SARFARAZ SINGH.*

[I. L. R. 10 All. 182]

9.—*Pre-emptor disentitled by laches from claiming portion of property—Disqualification in claim for whole property* ] The principle of the rule that a pre-emptor must claim the whole of the property included in the sale transaction, and for which one price was paid, if he is entitled to claim it, and cannot obtain a decree for part only of such property, applies to the case of a pre-emptor who claims the whole, but who is at the time disentitled by his own act or laches to maintain the claim as to a part. Such a disqualification prevents the pre-emptor from maintaining his suit for any portion of the property included in the sale. Where therefore a pre-emptor was disqualified from claiming a portion of the property sold, by not having made a prompt demand in accordance with the Mahomedan law in respect of such portion. *Held* that he was thereby prevented from maintaining his suit for another portion claimed under the provisions of the *wajib-ul-arz* of a village, though he was willing to pay the full purchase-money and to leave in the vendee’s hands the portion as to which he was disqualified. *MUHAMMAD WILAYAT ALI KHAN v. ABDUL RAB.*

[I. L. R. 11 All. 108]

## (3) CEREMONIES.

10.—*Want of proof of required ceremonies—Wajib-ul-arz—Custom—Immediate and confirmatory demands.* ] The *wajib-ul-arz* of a village gave a right of pre-emption according to the

# MAHOMEDAN LAW—PRE-EMPTION— *concluded.*

## (3) CEREMONIES—*concluded.*

usage of the country." In a suit for pre-emption there was no evidence to show what, in fact, was the usage prevailing in the district in regard to pre-emption. There was no evidence that the plaintiff had satisfied the requirements of the Mahomedan law as to immediate and confirmatory demands, or that there was any custom which absolved him from compliance with those requirements, or that he was at any time willing to pay the actual contract price: *Held* that in the absence of evidence of any special custom different from or not co-extensive with the Mahomedan law of pre-emption, that law must be applied to the case, and that, under the circumstances above stated, the suit failed and must be dismissed. *Fukir Rawot v. Emambakhsh*, B. L. R. Sup. Vol. 35; *Choudhry Brij Lal v. Goor Sahar*, Agra F. B 128, and *Jai Kuar v. Hira Lal*, 7 N. W. 1, referred to. *RAM PRASAD v. ABDUL KARIM*.

[I. L. R. 9 All. 513]

11.—*Omission to give notice of claim until after lapse of long time—Long deferred demand.*] A sale of property, to which the Mahomedan law of pre-emption was applicable, took place in October, 1884. The plaintiff pre-emptor and his agent became aware of the sale shortly after it took place, and many months prior to July, 1885. He did not allege that he had given notice that he claimed to exercise his right of pre-emption before July 1885. It was found as a fact that no such notice was given: *Held* that even if such notice was given, it was too late, and was not a prompt demand in accordance with the Mahomedan law. *MUHAMMAD WILAYAT ALI KHAN v. ABDUL RAB*.

[I. L. R. 11 All. 108]

# MAHOMEDAN LAW—WILL.

*See* MAHOMEDAN LAW—GIFT.

[I. L. R. 9 All. 357]

# MAINTENANCE.

*See* CHAMPERTY.

[I. L. R. 11 All. 58]

*See* EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES.

[I. L. R. 11 Bom 528]

*See* EXECUTION OF DECREE—MODE OF EXECUTION—JOINT PROPERTY.

[I. L. R. 11 Mad. 378]

*See* EXECUTION OF DECREE—MODE OF EXECUTION—MAINTENANCE.

[I. L. R. 9 All. 33]

[I. L. R. 10 All. 283]

# MAINTENANCE—*concluded.*

*See* HINDU LAW—MAINTENANCE.

*See* MALABAR LAW—JOINT FAMILY

[I. L. R. 11 Mad. 378]

*See* MALABAR LAW—MAINTENANCE.

*See* RES JUDICATA—REFUSAL OF RELIEF.

[I. L. R. 12 Mad. 183]

*See* RIGHT OF SUIT—DECREES, SUITS ON

[I. L. R. 12 Mad. 183]

*See* CASES UNDER SMALL CAUSE COURT MOFUSSIL—JURISDICTION—MAINTENANCE.

*See* SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—MAINTENANCE.

[I. L. R. 10 Mad 114]

# MAINTENANCE, ORDER OF CRIMINAL COURT AS TO.

1.—*Mahomedan Law—Shiah School—Muta Marriage—Gift of term—Divorce.*] In a suit brought by a Mahomedan of the Shiah sect against his wife, belonging to the same persuasion, for a declaration that the relationship of husband and wife had terminated, and that he was not liable to pay maintenance to her which he had been directed to do by an order passed under the provisions of the Code of Criminal Procedure, on the allegation that the marriage was of a *muta* form and that he, on the 22nd February 1882, had made *hiba-i-muddat* (gift of the term) of whatever period there then might remain unexpired, the wife pleaded *inter alia* that her husband was not competent to dissolve the marriage tie within the contracted period without her consent, and that, if under the Mahomedan law the consent was unnecessary, the Court was bound, in administering justice, equity and good conscience, to modify the strict law in this respect. *Held* that, although the Court could not grant an injunction restraining the Magistrate from enforcing the order for maintenance, the plaintiff was entitled to ask the Magistrate to abstain from giving further effect to his order after the Civil Court had found that the relationship of husband and wife had ceased to exist. *MAHOMED ABID ALI KUMAR KADAR v. LUDDEN SAHIBA*.

[I. L. R. 14 Calc. 276]

2.—*Criminal Procedure Code, s. 488—Release of claim for maintenance.*] Where an application is made to a Magistrate to enforce an order for maintenance, passed under s. 488 of the Code of Criminal Procedure, such Magistrate is not bound to enforce the order if the defendant proves that the claim for maintenance has been released. *RENGAMMA v. MAHAMMAD ALI*.

[I. L. R. 10 Mad. 13]

# MAINTENANCE, ORDER OF CRIMINAL COURT AS TO—continued.

3.—*Criminal Procedure Code*, s. 488—*Wife—Breach of order for monthly allowance—Warrant for levying arrears for several months—Imprisonment for allowance remaining unpaid after execution of warrant—Act I of 1868, s. 2, cl. 18—“Imprisonment.”*] Where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding, and arrears levied under a single warrant, the Magistrate acting under s. 488 of the Criminal Procedure Code has no power to pass a heavier sentence in default than one month's imprisonment, as if the warrant only related to a single breach of the order. *Per* EDGE, C. J.—S 488 contemplates that a separate warrant should issue for each separate monthly breach of the order. *Per* STRAIGHT, J.—The third paragraph of s. 488 ought to be strictly construed, and, as far as possible, construed in favour of the subject. Under the section, a condition precedent to the infliction of a term of imprisonment is the issue of a warrant in respect of each breach of the order directing maintenance, and where, after distress has been issued, *nulla bona* is the return. The section contemplates one warrant, one punishment, and not a cumulative warrant and cumulative punishment. Also *per* STRAIGHT, J.—With reference to s. 2, cl. (18) of the General Clauses Act (I of 1868), “imprisonment” in s. 488 of the Criminal Procedure Code may be either simple or rigorous. *Per* OLDFIELD, J.—A claim for accumulated arrears of maintenance arising under several breaches of order may be dealt with in one proceeding, and arrears levied under a single warrant. *QUEEN-EMPRESS v. NARAIN.*

[I. L. R. 9 All. 240]

4.—*Criminal Procedure Code*, s. 488—*Maintenance order passed on report of Subordinate Magistrate.*] Under s. 488 of the Code of Criminal Procedure a Magistrate of the first class may, upon proof of neglect or refusal by a person having sufficient means to support his wife, order such person to make a monthly allowance for the maintenance of his wife: a first-class Magistrate having referred a complaint by a wife for maintenance to a Subordinate Magistrate to take evidence and report upon the facts stated in the petition of complainant, passed an order upon such report in the absence of the husband for payment of maintenance: *Held*, that the order was illegal. *VENKATA v. PARAMMA.*

[I. L. R. 11 Mad. 199]

5.—*Criminal Procedure Code*, s. 488—*“Cruelty.”*] The word “cruelty” in s. 488 of the Criminal Procedure Code is not necessarily limited to personal violence. *Kelly v. Kelly*, L. R. 2 P. D. 59 and *Tomkins v. Tomkins*, 1 S. & T. 168, referred to. *RUKMIN v. PEARE LAL.*

[I. L. R. 11 All. 180]

# MAINTENANCE, ORDER OF CRIMINAL COURT AS TO—concluded.

6.—*Criminal Procedure Code*, 1882, s. 488—*Evidence Act (Act I of 1872)*, s. 120—*Bastardy proceedings—Order of affiliation—Evidence—Competent witness*] Bastardy proceedings under the provisions of s. 488 of the Criminal Procedure Code are in the nature of civil proceedings within the meaning of s. 120 of the Evidence Act, and the person sought to be charged is a competent witness on his own behalf. Upon a summons, charging that the defendant, having sufficient means, had refused to maintain his child by his *nika* wife, whom he had subsequently divorced, the Magistrate found that the marriage had not been proved, but that, upon the other evidence adduced, including the similarity of the features and the name of the child with those of the defendant, who did not appear before him during the proceedings, but with whom he stated that he was well acquainted, the child was the illegitimate child of the defendant. He accordingly made an order for maintenance under the section: *Held*, that, under the circumstances, he was wrong in taking into account the similarity of the names and the features of the child and the defendant, but as there was ample evidence of the paternity, he was justified in making the order he did, as it was immaterial for the purpose of determining the liability of the defendant to maintain the child, whether the mother had been married to the defendant or not. *NUR MAHOMED v. BISMULLA JAN.*

[I. L. R. 16 Calc. 781]

# MAJORITY ACT (IX OF 1875).

—, s. 3.—*Minor—Guardian—Guardian of property—Guardian of person—Necessity for issue of certificate of administration in order to complete appointment of guardian of property—Appointment of guardian of person—Age of majority—Limitation.*] The Bombay Minors' Act XX of 1864 does not, in terms, provide for the appointment of a guardian of the property of a minor, but only for the grant of a certificate of administration, so that until the certificate is issued there is no such appointment of the guardian of the property as will extend the age of minority from eighteen to twenty-one. But it is different as regards the appointment of a guardian of the person. The Act provides, in terms, for such an appointment being made, and no certificate of appointment is contemplated by the Act, on the language of which it is plain that the appointment of a guardian of the person is complete on the order of the Court being made appointing him. The plaintiff's mother Gitabai died in 1866 possessed of property which she had inherited from her husband. The plaintiff, who was born in 1858, was then a minor of the age of eight years. In 1867 the plaintiff's maternal grandfather obtained a certificate of administration. On his death an order of Court was made on the 21st March 1873, appointing the Nazir of the Court administrator of the property and the plaintiff's mother-in-law the guardian of the

**MAJORITY LAW (IX OF 1875)—concluded.**

person of the plaintiff, but no fresh certificate of administration was granted. In 1880 the plaintiff brought the present suit against the defendants to recover from them the property left by her mother. The defendants contended (*inter alia*) that the plaintiff had attained her majority in 1874, when she arrived at the age of sixteen, and that the suit was therefore barred by limitation. The plaintiff, on the other hand, contended that the Indian Majority Act IX of 1875 was applicable, and that under its provisions she did not attain majority until she was twenty-one, *viz.* until the year 1879, and that the present suit was, therefore, in time. *Held*, that the suit was not barred by limitation. The Indian Majority Act IX of 1875 was applicable (except so far as its operation was excluded by s. 2), inasmuch as there was a guardian of the person of the plaintiff in existence both when she arrived at the age of sixteen and also when she was eighteen, and, therefore, the period of minority for her was extended to twenty-one years of age. *Quære*.—Whether the fact that a guardian has been at one time appointed is sufficient to bring the case within s. 3 of the Indian Majority Act IX of 1875, so as to extend the period of minority to the age of twenty-one. The intention of the Legislature to be gathered from s. 3 would appear to be to extend minority to twenty-one years of age in cases where at the time the minor reaches the age of eighteen his person or property is in the hands of a guardian. **YEKNATH v. WARUBAI.**

[I. L. R. 13 Bom. 285]

**MALABAR LAW—DEBTS.**

*Brahmans—Nambudris—Mussads—Hindu Law how far applicable—Liability of sons for father's debt in Hindu Law not applicable* ] The principle of Hindu law, which imposes a duty on a son to pay his father's debt, contracted for purposes neither illegal nor immoral, is not applicable to the Malabar Brahmans called Nambudris and Mussads. **NILAKANDAN v. MADHAVAN.**

[I. L. R. 10 Mad. 9]

**MALABAR LAW—ENDOWMENT.**

*Rights of stanomdars* ] Rights of members of a stanom, *inter se*, considered. **MAHOMED v. KRISHNAN.**

[I. L. R. 11 Mad. 106]

**MALABAR LAW—INHERITANCE.**

*Appointment of Heir—Nambudris, their personal law—Power of disposing of tarwad property by an antharyanam—Sarvaspadhanam marriage* ] Suit by the Secretary of State to declare a right of escheat of the property of a Nambudri *illam*. The last male member of the *illam* died about 1859, leaving defendant No. 1 and her mother the sole surviving members of the *illam*. Defendant No. 1 had previously been married to a member of another *illam* by a sarvaspadhanam marriage, but her husband died with-

**MALABAR LAW — INHERITANCE—concluded.**

out issue. In 1872, defendant No. 1 and her mother—there being no *attaladakkam* heirs—appointed defendant No. 2, an adult member of a third *illam*, to be manager and heir of their *illam* and to marry and raise up issue for it. The mother and father of defendants Nos. 1 and 2, respectively, were brother and sister: *Held*, (1) that Nambudri Brahmans are governed by Hindu law as modified by special customs adopted by them since their settlement in Malabar; (2) that defendant No. 2 had no right to the property of the *illam* independently of the appointment of 1872; (3) that the property of the *illam* was not the *soudayika* of defendant No. 1, and as such at her absolute disposal; (4) that a Nambudri widow, who is the sole surviving member of her *illam*, is not at liberty to alienate the property of the *illam* at her pleasure; (5) that there was sufficient evidence of a custom that a Nambudri widow can adopt or appoint an heir in order to perpetuate her *illam* in the absence of *dayadars* with ten or three days' pollution and the appointment of defendant No. 2 was valid against the Crown. *Quære*.—Whether in such appointment of an heir it is necessary to direct that he should marry for the *illam* to which he is appointed as heir. **VASUDEVAN v. SECRETARY OF STATE FOR INDIA.**

[I. L. R. 11 Mad. 157]

**MALABAR LAW—JOINT FAMILY.**

*See RIGHT OF SUIT—INTEREST TO SUPPORT RIGHT*

[I. L. R. 11 Mad. 106]

1.—*Power of karnaran—Power to set aside family arrangements*—A *karnaran* is not entitled of his own authority to set aside a family arrangement made on behalf of all the members of the *tarwad*. **KOMU v. KRISHNA.**

[I. L. R. 11 Mad. 134]

2.—*Powers of karnaran—Delegation of powers of karnaran to his son*.] The *karnaran* of a Malabar *tarwad* having been sentenced to a term of imprisonment delegated to his son all his powers as *karnaran* pending the expiry of his sentence. *Held*, that the delegation was *ultra vires* and void. **CHAPPAN NAYAR v. ASSEN KUTTI.**

[I. L. R. 12 Mad. 219]

3.—*Karnaran, disqualification for the office of—Blindness*.] Suit to remove the defendant from the office of *karnaran* of a Malabar *tarwad*. The defendant had become blind after occupying the office of *karnaran* for some years. *Held*, that the defendant was not a fit person to be the *karnaran* of a *tarwad* and should be removed from his office. **KANARAN v. KUNJAN.**

[I. L. R. 12 Mad. 307]

# MALABAR LAW--JOINT FAMILY-- continued.

4.—*Decree for maintenance against karnavan—Execution against tarwad property* ] A member of a Malabar tarwad having obtained a decree for maintenance against her karnavan, assigned the decree to the plaintiff, who proceeded to execute it against the tarwad property. The then karnavan objected and his claim was allowed. In a suit by plaintiff to have it declared that he was entitled to execute the decree against tarwad property *Held*, that the plaintiff was entitled to execute the decree against the tarwad property. CHANDU v RAMAN.

[I. L. R. 11 Mad. 378]

5.—*Decree against karnavan and senior anandhravan not binding on junior members—Civil Procedure Code, s. 13, expl. 5, s. 30* ] A decree having been obtained against the karnavan and senior anandhravan of a Malabar tarwad whereby the tarwad was dispossessed of certain land, the junior members of the tarwad who had not been impleaded in the suit sued to recover the land. — *Held*, that the plaintiffs were entitled to recover upon proof that the decree in the former suit was not substantially correct, and that they were bound to prove mala fides on the part of their karnavan in defending the former suit as a condition precedent to recover. SRIDEVI v. KELU ERADI.

[I. L. R. 10 Mad. 79]

6.—*Karnavan, decree against—Female managing the affairs of a tarwad—Res judicata.* ] The senior female member of a Malabar tarwad, who managed its affairs, instituted a suit on behalf of the tarwad and in the capacity of karnavan: *Held*, (1) that a female is not precluded from managing the affairs of her tarwad when there is no male member in her family capable of performing the duties of a karnavan; and (2) that the junior members of the tarwad were, in the absence of fraud shown, constructively parties to the suit, and were accordingly bound by the decree. SUBRAMANYAN v. GOPALA.

[I. L. R. 10 Mad. 223]

7.—*Res judicata—Cancellation of deeds—Declaratory suit—Withdrawal of part of claim* ] A and B, junior members of a Malabar tarwad, sued to cancel certain mortgages executed by their karnavan and senior anandhravan, on the ground that the secured debt was not binding on the tarwad, and to appoint A to the office of karnavan. The last part of the prayer was withdrawn. The mortgages were executed to secure a decree-debt, the decree having been passed *ex parte* against the late karnavan of the tarwad. No fraud was alleged, but the lower Courts found that the karnavan had been guilty of fraud in allowing the decree to be passed *ex parte*. The plaintiffs had not been parties to the decree, and the other junior members of the tarwad who had been joined were exempted from liability. *Held* that the nature of the debt was not *res judicata* and

# MALABAR LAW--JOINT FAMILY -- concluded.

that the plaintiffs were entitled to a declaration that the mortgages in question were invalid as against them. MOIDIN KUTTI v. KRISHNAN.

[I. L. R. 10 Mad. 322]

8.—*Suit against karnavan and senior female member of a tarwad—Evidence of intention to sue defendants as representatives of the tarwad* ] The karnavan and senior female member of a Malabar tarwad executed a hypothecation-bond, on which a suit was brought against them asking for the sale of the tarwad property. The defendants had represented the tarwad in other suits, but were not in this case expressly sued in a representative capacity. The plaintiff obtained a decree. *Held*, that the decree was binding on the tarwad. SUBRAMANYAN v. KALI.

[I. L. R. 10 Mad. 355]

9.—*Personal decree against karnavan.* ] A sued for possession of certain shops belonging to a Malabar tarwad which had been attached in execution of a personal decree passed against a karnavan in a suit on a private debt. In the execution proceedings an objection petition was put in, stating that the shops were *stridhanan* and was rejected; and the order of rejection was not appealed against for one year. Respondents Nos. 1 to 4, the husbands of the persons who put in the objection petition, were in possession and were now sued for possession. The plaintiff was assignee of the purchaser at the execution-sale: *Held*, that upon the facts found the plaintiff acquired nothing under the Court-sale. ACHUTA v MAMMAVU.

[I. L. R. 10 Mad. 357]

10.—*Decree against karnavan—Representative of tarwad.* ] The karnavan and an anandhravan of a Malabar tarwad were authorized by a karar to manage the affairs of the tarwad. A decree was obtained against them, and land belonging to the tarwad was attached and sold in execution. The plaint did not describe the defendants otherwise than by their individual names; but the plaintiff's claim was, *inter alia*, in respect of the breach of a contract by the defendants to put him into possession of certain land which was expressed to be "the *jenm* of the defendants tarwad." It was found in the present suit that the amount decreed in the prior suit constituted a debt due by the tarwad. *Held*, that the decree and the execution-sale did not bind the tarwad—*Daulat Ram v. Mehr Chand* (I. L. R. 15 Calc. 70), distinguished. SANKARAN v. PARVATHI.

[I. L. R. 12 Mad. 434]

# MALABAR LAW--MAINTENANCE.

1.—*Maintenance claimed by anandhravans living in tarwad house against karnavan, who had left tarwad house and neglected to maintain family.* ] Where a suit was brought by an anandhravan of a Malabar tarwad living in the family house for

**MALABAR LAW—MAINTENANCE—**  
*continued.*

maintenance against the *karnavan*, who had left the family house, resided elsewhere, and neglected to maintain the plaintiffs: *Held*, that the plaintiffs were entitled to maintain the suit—*Kunhammatha v. Khunhi Kutti Ali* (I. L. R. 7 Mad. 235), distinguished. *KESAVA v. UNIKKANDA*.  
[I. L. R. 11 Mad. 307]

2.—*Karnavan, insufficient maintenance of junior members by—Suit by junior members living in a tarwad house apart from the karnavan* ] Suit by twelve junior members of a Malabar tarwad against the *karnavan* for arrears of maintenance. The plaintiffs lived in a *tarwad* house apart from the *karnavan*, who did not allege that this arrangement was contrary to his wishes, but pleaded that he provided for them adequately. *Held*, that the plaintiffs were entitled to a decree for a reasonable amount by way of maintenance, in computing which allowance should be made for the income of the *tarwad* property in their possession. *Nal-lakandiyil Parvadi v. Chathu Nambiar* (I. L. R., 4 Mad., 169) followed. *CHEKKUTTI v. PAKKI*.  
[I. L. R. 12 Mad. 305]

**MALABAR LAW—MORTGAGE.**

1.—*Rights under a kanam—Denial of jenmi right by kanamdar—Adverse possession—Limitation—Declaration of escheat.* ] A demised certain lands on *kanam* to B in 1853. B afterwards committed an offence under the Mapilla Act and the lands were handed over for the benefit of his representatives to C. Government subsequently without making A a party to their proceedings, declared the lands to have escheated, and in 1863 sold them to C. A's representatives now sued to recover the lands from C's representatives who set up an adverse title and alleged that the suit was time-barred: *Held*, that C was, at the time of the escheat, in the position of a manager for mortgagees; that the escheat proceedings of which the mortgagor had no notice did not affect his rights; that denial by the mortgagee in possession of the mortgagor's right to redeem is not sufficient to convert such possession into adverse possession. *MUSSAD v. THE COLLECTOR OF MALABAR*.  
[I. L. R. 10 Mad. 189]

2.—*Kanam—Construction of redemption clause—Time for redemption.* ] The primary intention that a *kanam* is to be redeemed only after 12 years, can be negatived either expressly or by implication by a special clause. *Puthenpurayil Kuridpravan Kanara Kurup v. Puthenpurayil Kuridpravan Govindan* (I. L. R. 5 Mad. 311), distinguished. *AHMED KUTTI v. KUNHAMED*.  
[I. L. R. 10 Mad. 192]

**MALABAR LAW—WILL.**

—*Testamentary dispositions of tarwad property by last surviving member of tarwad, valid.* ] The last surviving member of a Malabar tarwad can

**MALABAR LAW—WILL—concluded.**

make a valid testamentary disposition of the *tarwad* property. *ALAMI v. KOMU*; *SECRETARY OF STATE FOR INDIA v. KOMU*.  
[I. L. R. 12 Mad. 126]

**MALICE**

*See* WRONGFUL CONFINEMENT

[I. L. R. 13 Bom. 376]

*See* PRIVILEGED COMMUNICATION

[I. L. R. 12 Mad. 374]

**MALICIOUS PROSECUTION.**

*See* ABATEMENT OF SUIT—SUITS.

[I. L. R. 13 Bom. 677]

*See* RIGHT OF SUIT—SURVIVAL OF RIGHT.

[I. L. R. 13 Bom. 677]

*See* SUBORDINATE JUDGE, JURISDICTION OF.

[I. L. R. 11 Bom. 370]

[I. L. R. 12 Bom. 358]

—*Application for sanction to prosecute—Civil Procedure Code, s. 195—Cause of action* ] *Held* that an unsuccessful application under s. 195 of the Criminal Procedure Code for sanction to prosecute for offences under the Penal Code, in which the only loss or injury entailed on the party against whom such application was directed, was the expense he incurred in employing counsel to appear in answer to such application, such appearance being due to the fact not that he had been summoned, but that he had applied through counsel for notice of the application, anticipating that it would be made, afforded no cause of action in a suit for recovery of damages on account of malicious prosecution. *EZID BAKHSH v. HARSUKH RAI*.  
[I. L. R. 9 All. 59]

**MALIKANA.**

*See* COVENANT—COVENANT RUNNING WITH LAND.

[I. L. R. 9 All. 591]

*See* DEED—CONSTRUCTION.

[I. L. R. 9 All. 591]

*See* SMALL CAUSE COURT MOFUSSIL—JURISDICTION—TITLE, QUESTION OF.

[I. L. R. 9 All. 591]

*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS—TITLE, QUESTION OF.

[I. L. R. 9 All. 591]

**MAMLATDARS' COURTS ACT (BOMBAY ACT III OF 1876).**

—, s. 4 —*Jurisdiction of Mamlatdars' Courts in redemption suits—Construction of statutes* [Under Bombay Act III of 1876 Mamlatdars have no jurisdiction to take cognizance of suits arising out of disputed claims to redeem mortgages *SHIDLINGAPA v. KARISBASAPA*.]

[I. L. R. 11 Bom. 599]

—, s. 1, cl. 2.—*Jurisdiction to grant an injunction—Possession—Physical possession—Disturbance of possession.* [Under s. 4, cl. 2 of the Mamlatdars' Act (Bombay Act III of 1876) a Mamlatdar can grant an injunction in those cases only in which an interruption of physical possession or enjoyment is sought to be removed. *DESAI MALABHAI BAPUHAJI v. KESHAV BHAI KUBERBHAI*.]

[I. L. R. 12 Bom. 419]

—, s. 15, cl. (c).—*Suit for injunction—Person dispossessed in execution of decree—His remedy by suit or application under s. 332 of the Code of Civil Procedure (Act XIV of 1882).* [A person is not entitled to claim relief (by way of injunction) under s. 15, cl. (c) of the Bombay Mamlatdars' Act (III of 1876), if he is not in possession at the time of the suit. A person, dispossessed of his land in execution of a decree of a Civil Court against a third party, should proceed for the alleged obstruction of his possession, not by a suit in the Mamlatdar's Court, but by an application under s. 332 of the Code of Civil Procedure (Act XIV of 1882), or by a regular suit. *GULABHAI GOPALJI v. JINABHAI RATANJI*.]

[I. L. R. 13 Bom. 213]

—, ss. 17 and 18.—*Procedure applicable to such Courts.* [Where a person is dispossessed in execution of a Mamlatdar's decree against a third party, his proper remedy is by a suit, and not by a miscellaneous application. Though the Mamlatdars' Courts, as constituted under Bombay Act III of 1876, are Civil Courts, subject to the revisional jurisdiction of the High Court, it does not follow that the provisions of the Code of Civil Procedure are generally applicable to those Courts. Bombay Act III of 1876 provides a special procedure for Mamlatdars' Courts; and there is no indication in the Act of any intention that the rules of the Code of Civil Procedure shall apply to causes for which the special procedure makes no provision. Ss. 17 and 18 of the Act, which relate to the execution of Mamlatdars' decrees, cannot be supplemented, as to matters not referred to in those sections, by any of the provisions of the Code relating to the execution of decrees of Civil Courts. *KASAM SAHEB VALAD SHAH AHMED SAHEB v. MARUTI BIN RAMBHAIJI*.]

[I. L. R. 13 Bom. 552]

**MANAGEMENT OF ESTATE BY COURT.**

—*Summary enforcement of contract made by the Court—Izarah Lease Lessor, Application by, though no party to the suit—Application by a person not a party to a suit* [A Court has com-

**MANAGEMENT OF ESTATE BY COURT**  
—*concluded.*

plete power to enforce summarily a contract made by it when managing or administering an estate, whatever that contract may be. Such power of enforcing subsisting contracts made by it is not affected by the fact that the Court has ceased to manage the estate before such contract is carried out by reason of the dismissal of the suit under an order in which the Court had derived its power of management. Case in which the Court passed summarily such an order on the application of a lessee, not a party to the suit in which the order completing the agreement for lease had been passed, and at a time when such suit was no longer in existence. *SURENDRO KESHUB ROY v. DORGASOONDERY DOSSEE, EX-PARTE SARODAPERSAUD SOOR*.

[I. L. R. 25 Calc. 253]

**MANAGER, APPLICATION FOR.**

See APPEAL—ACTS—BENGAL TENANCY ACT.

[I. L. R. 14 Calc. 312]

**MARKET.**

See MADRAS DISTRICT MUNICIPALITIES ACT, s. 198.

[I. L. R. 10 Mad. 216]

**MARRIAGE.**

—, Dissolution of, Suit for.

See DIVORCE ACT, ss. 16, 17.

[I. L. R. 10 All. 559]

—, Illegal Agreement respecting.

See CONTRACT ACT, s. 23 — ILLEGAL CONTRACTS — AGAINST PUBLIC POLICY.

[I. L. R. 13 Bom. 126, 131]

—, Validity of.

See BIGAMY.

[I. L. R. 10 Mad. 218]

See HINDU LAW — MARRIAGE — RIGHT TO GIVE IN MARRIAGE, &c.

[I. L. R. 11 Bom. 247]

See PARSIS.

[I. L. R. 11 Bom. 302]

**MARRIED WOMAN'S PROPERTY ACT (III OF 1874).**

—, s. 8.—*Husband and wife—Settlement—Property settled on married woman to her separate use and without power of anticipation—Power of married woman to charge such property with payment of debts incurred subsequently to marriage.* [Held, that, under s. 8 of Act III of 1874, a married woman has power to charge property settled upon herself, for her separate use without power of anticipation with the payment of debts incurred



**MARRIED WOMAN'S PROPERTY ACT**  
(III OF 1874)—*concluded*.

by her subsequently to her marriage, and such a charge is valid and binding. *CURSETJI PESTONJI TARACHAND v RUSTOMJI DOSSABHOY*

[I. L. R. 11 Bom. 348]

**MAXIM.**

—, *Actio personalis moritur cum persona.*

*See* ABATEMENT OF SUIT—SUITS.

[I. L. R. 13 Bom. 677]

*See* RIGHT OF SUIT—SURVIVAL OF RIGHT.

[I. L. R. 13 Bom. 677]

—, *Certum est, quod certum reddi potest.*

*See* LIMITATION ACT 1877, ART. 132.

[I. L. R. 9 All. 158]

*See* MORTGAGE—FORM OF MORTGAGES.

[I. L. R. 9 All. 158]

—, *Aedificare in tuo proprio solo non licet quod alteri noceat.*

*See* CUSTOM.

[I. L. R. 10 All. 358]

*See* PRESCRIPTION—EASEMENTS—PRIVACY.

[I. L. R. 10 All. 358]

*See* RIGHT OF SUIT—EASEMENTS.

[I. L. R. 10 All. 358]

—, *Omnia præsumentur rite esse acta.*

*See* SUPERINTENDENCE OF HIGH COURT.

—CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 10 All. 119]

—*[Certificate of sale—Proof of title without production of certificate.]* A plaintiff who has purchased land at a sale in execution of a decree is not bound to rely on the certificate to prove his title. If it is proved *abunde* that the sale took place and that possession was given, the Court should presume, after long lapse of time and possession by a mortgagee of the purchaser that the sale was duly made by the Court. *VELAN v. KUMARASAMI.*

[I. L. R. 11 Mad. 296]

—, *Quod fieri non debuit, factum valet.*

*See* CASES UNDER HINDU LAW—ADOPTION—DOCTRINE OF FACTUM VALET AS RESPECTS ADOPTION.

*See* HINDU LAW—MARRIAGE—RIGHT TO GIVE IN MARRIAGE, &c.

[I. L. R. 11 Bom. 247]

**MAXIM—concluded.**

—, *Sic utere tuo ut alienum non lœdas.*

*See* CUSTOM.

[I. L. R. 10 All. 358]

*See* PRESCRIPTION—EASEMENTS—PRIVACY.

[I. L. R. 10 All. 358]

*See* RIGHT OF SUIT—EASEMENTS

[I. L. R. 10 All. 358]

—, *Volenti non fit injuria.*

*See* NEGLIGENCE.

[I. L. R. 13 Bom. 183]

*See* VENDOR AND PURCHASER—MISCELLANEOUS CASES

[I. L. R. 13 Bom. 183]

**MEASUREMENT OF LAND.**

*See* LEASE—CONSTRUCTION.

[I. L. R. 14 Calc. 99]

**MEDAL, TAKING PAWN OF, FROM SOLDIER**

*See* ARMY ACT 1881, s. 156.

[I. L. R. 10 Mad. 108]

**MERCANTILE USAGE.**

*See* CUSTOM.

[I. L. R. 11 Mad. 459]

*See* TRANSFER OF PROPERTY.

[I. L. R. 11 Mad. 459]

**MERCHANT SHIPPING ACT 1854, 17 and 18 VICT., c. 104.**

—, s. 267.—*Trial of British Seamen for offences committed on British ship on the High Seas—Procedure at such trial—Murder—Admiralty Courts—British Seamen on British ship—Letters Patent, High Court, 1865, cl. 26—Case certified by Advocate-General.* A British seaman, who stood charged with the murder of a fellow-sailor on board a British ship on the high seas, was tried by a Judge of the High Court, under the Code of Criminal Procedure; the chief evidence against the prisoner being that given in the depositions of the Captain and Second Officer of the ship, taken on commission; this evidence was admitted in evidence, and the prisoner was convicted and sentenced. It was objected that, under s. 267 of the Merchant Shipping Act of 1854, the prisoner ought to have been tried in every respect as though the trial had been held at the Central Criminal Court in London, and that the law of evidence to be applied was that prevailing in England. *Held*, on a case certified by the Advocate-General under cl. 26 of the Letters Patent, that the prisoner had been properly tried according to the ordinary practice

**MERCHANT SHIPPING ACT 1854, 17 and 18 VICT, C. 104—concluded.**

of the High Court and that the evidence was admissible against him. *QUEEN-EMPRESS v. BARTON.*

[I. L. R. 16 Cal. 238]

**MERGER.**

*See* MORTGAGE—SALE OF MORTGAGED PROPERTY—MONEY DECREES ON MORTGAGES.

[I. L. R. 9 All. 23]

—*Merger of securities.*] On the 5th September 1874, *R*, a Hindu, and his sons borrowed Rs. 5,000 from *V*, and mortgaged to him certain land, items 1, 2, and 3. On the 7th September 1874, *V* borrowed Rs. 5,000 from *R N*, and mortgaged his rights in items 1 and 2 and land of his own to *R N*. In 1877 *R N* bought at a sale in execution of a decree against *R* the share of *R* in the said items 1 and 2 subject to the mortgage created by *R* on 5th September 1874, and to another mortgage created by *R* on 11th January 1875. In 1885 *R N* sued the sons of *R* and *V* to recover principal and interest due under his mortgage-bond. *V* pleaded that, as *R N* had bought *R*'s share in items 1 and 2, subject to the mortgages created by him, *R N*'s rights as mortgagee were merged in his rights as purchaser. *Held*, that the claim of *R N* was not merged. *VENKATA v. RANGA.*

[I. L. R. 10 Mad. 160]

**MESNE PROFITS.**

Col.

1. Right to and liability for mesne profits 669
2. Assessment in execution and suits for mesne profits ... 670
3. Mode of assessment and calculation . 671

*See* CASES UNDER DECREE—CONSTRUCTION OF DECREE—MESNE PROFITS.

*See* EXECUTION OF DECREE—MODE OF EXECUTION—DECLARATORY DECREE,

[I. L. R. 12 Bom. 416]

*See* LIMITATION ACT, 1877, ART. 131.

[I. L. R. 12 Bom. 416]

—, Liability for.

*See* MINOR—REPRESENTATION OF MINOR IN SUITS.

[I. L. R. 16 Cal. 40]

**(1) RIGHT TO AND LIABILITY FOR MESNE PROFITS.**

1.—*Suit for partition and account of right in joint estate.*] The sections of the Code of Civil Procedure relating to mesne profits are not applicable to a suit for partition or for an account of the proceeds of family estate in which a plaintiff has no specific interest until decree. *PIRTHI PAL v. JOWAHIR SINGH.*

[I. L. R. 14 Cal. 493]

[L. R. 14 I. A. 37]

**MESNE PROFITS—continued.****(1) RIGHT TO AND LIABILITY FOR MESNE PROFITS—(concluded.)**

2.—*Ejectment and taking possession on expiry of lease without notice of ejectment—N. W. P. Rent Act XII of 1881, s. 36.*] Where upon the expiry of the term of a lease, but without the written notice of ejectment required by s. 36 of the N. W. P. Rent Act having been given by the lessor, possession was taken and rents collected by persons claiming under a subsequent lease—*held* that the tenancy of the first lessees did not cease upon the determination of the term of their lease, and that the second lessees were wrong-doers in usurping possession and collecting rents and profits, and were liable in a suit for damages by way of mesne profits after deduction of a sum paid by them for Government revenue, but without deduction of what they had paid the lessor or of the expenses they had incurred in collecting the rents. *SHITAB DEI v. AJUDHIA PRASAD.*

[I. L. R. 10 All. 13]

**(2) ASSESSMENT IN EXECUTION AND SUITS FOR MESNE PROFITS**

3.—*Execution of Decree—Possession under decree—Reversal of decree—Restitution of property after reversal of decree—Civil Procedure Code, 1882, s. 244.*] A Court, reversing a decree under which possession of property has been taken, has power to order restitution of the property taken possession of and with it any mesne profits which may have accrued during such possession. *MOOKOOND LAL PAL CHOWDERY v. MAHOMED SAMI MEAH.*

[I. L. R. 14 Cal. 484]

4.—*Decree for possession of immoveable property—Reversal of decree on appeal—Suit for recovery of mesne profits from person who has taken possession under a decree which is subsequently reversed on appeal—Civil Procedure Code (Act XIV of 1882), s. 244.*] A landlord sued his tenant for arrears of rent, and obtained a decree for a certain amount and a declaration that if the amount were not paid within fifteen days, the tenant should be ejected under s. 52, Bengal Act VIII of 1869. The amount was not paid, and the landlord executed the decree and obtained possession. The tenant appealed and succeeded in getting the decree set aside, and the amount found due from him for arrears by the first Court, was reduced, and a decree made directing that if the reduced amount were not paid within fifteen days he should be ejected. He paid the amount found due by the Appellate Court within the fifteen days and recovered possession of his holding. He then brought a suit in the Munsif's Court to recover mesne profits from his landlord for the time he was in possession after the execution of the first Court's decree. It was contended on second appeal that the suit would not lie as the matter might and should have been determined in the execution department under s. 244 of the

**MESNE PROFITS—concluded.****(2) ASSESSMENT IN EXECUTION AND SUITS FOR MESNE PROFITS—concluded.**

Civil Procedure Code. *Quære*.—Whether such a suit does not lie, and whether the decisions in *Late Koor v. Sahodra Koor*, 2 C L. R. 75, and analogous cases to the effect that such a suit does not lie are correct. *Ram Ghulam v. Dwarika Rao*, I. L. R. 7 All. 170, cited and approved. *AZIZUD DIN HOSSEIN v. RAMANUGRA ROY*.

[I. L. R. 14 Calc. 605]

5.—*Civil Procedure Code, s. 583—Claim for mesne profits on reversal of decree for possession of land executed.* [A decree for possession of immovable property having been executed was reversed on appeal. The defendant applied under s. 583 of the Code of Civil Procedure for restitution of the mesne profits taken by the plaintiff. The lower Courts dismissed the application on the ground that the proper remedy was by suit:—*Held* that the defendant was entitled to the relief claimed. *KALIANASUNDRAM v. EGNAVEDESWARA*.

[I. L. R. 11 Mad. 261]

**(3) MODE OF ASSESSMENT AND CALCULATION**

6.—*Sale by occupancy-tenant—Decree in favour of landholder against purchaser for mesne profits—Mesne profits how to be assessed* [Where in a suit against an occupancy-tenant and his vendor, the zemindar obtained a decree for cancelment of the deed of sale, for possession of the land by ejectment, and for mesne profits from the date of the suit to the date of recovery of possession—*held* that the mesne profits awarded must be assessed as damages against the vendee as a trespasser, and that the proper measure of such damages was not the rent which was payable by the vendor, but the actual market value of the land for the purpose of letting. *MATUK DHARI SINGH v. ALI NAQI*.

[I. L. R. 10 All. 15]

**MILITARY DECORATION, TAKING PAWN OF, FROM SOLDIER.**

*See* ARMY ACT, 1881, s. 156.

[I. L. R. 10 Mad. 108]

**MINOR.**

*Col*

1. Liability of minor on contracts... 672
2. Right to enforce contracts .. 673
3. Representation of minor in suits 673
4. Cases under Bombay Minors' Act (XX of 1864) ... 677

*See* ACT XL OF 1858, s. 18.

[I. L. R. 9 All. 340]

*See* COMPROMISE—COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE.

[I. L. R. 12 Mad. 483]

[I. L. R. 13 Bom 137]

**MINOR—continued.**

*See* ESTOPPEL—ESTOPPEL BY DEEDS AND OTHER DOCUMENTS.

[I. L. R. 10 Mad. 272]

*See* GUARDIAN—DUTIES AND POWERS OF GUARDIANS.

[I. L. R. 9 All 340]

[I. L. R. 12 Bom. 686]

*See* GUARDIAN—RATIFICATION.

[I. L. R. 10 Mad. 272]

*See* LIMITATION ACT, 1877, ART. 167.

[I. L. R. 11 Bom. 473]

*See* LIMITATION ACT 1877, ART. 179—NATURE OF APPLICATION—IRREGULAR AND DEFECTIVE APPLICATIONS.

[I. L. R. 12 Bom. 427]

*See* OATHS' ACT, s. 9.

[I. L. R. 12 Mad. 483]

*See* PRACTICE—CIVIL CASES—NEXT FRIEND

[I. L. R. 16 Calc. 771]

—, Custody of.

*See* CRIMINAL PROCEDURE CODE, s. 551.

[I. L. R. 16 Calc. 487]

—, Personal Decree against.

*See* SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622

[I. L. R. 11 Mad. 303]

—, Right of, to execute decrees.

*See* LIMITATION ACT 1877, s. 7.

[I. L. R. 14 Calc. 50]

—, Suit by.

*See* ACT XL OF 1858, s. 3.

[I. L. R. 14 Calc. 55]

—, Suit against.

*See* GUARDIAN—APPOINTMENT.

[I. L. R. 12 Bom 553]

**(1) LIABILITY OF MINOR ON CONTRACTS.**

1.—*Enhancement of rent, Effect of—Acts of mother and guardian how far binding on minor son—Kabuliat given by widow in possession to bind her son and successor to pay enhanced rent decreed against her.* [A putnidar obtained decrees for the enhancement of the rent of holdings in the possession of the widow of a deceased tenant, one decree being in respect of land formerly held by the latter, and the other in respect of a holding purchased by the widow, on behalf of her

## MINOR—continued.

(1) LIABILITY OF MINOR ON CONTRACTS  
—concluded.

minor son by the deceased, whilst the enhancement suits were pending. The widow also signed *habluts* relating to both tenancies, agreeing, as mother of the minor, to pay the enhanced rent. *Held*, that as the *putnadar* was entitled to sue for enhancement, and it was not to be presumed that the mother held adversely to her son, also as she had come to what she believed to be, and was, a proper arrangement, the son on his attaining full age, and entering into possession of the tenancies, was bound by the *habluts*. *WATSON AND COMPANY v. SHAM LALL MITTER.*

[I. L. R. 15 Calc. 8  
[L. R. 14 I. A. 178]

## (2) RIGHT TO ENFORCE CONTRACTS.

2.—*Contract Act IX of 1872, ss. 10 and 11—Suit on a bond passed to a minor.* A money-bond taken by a minor is good in law, and may be sued on. *HANMANT LAKSHMAN v. JAYARAO NAR-SINHA*

[I. L. R. 13 Bom. 50]

## (3) REPRESENTATION OF MINOR IN SUITS

3.—*Objection to description of minor—Permission to sue, Proof of—Civil Procedure Code, ss. 440, 578—Act XL of 1858, s. 3.* Although the proper and regular manner of giving permission to sue on behalf of a minor is by an order recorded in the order-sheet, there is, nevertheless, nothing in the nature of the sanction provided by s. 3 of Act XL of 1858 which takes it out of the general rule of evidence that sanction may be proved by express words or by implication. Where on a construction of the pleadings it is found that the minor is the real plaintiff, the mere fact of his not having been properly described in accordance with s. 440 of the Civil Procedure Code is no ground for setting aside a decree passed in the suit. *BHABA PERSHAD KHAN v. SECRETARY OF STATE FOR INDIA.*

[I. L. R. 14 Calc. 159]

4.—*Error in the frame of a suit against a minor defendant. Effect of—Guardian “ad litem” how appointed—Sanction of Court without formal order, Effect of—Service of summons—Civil Procedure Code (Act XIV of 1882), ss. 100 and 443.* The plaintiff in a suit described one of the defendants thus: “N C, guardian on behalf of her own minor son, S C.” Upon the presentation of the plaint the Court directed the plaintiff to produce an affidavit to the effect that the mother of the minor defendant was his guardian, and an affidavit having been made that the “minor defendant” was under the guardianship of the mother, ordered a suit to be registered and summons to be issued on the defendants. N C then filed a written statement, alleging that she held

W., D.

## MINOR—continued.

(3) REPRESENTATION OF MINOR IN  
SUITS—continued.

the land in suit on behalf of the minor: *Held*, that having regard to the order of the Court and the allegations made in the plaint and written statement, the suit was substantially brought against the minor, and the error of description in the plaint being one of mere form, could not without proof of prejudice invalidate a decree against him in the suit. *Held*, also that the want of a formal order appointing a guardian *ad litem* was not fatal to the suit, when it appeared on the face of the proceedings that the Court had sanctioned the appointment. *Held* (O’KINEALY, J., dissenting) that the fact that an order appointing a guardian *ad litem* at the instance of the plaintiff was made *ex parte* was not necessarily fatal to the suit, unless it could be shown that the minor had in any manner been prejudiced thereby. *Per MITTER, J.* (PETHERAM, C J, concurring) that, although the matter of the appointment of a guardian *ad litem* is left to the discretion of the Court, it is always desirable that the appointment at the instance of the plaintiff should not be made, unless the minor, or his friends and relatives in whose care he may be, failed to move the Court for that purpose within a reasonable time after receiving notice of the institution of the suit. *SURESH CHUNDER WUM CHOWDHRY v. JUGUT CHUNDER DEB.*

[I. L. R. 14 Calc. 204]

5.—*Minor. Suit against—Misdescription in title of the plaint and in decree. Effect of.* In a suit brought against a minor widow as the heir of her deceased husband she was described in the cause title of the plaint as ‘the deceased debtor R A’s heiress and minor widow B D’s mother and guardian A D.’ The plaintiff obtained no order for the appointment of a guardian *ad litem*. He, however, obtained a decree, and the minor defendant was described therein in the same manner. *Held*, that the minor was neither a party to the original suit nor to the decree, and that no property of the minor passed upon a sale in execution of such decree. *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb.* [I. L. R. 14 Calc. 204, distinguished *GANGA PRASAD CHOWDHRY v. UMBICA CHURN GOONDOO.*

[I. L. R. 14 Calc 754]

6.—*Minor when bound by proceedings against him—Minor’s Act (XX of 1864), s. 2—Suit by a minor, one year after attaining majority, to recover property sold in execution of a decree obtained against him during minority.* In 1870 a creditor of the plaintiff’s father brought a suit (No. 573 of 1870) against the plaintiff, and obtained a money-decree against him. The plaintiff was then a minor, and his estate was administered by the Collector of Ratnagiri. In this suit he was represented by his mother and guardian. At the sale held in 1871, in execution of the decree, the property in question was purchased by the defendant, who obtained possession in 1876. In 1879

## MINOR—continued.

## (3) REPRESENTATION OF MINOR IN SUITS—continued.

the plaintiff attained majority, and in 1882 he brought the present suit to recover the property from the defendant. *Held*, that the plaintiff was not bound by the proceedings in suit No 573 of 1870, as he had not been properly represented as required by s. 2 of Act XX of 1864. **VISHNU KESSHAV v. RAMCHANDRA BHASKAR.**

[I L. R. 11 Bom. 130]

7.—*Decision of Survey Officers under Boundary Act XXVIII of 1860—Representation by manager appointed under Mad. Reg. V of 1804, s. 8* [A Survey Officer in 1875, held an enquiry under the Boundary Act 1860, and demarcated certain land out of a zemindari. At that time the zemindar was a minor under the Court of Wards and he was represented at the enquiry by the manager of his estate appointed under s. 6 of Regulation V of 1804. In a suit brought by the zemindar to recover the land it was contended that the decision of the Survey Officer was not binding on the zemindar, because he was not properly represented by his guardian at the enquiry.—*Held*, that the decision of the Survey Officer was binding on the zemindar. **KAMARAJU v. SECRETARY OF STATE FOR INDIA.**

[I. L. R. 11 Mad. 309]

8.—*Next friend—Suit filed by a minor without a next friend—Application by defendant to strike plaint off the file—Civil Procedure Code (Act XIV of 1882), s. 442.* [The plaintiff was a widow, and sued for the administration of her deceased husband's estate. The suit was filed on the 5th April 1885. On the 2nd May the defendants' attorneys gave notice to the plaintiff's attorney that the plaintiff was a minor suing without a next friend, and that the plaint must be struck off the file in consequence. The plaintiff's attorney replied that if the plaintiff was really a minor he would at once take steps to have her father appointed her next friend, and the plaint and proceedings amended. On the 7th May, inspection was given to the plaintiff's attorney of the plaintiff's horoscope, and after that inspection the plaintiff's attorney proposed that the proceedings should be amended by making the plaintiff's father her next friend. It appeared that the plaintiff was sixteen months under age. Nothing was done by either party for some weeks. On the 6th June the defendants' attorneys gave notice that they would apply for an order that the plaint should be taken off the file under s. 442 of the Civil Procedure Code (Act XIV of 1882). On hearing the application the Court refused to make the order asked for. The suit did not appear to be a vexatious one, and the plaintiff's age did not appear to have been fraudulently concealed, her father having stated on oath that he believed her to be of age and expressing his willingness at once to be placed on the record as her next friend. The Courts, as

## MINOR—continued.

## (3) REPRESENTATION OF MINOR IN SUITS—continued.

a rule, only strike the plaint off the file where it appears, on the face of the plaint, that it was filed by a person who was a minor, or when it is proved that it was filed with the knowledge that the plaintiff was a minor and with the intention of deceiving the Court and evading the payment of costs in case the plaintiff failed in the claim. When the fact of minority is a *bona fide* question of evidence and the defendant's allegation is found correct, then the usual course is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend. **RATTONBAI v. CHABILDAS LALLOOBHOY.**

[I L. R. 13 Bom. 7]

9.—*Mesne profits—Decree made against a widow representing estate enforced against a minor adopted son through the widow as his guardian—Devolution of liability, along with estate, upon the minor, without his having been made formally a party to the decree—His similar liability in a suit for mesne profits* [A minor, who had been adopted by a widow as a son to her deceased husband, was not made a party to an appeal, which she preferred after the adoption, from a decree made against her when she represented the estate;—*Held*, that, as liability under the decree, made when the widow fully represented the estate, devolved upon the minor on his adoption, the widow's estate being also thereupon divested, it would be right for her to continue to defend, but only as guardian of the minor. Also, that it having been for the minor's benefit that the widow, as guardian, should appeal from a decree, which had already diminished his estate, the minor was bound by the adverse decree of the Appellate Court, although he had not been made formally a party thereto. The principle of the decision in *Dhurm Dass Panday v. Shamasoodery Debra*, 3 Moore's I. A. 229, referred to, and applied in this case: *Held*, also that the minor, by his adoptive mother as his guardian, was liable to a suit for mesne profits, brought after the decree upon title; it being made clear that the suit for mesne profits was substantially brought against the minor. **Sureshchunder Wynn Chowdhry v. Jugutchunder Deb**, I L. R. 14 Cal. 201, approved. **HARI SARAN MOITRA v. BHUBANESWARI DEBI.**

[I. L. R. 16 Cal. 40]

[L R 15 I. A. 195]

10.—*Costs—Minor not represented by a next friend or guardian—Costs against such minor's estate—Application for leave to sue as pauper—Civil Procedure Code (Act XIV of 1882), ss. 441, 442, 441.* [Neither s. 441 nor 442 of the Code of Civil Procedure (Act XIV of 1882) gives any authority to a Court to make a minor's estate liable for costs. A applied for leave to file a suit *in forma pauperis* against B. B resisted the application, on the ground that A was a minor.

## MINOR—continued.

## (3) REPRESENTATION OF MINOR IN SUITS—concluded.

The Government pleader also resisted, on the ground that A was not a pauper. The Court without inquiring into A's pauperism rejected the application solely on the ground that A was a minor, and that he was not properly represented by a next friend or guardian. The Court ordered all costs to be paid out of the minor's estate. The minor died soon afterwards. The Collector then applied to the Court to attach certain property in B's hands which was alleged to form a part of the minor's estate. B objected, but the attachment was allowed: *Held*, that the order for costs, as well as the attachment that followed thereon, were illegal and *ultra vires*. The order was clearly opposed to the provisions of s. 414 of the Code of Civil Procedure (Act XIV of 1882), under which no order affecting a minor can legally be made without such minor being represented by a next friend or guardian *ad litem*. AMICHAND TALAKCHAND v. COLLECTOR OF SHOLAPUR.

[I. L. R. 13 Bom. 234]

## (4) CASES UNDER BOMBAY MINORS' ACT (XX OF 1864.)

11.—*Authority of the Political Agent appointed by Government as manager of the estate of a minor Chief to sue in respect of the Chief's property in British territory*. A suit was brought by the Political Agent, Southern Maratha Country as administrator of the estate of the Chief of Mudhol, who was described in the plaint as being nineteen years of age, to eject the defendants from certain lands, belonging to the Chief, situated in the Satara District. The defendants raised a preliminary objection to the institution of the suit by the Political Agent, on the ground (among others) that he was not a certificated guardian of the Chief under the Bombay Minors' Act XX of 1864. *Held*, that the appointment, by Government, of the Political Agent to manage the estate of the Chief of Mudhol during a certain period could not give him the position contemplated by the Bombay Minors' Act XX of 1864. With regard to property in British India, he had no authority to sue on behalf of the minor without obtaining a certificate of administration under the Act. VENKATRAY RAJE GHORPADE v. MADHAVRAY RAMCHANDRA.

[I. L. R. 11 Bom 53]

12.—*Guardian without certificate, authority of to represent minor in a suit brought against him.* Where a guardian of a minor had not obtained a certificate under the Bombay Minors' Act (XX of 1864) the minor was held to be not properly represented in a suit in which a decree had been obtained against the guardian purporting to represent the minor. DAJI HIMAT v. DHIRAJRAM SADARAM.

[I. L. R. 12 Bom. 18]

## MINOR—continued.

## (4) CASES UNDER BOMBAY MINORS' ACT (XX OF 1864)—concluded.

13.—*Act XX of 1864, s. 18.—Assignment without sanction of Court*. S. 18 of the Minors' Act XX of 1864 applies only to persons to whom a certificate has been granted under that Act. An assignment of a mortgage, therefore, by a widow, acting as natural guardian of her minor son, but who has not obtained a certificate under the Act (XX of 1864), is not invalid because effected without the sanction of the Court. MANISHANKAR PRANJIVAN v. BAI MULLI.

[I. L. R. 12 Bom. 686]

14.—*Guardian—Guardian of property—Guardian of person—Necessity for issue of certificate of administration in order to complete appointment of guardian of property*. The Bombay Minors' Act XX of 1864 does not, in terms, provide for the appointment of a guardian of the property of a minor, but only for the grant of a certificate of administration so that until the certificate is issued there is no such appointment of the guardian of the property as will extend the age of the minority from eighteen to twenty-one. But it is different as regards the appointment of a guardian of the person. The Act provides, in terms, for such an appointment being made, and no certificate of appointment is contemplated by the Act, on the language of which it is plain that the appointment of a guardian of the person is complete on the order of the Court being made appointing him. The plaintiff's mother G., died in 1866 possessed of property which she had inherited from her husband. The plaintiff, who was born in 1858, was then a minor of the age of eight years. In 1867 the plaintiff's maternal grandfather obtained a certificate of administration. On his death an order of Court was made on the 21st March, 1873, appointing the Nazir of the Court administrator of the property and the plaintiff's mother-in-law the guardian of the person of the plaintiff, but no fresh certificate of administration was granted. In 1880 the plaintiff brought the present suit against the defendants to recover from them the property left by her mother. The defendants contended (*inter alia*) that the plaintiff had attained her majority in 1874, when she arrived at the age of sixteen, and that the suit was therefore barred by limitation. The plaintiff, on the other hand, contended that the Indian Majority Act IX of 1875 was applicable, and that under its provisions she did not attain majority until she was twenty-one. *z. z. z.*, until the year 1879, and that the present suit was therefore in time. *Held*, that the suit was not barred by limitation. The Indian Majority Act IX of 1875 was applicable (except so far as its operation was excluded by s. 2), inasmuch as there was a guardian of the person of the plaintiff in existence both when she arrived at the age of sixteen and also when she was eighteen, and therefore, the period of minority for her was extended to twenty-one years of age. YEKNATH v. WARUBAI.

[I. L. R. 13 Bom 285]

**MISCHIEF.**

See OFFENCE RELATING TO DOCUMENTS  
[I. L. R. 12 Mad. 54]

See THEFT.

[I. L. R. 15 Calc. 388]

**MISDIRECTION.**

See CHARGE TO JURY—MISDIRECTION.  
[I. L. R. 12 Mad 196]

**MISJOINDER.**

See CASES UNDER MULTIFARIOUSNESS.

1—*Plea of misjoinder, when sustainable—Suit against several persons claiming under different titles, Effect of—Civil Procedure Code, ss 31 and 53.* A, as auction-purchaser at a revenue-sale brought a suit against a number of persons for possession of some *chur* land. The defendants claimed portions of the land under different titles and pleaded misjoinder. The Court upon the Amin's report gave A the option to amend the plaint by withdrawing the suit against any particular sets of defendants. A elected to go to trial on the suit as brought: *Held* that, under the circumstances, it was necessary for the Court to adjudicate on the question of misjoinder. *Held*, also, that the plaintiff was not entitled to join in one suit all the persons, on the ground that they obstructed his possession, unless he was able to show that those persons acted in concert or under some common title. *Held*, further, that, having regard to the provisions of ss. 31 and 53 of the Civil Procedure Code, the proper order of the Court should have been to reject the plaint and not dismiss the suit on the ground of misjoinder. *SUDHENDU MOHUN ROY v. DURGA DAS*.

[I. L. R. 14 Calc. 435]

2—*Civil Procedure Code, s. 44, Rule b* [An objection to the attachment and sale of certain immoveable property, raised by one who claimed to have purchased the same at a sale in execution of a prior decree, was disallowed on the ground that, under the prior decree, the rights of one only of the present judgment-debtors had been sold and purchased by the objector. In accordance with this order two-thirds of the property under attachment were sold and the objector thereupon brought a regular suit for a declaration of his right as a purchaser of the whole property in execution of the prior decree. To this suit he impleaded as defendants the decree-holder and the judgment-debtors. The suit was decreed, and in the result the decree-holder alone was compelled to pay the whole of the costs. Subsequently he brought a suit for contribution in respect of these costs, making defendants to the suit (i) R one of his co-defendants in the previous suit, personally and as heir of A who was another of those co-defendants, (ii) N, and (iii) S, these two being sued in the character of heirs of A. *Held*, with reference to a plea of misjoinder within the terms

**MISJOINDER—concluded**

of rule b of s. 44 of the Civil Procedure Code, that even if there were misjoinder of parties, the first Court, having proceeded to trial of the suit, and not having rejected the plaint or returned it for amendment, or amended it, should have disposed of it upon the merits and found what A's share in the amount paid by the plaintiff was and whether assets to that amount had come to the hands of the defendants as her heirs. *KISHNA RAM v. RAKMINI SEWAK SINGH*.

[I. L. R. 9 All. 221]

3—*Form of suit.* The defendants' ancestors or predecessors in title were the cultivating tenants of the lands of a certain temple from a date not later than 1827, in which year they were so described in the *parmaish* accounts. In 1830, they executed a *muchalka* to the Collector, who then managed the temple, whereby they agreed among other things to pay certain dues. They were described in the *muchalka* as *paracudis*. In 1857, the plaintiff's predecessors took over the management of the temple from, and executed a *muchalka* to, the Collector, whereby he agreed among other things not to eject the raiyats as long as they paid *kist*. In 1882 the dues (which were payable separately), having fallen into arrear, the manager of the temple sued to eject the defendants. *Held*, that the suit was not bad for misjoinder. *THIAGARAJA v. GIYANA SAMBANDHA PANDARA SANNADHI*.

[I. L. R. 11 Mad. 77]

**MISREPRESENTATION**

See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY THE COURT (INEQUITABLE CONTRACTS),

[I. L. R. 16 I. A. 233]

[I. L. R. 17 Calc. 291]

**MISTAKE IN LAW.**

See LIMITATION ACT, 1877, s. 14

[I. L. R. 12 Bom. 320]

**MISTAKE, POTTA GRANTED BY.**

See COLLECTOR.

[I. L. R. 12 Mad 404]

**MONEY HAD AND RECEIVED.**

*Money paid as price of goods, suit to recover—consideration, failure of.* Money paid as the price of goods to be delivered hereafter is money received for the use of the seller, and it is only upon failure of consideration that the money so paid becomes money received for the use of the buyer. *ATUL KRISTO BOSE v. LYON & Co.*

[I. L. R. 14 Calc. 45]



**MONEY, SUITS FOR**

*See* PLAINT—FORM AND CONTENTS OF  
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[I L R. 12 Bom 675]

*See* VALUATION OF SUIT—SUITS

[I L R. 12 Bom 675]

**MONEY WRONGLY PAID OUT OF  
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*See* LIMITATION ACT, 1877, ART. 29.

[I L R. 11 Mad. 345]

**MOOKTEAR, DISMISSAL OF.**

*See* LEGAL PRACTITIONERS' ACT, SS. 14.  
AND 10

[I L R. 15 Calc. 152]

**MOOKTEAR, FUNCTIONS OF.**

*See* LEGAL PRACTITIONERS' ACT, s 32

[I L R. 14 Calc. 556]

**MORTGAGE.**

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*See* GUARDIAN--DUTIES AND POWERS OF  
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[I L R. 9 All. 340]

*See* HINDU LAW—ALIENATION--ALIENA-  
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[I L R. 14 Calc 401]

**MORTGAGE—continued.**

*See* LIMITATION ACT, 1877, ART. 134.

[I L R. 12 Bom. 352]

*See* MALABAR LAW—MORTGAGE.

*See* PARTIES—PARTIES TO SUITS—MORT-  
GAGES, SUITS CONCERNING

[I L R. 9 All 125]

*See* RES JUDICATA—ESTOPPEL BY JUDG-  
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[I L R. 12 Bom. 352]

*See* STAMP ACT, 1879, s 3, CL 4 (b)

[I L R. 9 All. 585]

*See* STAMP ACT, 1879, s 3, CL 13.

[I L R. 11 Mad. 39]

*See* STAMP ACT, 1879, SCH I, ART 44.

[I L R. 9 All 585]

**(1) FORM OF MORTGAGE**

1.—*Document not creating charge* ] A lent B Rs. 99, and B executed a document on the 24th July 1881, whereby he agreed to repay the amount with interest in the month of Baisakh, 1289 F S. (April 1882), and further agreed that, if he did not pay the money as stipulated, he should sell his right to certain land, and that A should take possession thereof, and that after A took possession of the land no interest should be paid by him (B), and that A should pay the rent of the landlord out of the profits of the land without any objection. A instituted a suit on the 31d August 1885, to recover the Rs. 99. *Held*, that the document did not amount to a mortgage. *MADHO MISSEER v. SIDH BINAIK UPADHYA alias BENA UPADHYA*

[I L R 14 Calc. 687]

2.—*Requisites of a mortgage—Contract—Con-  
struction* ] In 1862, A, in consideration of a debt of Rs. 150 passed to B a writing called *karz rokha* (or debt-note). It provided (*inter alia*) that B should hold and enjoy a certain piece of land belonging to A for twenty years; that at the end of that period the land should be restored to A, free from all claims for payment of the principal or interest of the debt of Rs. 150; and that if B planted vines, he should be at liberty to retain the land so planted after the lapse of the twenty years as a tenant at Rs. 50 per annum. According to the terms of this agreement, B continued in possession of the land till 1882, when A, treating the transaction as a mortgage, brought this suit for redemption: *Held*, on the construction of the *karz rokha*, that the contract between the parties was not a mortgage, and that the defendant had a right to retain occupation at least of the vineyard, subject only to a rent of Rs. 50 a year. There was no stipulation for interest nor was there any agreement for the payment of Rs. 150 in any case. It is not the

## MORTGAGE—continued.

## (1) FORM OF MORTGAGE—continued.

name given to a contract, but its contents or the relations constituted by it, that determine its nature. *ABDULBHAI v. KASHI*.

[I L. R. 11 Bom 462]

3.—*Suit for money charged upon immoveable property—Instrument purporting in general terms to charge all the property of obligor—Maxim "certum est quod certum reddi potest"—Act IV of 1882 (Transfer of Property Act), ss 98, 100.] The obligor of a bond acknowledged therein that he had borrowed Rs 153 from the obligee at the rate of Rs. 1-8 per cent per mensem, and promised to pay the principal with interest at the agreed rate upon a date named. The bond continued thus—"To secure this money, I pledge, voluntarily and willingly, my wealth and property in favour of the said banker. Whatever property, etc., belonging to me be found by the said banker, that all should be available to the said banker. If, without discharging the debt due to this banker, I should sell, mortgage, or dispose of the property to another banker, such transfer shall be void. For this reason, I have of my free will and consent executed this hypothecation-bond that it may be of use when needed." The amount secured by the bond became due on the 6th May 1879. The bond was registered under the Registration Act as a document affecting immoveable property and the obligor was a party to such registration. On the 9th May 1885, the obligee sued the heir of the obligor to recover the principal and interest due upon the bond by enforcement of lien against sale of immoveable property belonging to the defendant. *Held*, that the bond showed that the intention of the parties was to create by it a charge upon all property of the obligor for the payment to the plaintiff of the principal monies borrowed, together with interest at the agreed rate. *Najibulla Mulla v. Nusr Mistri*. I L. R. 7 Cal 196, referred to. *Held* also that the words used in the bond as indicating the property which was intended to be subject to the charge were sufficiently specific and certain to include, and were intended to include, all the property of the obligor; that, this being so, the maxim "*certum est quod certum reddi potest*" applied; and that the bond created a charge upon the immoveable property of the obligor in respect of the principal and interest in question. *RAMSIDDH PANDE v. BALGOBIND*.*

[I L. R. 9 All. 158]

4.—*Movable property—Non-existent movables—Contract to assign after-acquired chattels—Completion of assignment on property coming into existence—Transferee with notice of hypothecation.] Held* upon principles of equity, that a hypothecation of certain future indigo produce was a valid contract to assign such produce when it should come into existence; and that the hypothecation became complete when the crop was

## MORTGAGE—continued.

## (1) FORM OF MORTGAGE—concluded.

grown and the produce realized; and was enforceable against a transferee of such produce with notice of the obligee's equitable interest. *Collyer v. Isaacs*, I. R. 19 Ch. D 342, and *Holroyd v. Marshall*, L. R. 10 H. L. 191, referred to; *Held* also that such an interest would not avail against a transferee without notice. *Joseph v. Lyons*, L. R. 15 Q. B. D 280, and *Hallas v. Robinson*, L. R. 15 Q. B. D. 288, referred to. *BANSIDAR v. SANT LAL*.

[I. L. R. 10 All. 133]

## (2) CONSTRUCTION.

5.—*Mention in mortgage deed of another debt due to mortgagee distinct from sum advanced at date of mortgage—Clause in deed undertaking to pay off old debts when taking back the land—Old debt not a charge on land, but redemption conditional on payment of both debts.] V mortgaged certain land to the defendant's father for a sum of Rs 64 advanced by the latter at the date of the mortgage. The mortgage-deed stated that V owed the mortgagee another debt of Rs. 100, which was due on a separate bond, and it contained a clause in the following terms:—"The principal sum of *huns* (coins) due on that document, as also this document, I will pay at the same time, and take back the land along with this document as well as that document. Till then you are to continue to enjoy the land \* \* \*." The plaintiff having obtained a decree against the mortgagor attached the land in execution. The defendant (son of the original mortgagee), thereupon claimed that he held a mortgage upon it to the extent of Rs. 164. On the 9th March 1881, the Court executing the plaintiff's decree made an order allowing the defendant's claim only to the extent of Rs. 64, and directing that the land should be sold subject to the defendant's lien for that sum. The plaintiffs bought the land at the execution-sale, and offered the defendant Rs 64 in redemption of his mortgage, which the defendant refused. The plaintiffs then brought the present suit to recover possession. *Held*, that the charge on the land did not include the old debt of Rs. 100. There were no words in the mortgage-deed expressly making that debt a charge on the property. The provisions in the deed only made the equity of redemption conditional on the payment of both the debts. *Quære*—Whether, under the circumstances of the case, the purchaser at the execution-sale would be bound by such a condition. *YESHVANT SHENVI v. VITHOBA SHETI*.*

[I L. R. 12 Bom. 231]

6.—*Priority of mortgage—Intention of preserving a prior security presumed—Mortgage—Mortgagor.] On the 29th November 1882, H mortgaged to the plaintiff his one-third share in a house and garden to secure Rs. 1,000 with interest at 12 per cent. On the 31st January 1884, H mortgaged his one-third share in the same house to a third person to secure Rs. 1,000 with*

**MORTGAGE—continued.****(2) CONSTRUCTION—concluded.**

interest at 18 per cent. On the 14th May 1881, *H* and his two brothers mortgaged to the plaintiff the entirety of the said house and garden to secure Rs 3,400 with interest at 18 per cent. This last mortgage recited the mortgage of 29th November 1882, and a further loan of Rs 100 by the plaintiff to *H*, and contained the following clause—"Now in order to liquidate the said debt, and on account of our necessity, we three brothers do this day mortgage to you whatever right, title, and interest we have in the said two premises and take the loan of Rs. 3,400, out of this money we have also liquidated the said debt, therefore for interest of the said money, we are paying at the rate of Re 1-8 per month." *Held*, that the transaction of the 14th May 1884 did not amount to payment of the original debt, but was in reality a further advance and a fresh security for both the old debt and the fresh advance, on different terms as to interest, the old debt remaining untouched; but that even had the original debt been satisfied thereby, that fact would not have necessarily destroyed the security, the presumption being, unless an intention to the contrary were shown, that the plaintiff intended to keep the security alive for his own benefit. *Gokuldas Gopaldas v. Parannal Prem-sukhdas*, I. L. R. 10 Cal. 1035, followed in principle. *GOPAL CHUNDER SREEMANY v. HEREMBO CHUNDER HOLDER*.

[I. L. R. 16 Cal. 523]

**(3) POSSESSION UNDER MORTGAGE.**

7.—*Bombay Regulation V of 1827, s. 15—Mortgagee in possession, liability of, to protect the mortgaged property from claims under a paramount title—Limitation for a suit to recover debt personally from the mortgagor where mortgage-deed contains no personal undertaking of repayment.* By a registered mortgage-deed dated the 11th May 1876, the defendant mortgaged certain land with possession to the plaintiff for a term of five years, the mortgage-deed stipulating that the plaintiff was to enjoy the profits, pay the assessment for it, and restore it to the defendant on repayment of the debt. But no personal undertaking to pay was given by the defendant. The land was sold by the revenue authorities for arrears of assessment due from the defendant for certain other lands of the defendant. The plaintiff now sought to recover the debt personally from the defendant. The Court of First Instance dismissed the plaintiff's claim, on the ground that the failure, on the part of the plaintiff, to pay the arrears of assessment, disentitled him to recover the debt from the defendant personally. The plaintiff appealed to the District Judge, who referred the case to the High Court. *Held*, that the plaintiff was not bound to save the mortgaged property from claims under a paramount title, his liability being confined, under the terms of the mortgage, to the payment of assessment for the property mortgaged which

**MORTGAGE—continued****(3) POSSESSION UNDER MORTGAGE—concluded.**

he had duly discharged, and that the case did not fall under s. 15 of Reg V of 1827. The mortgage consideration for the debt having failed, the debt was recoverable within three years—the registered mortgage-deed containing no personal undertaking by the defendant (mortgagor) to pay the loan. *SAWABA KHANDAPA v. ABAJI JOTIRAV*.

[I. L. R. 11 Bom. 475]

**(4) POWER OF SALE.**

8.—*Exercise of power of sale—Notice of sale—Transfer of Property Act, s. 69 (1)—Invalid condition as to notice of sale.* In a deed of mortgage of property, situate within the town of Madras, it was provided that a power of sale might be exercised after fifteen days' notice. The property was sold. *Held* that (s 69 of the Transfer of Property Act 1882, requiring three months' notice before such a power of sale shall be exercised), the condition as to notice was invalid, but that the sale was nevertheless valid. *MADRAS DEPOSIT AND BENEFIT SOCIETY v. PASSANHA*.

[I. L. R. 11 Mad. 201]

9.—*Transfer of Property Act, s. 67 (a)—Usufructuary mortgage—Remedy of mortgagee.* A usufructuary mortgagee is not entitled, in the absence of a contract to that effect, to sue for sale of the mortgaged property. *Semble*—The construction placed on s 67 (a) of the Transfer of Property Act 1882 in *Venkataram v. Subramanaya* (I. L. R. 11 Mad. 88) that a usufructuary mortgagee can sue either for foreclosure or for sale but not for one or other in the alternative is wrong. *CHATHU v. KUNJAN*.

[I. L. R. 12 Mad. 109]

**(5) SALE OF MORTGAGED PROPERTY.****(a) RIGHTS OF MORTGAGEES.**

10.—*Covenant that mortgagee be entitled to enter—Entry, Right of—Mortgage-deed in English form* *B* executed a mortgage-deed in the English form in favour of the *Z* Bank, containing amongst other covenants one providing that, upon default, the mortgagee would be entitled to enter into possession of the mortgaged properties. *B* died leaving a widow, a daughter, and a sister *S*, his heirs. According to Mahomedan law *S* was entitled to a six-annas share of the mortgaged properties. On the 9th of May 1872, after the mortgage-money became due, the *Z* Bank brought a suit, and on the 13th of July 1872, obtained a decree by consent. The existence or right of *S* to a share in the properties was not known to the Bank, and she was not made a party to that suit. The Bank, in execution of their decree, caused the mortgaged properties to be sold, and themselves purchased some of them. The sale-proceeds did not satisfy the entire claim. On the 1st of December 1875, *S* sold her share of six-annas in the properties to *R*. In a suit by *R* against the

**MORTGAGE—continued.****(5) SALE OF MORTGAGED PROPERTY—continued****(a) RIGHTS OF MORTGAGEES—continued.**

purchaser of two of the mortgaged properties at the aforesaid sale, it was held that the share of *S* in the estate of *B* did not pass to the purchasers, though the Bank purported to have brought the whole sixteen annas in the properties to sale. *R* then brought this suit for the recovery of possession of the six-annas share of the properties purchased at the sale by the Bank themselves, and which was now in their possession. *Held*, that, under the covenant in the mortgage-deed above referred to, the Bank were entitled to remain in possession as mortgagees until the proportion of the debt, which might legitimately be imposed upon the six-annas share of the properties in their hands, was paid. **LUTCHMIPUT SINGH BAHADUR v. LAND MORTGAGE BANK OF INDIA.**

[I. L. R. 14 Cal. 464]

11.—*Right to sale of portion of mortgaged property—Death of sole mortgagee leaving several heirs—Sale of mortgagee's right by one of such heirs—Suit by purchaser for sale of mortgaged property—Act IV of 1882, s. 67* ] Upon the death of a sole mortgagee of zemindari property, his estate was divided among his heirs, one of whom, a son, was entitled to fourteen out of thirty-two shares. The son executed a sale-deed whereby he conveyed the mortgagee's rights under the mortgage to another person. In a suit for sale brought against the mortgagee by the representative of the purchaser, it was found that the plaintiff acquired, under the deed of sale, only the rights in the mortgage of the son of the mortgagee, though the deed purported to be an assignment of the whole mortgage. *Held* by the Full Bench that the plaintiff was not entitled, in respect of his own share, to maintain the suit for sale against the whole property, the other parties interested not having been joined, that, moreover, he was not entitled to succeed, even in an amended action, in claiming the sale of a portion of the property in respect of his own share, and that the suit was, therefore, not maintainable. *Bishan Dial v. Mannu Ram*, I L. R. 1 All. 297, *Bhora Roy v. Abilack Roy*, 10 W. R. 476; and *Bedar Bakht Muhammad Ali v. Khurram Bakht Yahya Ali Khan*, 19 W. R. 315, referred to **PARSOTAM SARAN v. MULU.**

[I. L. R. 9 All. 68]

12.—*First and second mortgages—Sale of mortgaged property in execution of money decree obtained by first mortgagee—Effect on second mortgagee's rights—Purchase by one of several joint mortgagees of mortgaged property—Extinction of mortgage-debt—Suit for sale of mortgaged property.* ] In January 1866, *B* obtained a simple money-decree only in a suit for enforcement of lien created by a bond executed by the wife of *Z*, and at a sale in execution of such decree, a 10 biswas share hypothecated in the bond was sold and purchased by *Z* in November 1872. On the 3rd May

**MORTGAGE—continued****(5) SALE OF MORTGAGED PROPERTY—continued****(a) RIGHTS OF MORTGAGEES—continued.**

1872, two bonds were executed in favour of *B* and *H* jointly, the first by *Z* and *I* jointly, hypothecating 6½ out of the above-mentioned 10 biswas, and the second by *S* in which the obligor promised to pay the obligees the amount of the bond given by *Z* and *I* in the event of such amount not being paid by them, and mortgaged certain property as security for such payment by him. In December 1872, *Z* gave another bond to *B*, hypothecating the same 10 biswas, and in execution of a decree obtained by *B* upon this bond, the 10 biswas were sold and purchased by *B* himself in 1877, and in 1883 were sold by him to *D*. Subsequently, *B* and *H* brought a suit against *Z* and *I*, the joint obligors under the bond of the 3rd May 1872, the heirs of their surety *S*, a purchaser from those heirs of the property mortgaged in the security-bond, and *D*, in which they claimed to recover the money due on the bond by sale of the property mortgaged therein and also by the sale of the property mortgaged in *S*'s security-bond. *Held*, that inasmuch as *B*'s decree of January 1866, was a simple money-decree only, *Z*'s purchase thereunder in November 1872, could not be regarded as operating in defeasance of the joint bond of the 3rd May 1872, executed by *Z* and *I*, and that the sale of November 1872 therefore left the rights of the parties wholly unaffected *quoad* that instrument. *Held* also that the effect of *B*'s purchase of the 10 biswas in 1887 upon the joint bond of the 3rd May 1872, was as effectually to extinguish the joint incumbrance thereon as if *H* had been associated with him in buying it, that consequently when *B* sold the 10 biswas to *D* in 1883, they were free of all incumbrance under the joint-bond, and that he passed to her a clean title which she could assert as a complete answer to the present suit in regard to the 6½ biswas. **BHUP SINGH v. ZAINULABDIN.**

[I. L. R. 9 All. 205]

13.—*Civil Procedure Code, ss. 354, 355, and 356—Insolvency—Receiver selling a mortgage property of insolvent—Purchaser at such sale.* ] By an order dated the 8th July 1879, *A* was declared an insolvent under s. 351 of the Civil Procedure Code (XIV of 1882), and his property vested in the Receiver, who was ordered to convert it into money. Nine fields, which were part of *A*'s property, had been mortgaged to the plaintiff, who was duly cited to appear and prove his debt. The plaintiff, however, failed to appear, and he was consequently omitted from the schedule of *A*'s creditors. The Receiver sold one of the fields, which was purchased by *A*'s undivided son *G*. At the sale the plaintiff gave notice of his claim as mortgagee. After paying off the debts of the scheduled creditors the Receiver made over to *A* the residue of the purchase-money and the eight unsold fields. In 1881 the plaintiff sued *A* for possession of the mortgaged property, and on appeal obtained a decree. While that suit was pending, *G* sold to

**MORTGAGE—continued.****(5) SALE OF MORTGAGED PROPERTY—contd.****(a) RIGHTS OF MORTGAGEES—continued.**

the defendant the field which he had purchased. In execution of his decree the plaintiff recovered possession of the eight fields, but on attempting to get possession of the ninth field, he was obstructed by the defendant, who was in possession, and he consequently brought this suit to recover it: *Held* that the plaintiff was entitled to recover it from the defendant. The only interest the insolvent had in the mortgaged premises was the equity of redemption, and this having vested in the Receiver under s. 354, he under section 356 was directed to convert it into money. *G.* therefore, at the sale only purchased the equity of redemption in the one field; and the defendant, who now stood in *G.*'s shoes with notice of the plaintiff's claim, although he might possibly be entitled to redeem the whole nine fields comprised in the mortgage, was bound to deliver possession to the plaintiff (the mortgagee) until that was done. The mortgaged property could not be sold by the Receiver without the consent of the plaintiff (the mortgagee) or paying him off. Section 356 of the Civil Procedure Code (Act XIV of 1882) no doubt contemplates the payment of debts secured by mortgage out of the proceeds of the conversion of the insolvent's property in priority to the general creditors, but this must be taken in connection with s. 354, and must be understood as referring to those cases in which the mortgaged premises have been sold after coming to an understanding with the mortgagee. **SHRIDHAR NARAYAN v. KRISHNAJI VITHOJI.**

[I. L. R. 12 Bom. 272]

**14.—Payment by mortgagee by conditional-sale of prior mortgage.—Decree obtained by intermediate simple mortgagee for sale — Mortgage by conditional-sale foreclosed — Intermediate simple mortgagee not entitled to sell without paying first mortgage.]** *B* made two mortgages, dated respectively, the 10th October 1871, and 10th October 1872, of his zemindari property in favour of *P*. On 27th January 1874, *B* mortgaged 117 bighas 7 biswas and 10 dhurs, of *ser* and cultivatory land belonging to his zemindari for Rs 700 to the defendant. On 10th September 1877, *B* made a conditional-sale of his zemindari property to the plaintiff for Rs. 4,500 to pay off the two charges created in favour of *P*. On the 10th August 1878, *B* made another mortgage to the defendant for Rs 300 of the same 117 bighas 7 biswas and 10 dhurs. On the 9th November 1881, defendant obtained a decree on his two bonds of the 27th January 1871 and 10th August 1878, and on his application for execution of the decree the property mortgaged to him was advertised for sale on the 20th November 1883. Meanwhile the plaintiff had taken the necessary proceedings to foreclose his conditional-sale, and upon the 29th March 1883, the sale was foreclosed. On the 19th November 1883, plaintiff instituted this suit with the object of having it declared that

**MORTGAGE—continued.****(5) SALE OF MORTGAGED PROPERTY—contd.****(a) RIGHTS OF MORTGAGEES—continued.**

defendant was not entitled to bring to sale the property mortgaged to him. *Held* that by the conditional-sale, which became absolute upon the 19th March 1883, the plaintiff acquired all the rights that subsisted under the two mortgages of the 10th October 1871 and 10th October 1872, and was entitled to press those securities in his aid as prior incumbrances to that of the defendant, for the purpose of stopping him from bringing the property to sale in execution of his decree before first recouping the plaintiff the amount which the latter found to satisfy and discharge those incumbrances. *Held* further that the only right which the defendant had to bring the property to sale was upon the strength of the decree obtained on the bond of 27th January 1874, for he had no right under the instrument in his favour of the 10th August 1878. The defendant should therefore only be permitted to bring the property to sale under his decree in respect of the mortgage of 27th January 1874, when he had satisfied and discharged the two mortgage-bonds held by the plaintiff of the 10th October 1871 and 10th October 1872. **ZALIM GIR v. RAM CHARAN SINGH.**

[I. L. R. 10 All 629]

**15.—Purchase of mortgaged property by mortgagee, at judicial sale on leave obtained to bid.]** Where mortgagees executed their decree on the mortgage, and having obtained leave to bid at the judicial sale, purchased the property. *Held* that they could not be held to have purchased as trustees for the mortgagees, the leave granted to bid, having put an end to the disability of the mortgagees to purchase for themselves, putting them in the same position as any independent purchasers. **MAHABIR PERSHAD SINGH v. MACNAGHTEN.**

[I. L. R. 16 Calc. 682]

[L. R. 16 I. A. 107]

**16.—Civil Procedure Code 1882, s. 294—Decree-holder, Purchase by—Satisfaction pro tanto — Mortgagee not trustee for mortgagor in sale-proceeds—Leave to bid at sale in execution when granted—Permission of the Court to decree-holder to buy —Practice.]** A mortgagee who has obtained a mortgage-decree, and after obtaining permission to bid at the sale held in execution of such decree has become the purchaser, does not stand in a fiduciary position towards his mortgagor. *Hart v. Tara Prasanna Mukerji*, I. L. R. 11 Calc. 718, distinguished. A mortgagee in such a position, therefore, is at liberty to take out further execution for any balance of the amount decreed that may be left after deducting the price for which the mortgaged property was sold, and is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court. The permission to a mortgagee to bid should be very cautiously granted, and only

**MORTGAGE—continued.****(5) SALE OF MORTGAGED PROPERTY—contd.****(a) RIGHTS OF MORTGAGEES—concluded.**

when it is found, after proceeding with a sale, that no purchaser at an adequate price can be found, and even then, only after some enquiry as to whether the sale-proclamation has been duly published *SHEONATH DOSS v. JANKI PROSAD SINGH*.

[I. L. R. 16 Calc. 132]

**(b) MONEY-DECREES ON MORTGAGES.**

17.—*Mortgage for securing payment of rent—Decree by Revenue Court for arrears of rent—Decree time-barred—Effect of decree on mortgage—Suit for sale of mortgaged property* ] In 1874 the plaintiff leased certain immoveable property to the defendant, and the latter executed a deed by which he covenanted to pay the annual rent and fulfil other conditions of the lease, and gave security in Rs. 3,000 by mortgage of landed property. In 1874 the plaintiff obtained decrees in the Revenue Court for arrears of rent, and the decrees were partially satisfied and then became barred by limitation. In 1884 the plaintiff brought a suit to recover the balance due by enforcement of the mortgage-security against the purchasers of the mortgaged property. *Held* that when the plaintiff obtained his decrees for rent, the mortgage security did not merge in the judgment-debts, nor did he lose his remedy on it, that the two rights were distinct, and the right of action on the mortgage-security was not lost because the execution of the decrees for rent was time-barred, the only effect of which was that the debt was not recoverable in execution, but the debt existed nevertheless so far as to enable the amount secured by mortgage to be recovered by suit in the Civil Court, so long as such suit was not barred by limitation. *Enam Mumtaz-ood-deen Mahomed v. Rajcoomar Dass*, 14 B L R. 408, referred to. *Held* also that the amount which the plaintiff could recover by enforcement of the mortgage-security was limited to Rs. 3,000 *CHUNNI LAL v. BANAPAT SINGH*.

[I. L. R. 9 All. 23]

18.—*Presumption that person paying off a mortgage intends to keep the security alive* ] In 1861 *B* granted a lease of his zemindari to *A* for 30 years, *A* undertaking to pay off all debts then due by *B*. *B* died in 1882, and his successor sued *A* and obtained a decree that, on payment of Rs. 1,20,000, *A* should give up possession of the zemindari. This sum having been paid into Court, *A* lost possession of the zemindari. On 5th January 1875, *A* had mortgaged the whole zemindari, which consisted of 22 villages, to *M* to secure a loan of Rs. 1,00,000 borrowed by *A* to pay off the debts of *B* which *A* undertook to pay in 1861. On 27th June 1879, *A* being indebted to *M*, in the sum of Rs. 1,78,000 paid *M* Rs. 1,00,000, and undertook to pay the balance out of the income of the estate, *M* releasing the 22 villages from the mortgage of 5th January

**MORTGAGE—continued.****(5) SALE OF MORTGAGED PROPERTY—contd.****(b) MONEY-DECREES ON MORTGAGES—concluded.**

1875. On 28th June 1879, *A* executed a mortgage of the 22 villages to *L*, to secure repayment of Rs. 1,30,000. Of this sum, Rs. 1,00,000 was borrowed to pay *M*, and Rs. 30,000 was a prior debt due by *A* to *L*. Of the Rs. 1,00,000 paid to *M*, Rs. 27,000 was specially applied to discharge so much of the charge created by the mortgage of 5th January 1875. On 30th January 1875, *A* borrowed from *S* Rs. 43,000 and mortgaged to her 10 of the 22 villages of the zemindari. In 1885 *S* sued *L* to have her debt declared a first charge on the money paid into Court by the zemindar. The Subordinate Judge held that *L* had a prior claim on the fund and dismissed the suit: *Held*, on appeal, following the principle of the decision in *Gokaldas Gopaldas v. Haranmal Prem-sukhdas* (L. R. 11 I A 126: I L R. 10 Calc 1035) that *L* was entitled to a first charge on the fund to the extent of Rs. 27,000 which had been applied to pay off the mortgage of 5th January 1875. *RUPABAI v. AUDIMULAM*.

[I. L. R. 11 Mad. 345]

**(c) PURCHASERS.**

19.—*Extinguishment of prior mortgage—Intention—Effect of payment of prior mortgage by subsequent incumbrances.* ] The mortgagor's right, title, and interest in certain immoveables in the Dekkan subject to a first and second mortgage, were sold in execution of a decree to a purchaser who afterwards paid off the first mortgage: *Held*, that as he had a right to extinguish the prior charge, or to keep it alive, the question was what intention was to be ascribed to him; and that, in the absence of evidence to the contrary, the presumption was that he intended to keep it alive for his own benefit. Where property is subject to a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course, according to the English practice, to have it assigned to a trustee for his benefit, as against intermediate mortgagees to whom he is not personally liable. But in India a formal transfer for the purpose of a mortgage is never made, nor is an intention to keep it alive even formally expressed? It was ruled in the English Court of Chancery in *Toulmin v. Stere*, 3 Mer. 210, that the purchaser from an owner of an equity of redemption with actual or constructive notice of another intermediate incumbrance is precluded in the absence of any contemporaneous expression of intention, from alleging that as against such other incumbrance, the prior mortgage paid off out of the purchase money is not extinguished. That case was not identical with this, where the prior mortgage was not paid off out of the purchase-money, but was paid off afterwards by the purchaser. The above ruling, however, is not to be extended to India, where the question to ask is, in the interests of justice, equity and good conscience there applicable, what was the in-

**MORTGAGE—continued.****(5) SALE OF MORTGAGED PROPERTY—contd.****(a) PURCHASERS—continued.**

intention of the party paying off the charge. **GOKALDAS GOPALDAS v. PURANMAUL PREM-SUKHDAS.**

[I L. R. 10 Cal 1035

[L. R. 11 I. A. 126

20.—*Suit by mortgagee purchasing part of property—Sale by first mortgagee in execution of decree upon second mortgage held by him—Interest acquired by purchaser at such sale—Sale of portions of mortgaged property—Mortgagee not compelled to proceed first against unsold portions—Enforcement of mortgage against purchaser not having obtained possession* ] At a sale in execution of a decree for enforcement of a hypothecation-bond, the decree-holder, by permission of the executing Court, made bids, but the property was purchased by another. At that time the decree-holder held a prior registered incumbrance which he did not personally announce. In a suit brought by him subsequently to enforce this incumbrance. *Held* that it could not be said that under the circumstances the plaintiff must be taken to have sold, in execution of his decree, the interest which he held under the bond now in suit, that he could not be compelled to proceed first against those portions of the mortgaged property which had not been sold; and that the bond was enforceable against a purchaser of part of the mortgaged property who had never obtained possession. **BANWARI DAS v. MUHAMMAD MASHIAT**

[I L. R. 9 All. 690

21.—*Sale in execution of mortgage-decree—Sale certificate—Confirmation of sale—Sale for arrears of Government revenue—Civil Procedure Code (Act XIV of 1882), s. 316—Act XI of 1859, ss. 13, 14, 54—Transfer of Property Act (Act IV of 1882), s. 73* ] *D* having obtained a decree on a mortgage of a 5½-anna share of an estate paying revenue to Government, caused the share to be put up for sale in execution of that decree on the 17th August 1883 and purchased it herself. The sale was not confirmed till the 18th September 1883. In the meantime a 14-anna share of the estate, including the 5½-anna share, which was separately liable for its own share of Government revenue, was on the 26th September 1883, sold for arrears of the June *list* of Government revenue under s. 13 Act XI of 1859, and purchased by one *G*, who sold it again to *P*, who obtained possession on the 6th August 1884. In a suit by *D* against *P* and the judgment-debtor to obtain possession of the 5½-anna share so purchased by her. *Held*, that the mortgage-debt was not extinguished nor the mortgage merged in the decree on the 17th August 1883, but having regard to the provisions of s. 316 of the Code of Civil Procedure, the mortgagee's rights were kept alive and remained in existence

**MORTGAGE—continued.****(5) SALE OF MORTGAGED PROPERTY—contd.****(a) PURCHASERS—continued.**

until the property vested in her by virtue of the granting of the sale-certificate, and that between the date of the sale, 17th August 1883, and the date of its confirmation, 18th December 1883, the mortgage lien was fully preserved, that *P*'s purchase being governed by s. 54 of Act XI of 1859, he acquired the share subject to all encumbrances, including the mortgage lien of *D*; that s. 73 of the Transfer of Property Act does not in such a case deprive a mortgagee of his lien over the property and confine him to proceeding against the surplus sale-proceeds; that as the judgment-debtor had the right, at any time between the 17th August 1883 and the 18th December 1883, to redeem the property upon payment of principal, interest, and costs to *D*, *P* having acquired the rights of the judgment-debtor by virtue of his purchase on the 26th September 1883, was equally entitled to redeem between that date and the 18th December 1883, but not having availed himself of that right the property became absolutely vested in *D*, on the 18th December 1883, and that consequently *D* was entitled to the relief claimed. **PREM CHAND PAL v. PURNIMA DAS.**

[I L. R. 15 Cal. 546

22.—*Sale of equity of redemption—Suit by mortgagee for sale of mortgaged property—Purchaser not a party to suit—Sale of mortgaged property in execution of decree obtained by mortgagee—What passed—Right of purchaser of equity of redemption—Redemption* ] On the 21st December 1871, three of the defendants in this suit mortgaged four groves to *H*. In 1872 the plaintiffs obtained a money-decree against one *D*, and in August 1872, in execution of that decree, sold the said groves, and at the sale purchased them and also two mills which were not in dispute in this suit. The decree against *D* had been found to have the same effect as if it were had and obtained against all the mortgagors. Of this sale *H* had notice; in fact he opposed it. Subsequently *H*, the mortgagee, sued the mortgagors on their mortgage, and obtained a decree on it, and under the decree brought the said groves to sale in 1877, and purchased them himself. In May 1880, *H* sold the groves to two of the defendants. The plaintiffs who were not parties to the suit which resulted in the decree under which the groves were sold in 1877, instituted this suit for possession of the groves: *Held* that, notwithstanding the sale of 1872, what was sold under the decree of 1877 was the right, title, and interest of the mortgagors, as they existed at the date of the mortgage of 21st December 1871, with which would go the rights and interest of the mortgagee; and although at a sale under a decree for sale by a mortgagee the right, title, and interest of the mortgagor which is sold is his right, title, and interest at the date of the mortgage, and any right, title, and interest he



**MORTGAGE—continued.****(5) SALE OF MORTGAGED PROPERTY—contd.****(a) PURCHASERS—continued.**

may have acquired between the date of mortgage and of the sale, still any puisne incumbrancer or purchaser from the mortgagor prior to the date of the mortgagee's decree, and who was not a party to the suit in which the mortgagee obtained his decree, would have the right to redeem the property which the mortgagor would have had but for the decree. This view is consistent with the principles of equity and recognised by the Transfer of Property Act. *Muhammad Sami-ud-din v Man Singh*, I. L. R. 9 All. 125, followed *GAJADHAR v. MUL CHAND*

[I L. R. 10 All. 520]

23.—*Mortgaged land subsequently sold by mortgagee in execution of a money-decree—Purchaser at such sale without notice of mortgage—Mortgagee estopped from subsequently enforcing his mortgage as against purchaser—Fraudulent concealment of lien—Registration not equivalent to notice in case of fraud—Civil Procedure Code (VIII of 1859), s. 213* ] Where a judgment-creditor in execution of a money-decree sells property as belonging to his judgment-debtor, he is afterwards estopped from enforcing, as against the purchaser, a previous mortgage of the property which has been created in his own favour, but of which he has given no notice at the time of the sale, and in ignorance of which the purchaser has bid for the property and paid the full price. This principle applies even though the mortgage-deed has been registered. In 1867, *R* and *G* mortgaged certain lands to *G R* by a registered deed of that date. In 1870, *G R* obtained a money-decree against *R* and *G*, and in execution put up the mortgaged land for sale. The plaintiff purchased it without notice of the mortgage; and in February 1872, obtained possession through the Court. In the meantime *G R* brought another suit upon his mortgage against his mortgagors. He obtained a decree, and in April 1872 ejected the plaintiff and obtained possession. In 1883 the plaintiff filed the present suit against *R*, *G* and *G R* to recover the lands. Held that the plaintiff was entitled to recover. *G R* (the mortgagee), when bringing the land to sale in execution of his decree was bound by s. 213 of the Civil Procedure Code (VIII of 1859) to disclose the limited interest of his judgment-debtors in it. By concealing his lien he had induced the plaintiff to pay full value for the property, and he could not, therefore, retain his lien. By his omission he was estopped from disputing the plaintiff's title. The rule that registration of a mortgage amounts to notice to all subsequent purchasers of the same property, does not apply to a case where there has been a fraudulent concealment by a judgment-creditor of the extent of his judgment-debtor's interest in the property brought by the judgment-creditor to sale. *AGAR-CHAND GUMANCHAND v. RAKHMA HANMANT*.

[I L. R. 12 Bom. 678]

**MORTGAGE—continued.****(5) SALE OF MORTGAGED PROPERTY—contd.****(a) PURCHASERS—continued.**

24.—*Subsequent sale by mortgagor of a part of the property mortgaged—Suit on the mortgage—Satisfaction of the decree in such suit partly by a second mortgage—Suit on second mortgage and decree for sale—Title of the purchaser at sale in execution of such decree as against the private prior purchaser of the part—Merger.* ] On the 4th October 1861, *N* mortgaged, without possession, a house to *K*. On the 25th June 1868, *N* sold the eastern half of that house to the defendant who forthwith entered into possession, *K* sued *N* upon the mortgage, and obtained a decree on the 28th November 1868. *N* made certain payments to *K* under the decree until 1875. On the 27th July 1875, *N* passed to *K* an instalment bond for the balance due on the decree, together with Rs 25 on account of *sarai* profits, and as security executed a new mortgage of the house. Satisfaction of the decree was entered up and certified, and the new mortgage-bond registered. In 1882 *K* sued *N* upon this mortgage-bond, and obtained a decree directing the debt to be realized by the sale of the mortgaged house, and on the 20th July 1883, the plaintiff purchased the house at the execution-sale. In 1885 the plaintiff sued to recover the eastern half of the house which was in the possession of the defendant. The lower Courts rejected the plaintiff's claim. On appeal by the plaintiff to the High Court, held, confirming the decree of the lower Courts that the plaintiff, by his purchase in July 1883, did not acquire a title paramount to that of the defendant. All rights under the mortgage of 1861 had merged in the decree obtained in November 1868, but satisfaction of that decree had been entered up and certified when the second mortgage of 1882 was passed. The mere circumstance that the debt secured by the second mortgage was the balance of the old debt was not sufficient to justify the inference that it was intended to keep the decree alive. There were therefore no rights under the old mortgage which the plaintiff could assert as against the defendants in possession. *HAMKRISHNA SADASHIV v. CHOITHMAL*.

[I L. R. 13 Bom. 348]

25.—*Right of purchasers of mortgaged property—Equities of mortgagor.* ] In a suit for possession by the certificated purchaser of one-third of certain mouzahs which had been sold in execution of a decree obtained by the mortgagee against the defendant as mortgagor, it appeared that the defendant had in a previous execution sale, at the instance of a second mortgagee of the same property, bought the same subject to his own first mortgage. The High Court held that the plaintiff should be treated not as a purchaser but as a mortgagee on respect of his purchase-money. They then directed that only so much of the original mortgage-debt as should be apportioned against the share bought by the plaintiff should be realized in his favour: Held

**MORTGAGE—continued.****(5) SALE OF MORTGAGED PROPERTY—concl'd.****(a) PURCHASERS—concluded.**

that this ruling and direction were founded on a misapprehension; that the purchaser had a right to possession of the property which he had bought; and that the defendant had no equity to prevent it. *LUTF ALI KHAN v FUTTEH BAHADUR*.

[L R 16 I A. 129]

[I L R. 17 Cal. 23]

**(6) MARSHALLING.**

26.—*Apportionment of mortgage-debt.* By a mortgage-deed, dated the 24th January 1878, S and V, two of three brothers constituting an undivided family, jointly mortgaged to the plaintiff B a part of the family property. On the 28th July 1878, S alone further mortgaged to the plaintiff for a fresh advance a portion of the property already mortgaged. Subsequently the three brothers effected a partition among themselves of all the undivided property, and the property jointly mortgaged by S and V fell, along with other property, to the share of V and the third brother N. In 1881 the plaintiff B sued S on the second of the above mortgages, viz., that of the 28th July 1878. He obtained a decree, and at a sale held in execution of that decree himself purchased the property comprised in that mortgage. In the meantime, on the 27th January 1882, and on the 6th December 1883, V and N respectively mortgaged, with possession to the defendant M, portions of the land comprised in the first mortgage of the 24th January 1878. In 1883 the plaintiff filed the present suit upon his first mortgage of 24th January 1878, claiming to recover Rs. 316-14-0 from S and V personally. He also prayed that the defendant M who had had been in possession of the property in dispute, should be prevented from obstructing him in selling the property. S and V did not appear. The third defendant N alone appeared and contended (*inter alia*) that the plaintiff, having purchased part of the lands comprised in the mortgage now sued upon in execution of the decree obtained by him upon his second mortgage, could not now seek to burden the remaining lands included in the mortgage with the whole of the mortgage-debt, but that a proportionate part of that debt must be satisfied. *Held* that the plaintiff could not recover the first mortgage-debt from the remaining lands without deducting a proportionate part of that debt. A mortgagee will not be allowed without special reason deliberately to execute his decree exclusively against one of the owners of the equity of redemption for the whole debt. *Ram Dhun Dhur v. Mohesh Chunder Chowdhry*, I. L. R. 9 Cal. 406, approved. *MORO RAGHUNATH v. BALAJI TRIMBAK*.

[I L R 13 Bom. 45]

**MORTGAGE—continued.****(6) MARSHALLING—continued.**

27.—*Transfer of Property Act, s. 81—Marshalling—Creditors of co-parcenary and separate creditors.* Suit by the adopted son of the obligee (deceased) of a hypothecation-bond to recover principal and interest due on the bond against the land comprised in the hypothecation. Defendant No. 1, the obligor of the bond, had executed it as manager of a joint Hindu family of which defendant No. 2 was a member, and for the rightful purposes of the family. The family subsequently became divided, and the hypothecated property was divided between defendants Nos 1 and 2. Defendant No. 1 afterwards hypothecated part of his share for a private debt to defendant No. 3, who having sued on his hypothecation and brought the land to sale in execution became the purchaser. The District Munsif passed a decree for the plaintiff, against which defendants Nos. 2 and 3 preferred separate appeals. The District Judge on appeal passed a decree directing that the plaintiff should first proceed against all the property which was not subject to the hypothecation to defendant No. 3 including the share of defendant No. 2. Defendant No. 2 preferred a second appeal: *Held*, that as the plaintiff and defendant No. 3 were not creditors of the same person having demands against the property of that person, no case for marshalling arose and consequently that the direction of the District Judge was wrong. *GOPALA v SAMINATHAYAN*.

[I. L. R 12 Mad. 255]

28.—*Transfer of property Act (IV of 1882), s. 78—Priority of mortgages—Gross negligence—Registration.* A mortgagee at the request of the mortgagors returned to them their certificate of title to the mortgaged premises to enable them to raise money to pay off his mortgage. This mortgage was duly registered. The mortgagors, who remained in possession of the mortgage premises throughout, having shown the certificate to a third person whom they informed of the existence of the first mortgage and borrowed Rs 400 from him, subsequently informed him that the first mortgage was paid off, delivered the certificate to him and executed to him a mortgage of the same premises to secure the sum of Rs. 400, and a further sum of Rs 800: *Held* that though the second mortgagee had been wanting in caution, yet since he had been thrown off his guard by the conduct of the first mortgagee, in returning to the mortgagors their certificate of title, the second mortgagee was entitled to priority in respect of his security over the first mortgagee. *DAMODARA v. SOMASUNDARA*.

[I. L. R. 12 Mad. 429]

29.—*Transfer of Property Act (IV of 1882), s. 78—Priority of mortgages—Gross negligence—Registration.* On the 20th of February 1888, defendant No. 1 executed a mortgage in favor of the plaintiff-company. Defendants Nos. 2 and 3,

**MORTGAGE—continued.****(6) MARSHALLING—concluded.**

bound themselves as sureties for the due payment of the mortgage amount, on default by the mortgagor. This mortgage had not been registered at the date of the execution of the mortgages next referred to. On the 27th of April 1888, the secretary of the plaintiff-company handed over to defendant No. 1 most of the title-deeds which had been delivered to the plaintiff-company on the execution of the mortgage, and defendants Nos. 1 and 3 undertook that they would raise a loan thereon and discharge the debt due to the plaintiff-company, or return the title-deeds if they failed in raising the loan. On the 20th April 1888, defendant No. 1 deposited the title-deeds with defendant No. 4 and executed a mortgage to her for Rs 4,000; and on 7th May 1888, he executed an instrument creating a further charge in her favor for Rs 1,000. These two sums were applied by defendant No. 1 to his own use, and not in discharge of the prior mortgage. The mortgages to defendant No. 4 described the mortgaged premises as being then free from incumbrances. *Held*, that the plaintiff-company had been guilty of gross negligence in letting the title-deeds out of their possession and that the mortgages of defendant No. 4 had accordingly priority over the mortgage to the plaintiff-company. **MADRAS HINDU UNION BANK v. VENKATANGIAH.**

[I. L. R. 12 Mad. 424]

**(7) REDEMPTION.****(a) RIGHT OF REDEMPTION.**

**30.—Mortgage with proviso that in case of non-redemption in a prescribed time it should become a sale—Razinama by mortgagor declaring sale to mortgagee—Transfer of possession to mortgagee—Extinction of equity of redemption—Subsequent sale by mortgagor of equity of redemption.]** In 1818 *B* and *R* mortgaged a piece of land to *V*. It was to be redeemed in eight years, or else to become the absolute property of the mortgagee. It was not redeemed and in 1850, *B* in whose name the land was entered in the Government records, executed a *razinama* in favour of *V*, and *V* passed a *kabuliyat* accepting the land. *B* and *R* then became *V*'s tenants, and were, as such, successfully sued by him for rent in 1863. In 1872 *V* sold the land to *N*, who again sold it to the defendant. The plaintiff, as purchaser from the original mortgagors (*B* and *R*) of their alleged equity of redemption, filed the present suit to redeem the property: *Held*, that as the *razinama* given by *V* contained no reservation, and as it was accompanied by a transfer of possession, it had the effect of a conveyance of all the mortgagor's rights to the mortgagee. It operated to extinguish the equity of redemption, notwithstanding any misconception or ignorance on *V*'s part of his rights as mortgagor. Under the Indian Contract Act (IX of 1872, s. 21), error of law does not vitiate a contract; much less will

**MORTGAGE—continued.****(7) REDEMPTION—continued.****(a) RIGHT OF REDEMPTION—continued**

it annul a conveyance after the lapse of many years, unless there has been some fraud or misrepresentation and an absence of negligence. **VISHNU SAK HARAM PHATAK v. KASHINATH BAPU SHANKAR.**

[I. L. R. 11 Bom. 174]

**31.—Mortgage by conditional sale—Bengal Regulation XVII of 1806, ss. 7, 8.]** In the part of India where Bengal Regulation XVII of 1806 is in force, the right to redeem a mortgage by conditional-sale depends entirely upon it, whatever may be the true construction of the terms of the condition in regard to payment of interest. Within a year after notification of a petition for foreclosure a mortgagor deposited the principal debt, and interest for the last year of the mortgage term, which had expired. Interest for prior years of the term had not been paid; but this, according to the mortgagor's contention, was, by the terms of the condition treated as a separate debt. *Held*, that as the mortgagor had not deposited the interest due on the sum lent, required, according to s. 7 of the Regulation, where, as here the mortgagee had not obtained possession, and as the year of grace had expired, the conditional-sale had become conclusive under s. 8, involving the dismissal of the mortgagor's suit for redemption. **MANSUR ALI KHAN v. SURJU PRASAD.**

[I. L. R. 9 All 20]

[L. R. 13 I. A. 113]

**32—Foreclosure decree—Order absolute—Redemption of mortgage before order absolute—Transfer of Property Act (IV of 1882), s. 87.]** In a foreclosure action, the mortgagor can redeem at any time until the order absolute is made under s. 87 of the Transfer of Property Act, 1882. **PORESH NATH MCJUMDAR v. RAMJODU MOJUMDAR.**

[I. L. R. 16 Calc. 246]

**33—Unregistered agreement by mortgagor to sell to mortgagee—Subsequent assignment of equity of redemption to third person for value, but with notice of agreement.]** In a suit for redemption filed by an assignee for value of the equity of redemption against a mortgagee in possession, it was found that the mortgagor had agreed with the defendant to sell the mortgaged premises to him, that part of the purchase-money had been acknowledged as paid, and that the balance had been tendered in pursuance of the agreement. It was further found that the plaintiff had taken his assignment with notice of the above agreement and tender. *Held*, that the plaintiff having purchased the equity of redemption with notice as above was not entitled to redeem. *Per cur.* The plaintiff having knowledge of the agreement was put upon enquiry to ascertain whether the tender had been made and whether there was any

**MORTGAGE—continued.****(7) REDEMPTION—continued.****(a) RIGHT OF REDEMPTION—concluded.**

objection to his purchase on that ground. **ADAK-KALAM v. THEETHAN.**

[I. L. R. 12 Mad. 505]

**34.—Suit for redemption—Conditional decree—Failure of mortgagor to pay in accordance with decree—Subsequent suit for redemption—Act IV of 1882 (Transfer of Property Act), s. 93]** In a suit for redemption of a usufructuary mortgage, a decree for redemption was passed conditional upon the plaintiff paying the defendants, within a time specified, a sum which was found still due to the latter, and the decree provided that if such sum were not paid within the time specified, the suit should stand dismissed. The plaintiff failed to pay, and the suit accordingly stood dismissed. Subsequently he again sued for redemption, alleging that the mortgage-debt had now been satisfied from the usufruct: *Held*, having regard to the distinction between simple and usufructuary mortgages, that the decree in the former suit only decided that, in order to redeem and get possession of the property, the mortgagor must pay the sum then found to be due by him to the mortgagee, and did not operate as *res judicata* so as to bar a second suit for redemption, when, after further enjoyment of the profits by the mortgagee, the mortgagor could say that the debt had now become satisfied from the usufruct. Having regard to s. 93 of the Transfer of Property Act (IV of 1882), in a suit brought by a usufructuary mortgagor for possession on the ground that the mortgage-debt has been satisfied from the usufruct, and in which the plaintiff is ordered to pay something because the debt has not been satisfied as alleged; the decree passed against such a mortgagor for non-payment has not the effect of foreclosing him for all time from redeeming the property. The decision in *Gulam Hossein v. Alla Rukhee Beebee*, 2 N. W. 62, treated as not binding since the passing of the Transfer of Property Act. *Charita v. Purun Sookh*, 2 Agra 256, and *Anrudh Singh v. Sheo Prasad*, I L. R. 4 All. 481, referred to. **MUHAMMAD SAMI UDDIN KHAN v. MANU LAL.**

[I. L. R. 11 All. 386]

**(b) REDEMPTION OF PORTION OF PROPERTY.**

**35.—Hindu Law—Widow's estate—Mortgage by two co-widows—Sale of equity of redemption in execution of decree against one widow—Suit to redeem by other widow—Decree for redemption of moiety on payment of moiety of mortgage amount]** A mortgage of ancestral estate having been made by A and B, two Hindu co-widows, the equity of redemption of the said estate was sold in execution of a decree for money against B only and purchased by the mortgagee. *Held*, that A was entitled to redeem only a moiety of the estate during the lifetime of B. **ARIYAPUTRI v. ALAMELU.**

[I. L. R. 11 Mad. 304]

**MORTGAGE—continued.****(7) REDEMPTION—continued.****(b) REDEMPTION OF PORTION OF PROPERTY—concluded.**

**36.—Division of mortgage security—Acquisition by mortgagee of ownership of mortgaged property]** The rule of law against breaking up the integrity of a mortgage-security is a rule aiming at the protection of the mortgagee, and is not applicable to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property. **KUDHAI v. SHEO DAYAL.**

[I. L. R. 10 All. 570]

**(c) REDEMPTION OTHERWISE THAN ON EXPIRY OF TERM.**

**37.—Redemption before expiry of term—Mortgagor entitled to redeem before expiration of term unless mortgagee can show that the term binds mortgagor—Usufructuary mortgage]** No such general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made, unless the mortgagee succeeds in showing that by reason of the terms of the mortgage itself, the mortgagor is precluded from paying off the debt due by him to the mortgagee. Where parties agree that possession of any property shall be transferred to a mortgagee by way of security and repayment of the loan for a certain term, it may be inferred that they intended that redemption should be postponed until the end of the term, though the creation of a term is by no means conclusive on the point. The term fixed for payment of a debt should be presumed to be a protection only for the debtor till a contrary intention is shown. **BHAGWAT DAS v. PARSHAD SING.**

[I. L. R. 10 All. 602]

**(d) MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE.**

**38.—Mortgage by conditional sale—Bengal Regulation XVII of 1806, ss 7 & 8.—Redemption]** In the part of India where Bengal Regulation XVII of 1806 is in force, the right to redeem a mortgage by conditional sale depends entirely upon it, whatever may be the true construction of the terms of the condition in regard to payment of interest. Within a year after notification of a petition for foreclosure a mortgagor deposited the principal debt, and interest for the last year of the mortgage term, which had expired. Interest for prior years of the term had not been paid; but this, according to the mortgagor's contention, was, by the terms of the condition, treated as a separate debt. *Held* that as the mortgagor had not deposited the interest due on the sum lent, required, according to s. 7 of the Regulation, where, as here, the mortgagee had not obtained possession, and as the year of grace had expired, the conditional sale had become conclusive under s. 8,

**MORTGAGE—continued.****(7) REDEMPTION—continued****(d) MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE—continued.**

involving the dismissal of the mortgagor's suit for redemption. **MANSUR ALI KHAN v. SARJU PRASAD.**

[**I. L. R. 9 All. 20**  
[**L. R. 13 I. A. 113**

**39.—Usufructuary mortgage—Covenant by the mortgagor to pay the mortgagee arrears of rent due at the time of redemption—Payment by mortgagee of arrears of revenue—Right of mortgagee to reimbursement before redemption.]** On the 27th August 1883, *M* and *B* jointly executed two usufructuary mortgages for the sums of Rs 3,000 and 5,000 respectively in favour of the defendants. On the 24th March 1886, the mortgagors executed another usufructuary mortgage in favour of the plaintiffs for Rs. 15,000, entitling them to possession of the property mortgaged. The second mortgagee instituted a suit to redeem the prior mortgages by depositing in Court the principal sum of Rs. 8,000. The defendants urged that a sum of Rs 4,000 was due to them besides the principal amount, without payment of which the property in suit could not be redeemed. The Court found that a sum of Rs 498-15-9 only, composed of certain arrears of rent, and an item of arrears of Government revenue paid by the defendants, was due to them, and decreed redemption of the property on condition of payment of the aforesaid sum. Both the parties appealed. *Held* that the items of arrears of rent were recoverable under the covenant contained in that behalf in the mortgage-deeds; as to the item for arrears of Government revenue, it was clear that unless this revenue was duly paid the whole estate might have been sold to realize it, thereby putting an end to all the rights of the mortgagors and mortgagees; and therefore upon the general principles of law upon which the doctrine of salvage and subrogation proceeds, persons in the position of mortgagees in possession are entitled to claim that sum before the property which they saved from sale for arrears of revenue could be redeemed. S 72 of the Transfer of Property Act only reproduces the rules of law which Courts of justice in India have uniformly adopted. **GIRDHAR LAL v. BHOLA NATH.**

[**I L R 10 All 611**

**40.—Redemption claimed under terms of mortgage—Insufficient tender of mortgage-money—Transfer of Property Act (IV of 1882, ss 60, 83, and 84.]** According to the judgment of the Appellate Court below, a mortgagor, having liberty by the terms of his mortgage to redeem at the end of its second year, on payment of the whole of the principal and interest, was not entitled to a decree for redemption, in a suit brought after the close of the second year, on showing only that in the first half of the second year the principal money had been deposited in Court, and that for the interest, for both

**MORTGAGE—continued.****(7) REDEMPTION—concluded.****(d) MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE—concluded.**

years, decrees had been obtained by the mortgagee against him, before his suit was instituted. The above not showing payment or tender of the interest, of which payment was secured by the mortgage an appeal was dismissed. **HEWANCHAL SINGH v. JAWAHIR SINGH.**

[**I. L. 1. 16 Cal. 307**

**41.—Decree for redemption without proviso for foreclosure or payment within a fixed time—Effect of not executing decree for redemption—Limitation.]** A decree for redemption which does not provide for payment of the mortgage-debt within a fixed time or for foreclosure in case of default operates of itself as a foreclosure decree, if not executed within three years. On 12th November 1883, *A* obtained a decree for redemption on payment of a certain sum of money to *B* (the mortgagee). The decree contained no direction as to foreclosure, or as to the time within which the payment was to be made. On 26th November 1884, *B*, the mortgagee, sued to recover the mortgage-debt by sale of the property mortgaged. On 8th April 1885, *A* paid into Court the sum directed to be paid by the redemption decree. *B* refused to accept the payment, and insisted upon his right of sale. *Held*, that no time having been fixed by the decree for redemption, *A* had three years within which to execute the decree; and as he had paid the money within the three years, *A* was entitled to recover the property. *Held*, also, that the decree for redemption would, if not executed within three years, operate as a foreclosure decree, and therefore effectually determined the rights under the mortgage both of the mortgagee and the mortgagor. **MALONI v. SAGAJI.**

[**I. L. R. 13 Bom. 567**

**(8) FORECLOSURE.****(a) RIGHT OF FORECLOSURE.**

**42.—Second mortgage of the same property to the same person—Foreclosure decree on the first mortgage—Second suit on second mortgage—Practice—Foreclosure, re-opening of.]** On the 8th August 1861 the defendant *B* mortgaged certain property to the plaintiff *R*, and on the 8th April 1873, he further mortgaged the same to secure a further advance from the plaintiff. In 1877 the plaintiff brought a foreclosure suit on the first mortgage, and obtained the usual foreclosure decree; and the defendant having made default in payment, his right in the property was foreclosed. The plaintiff sued, in 1882, on his second mortgage, which fell due in 1878. The lower Courts allowed his claim. On appeal by the defendant to the High Court: *Held*, reversing the decree of the Court below, that the plaintiff could not foreclose in 1877 so as to vest the property absolutely in himself, without treating the entire mortgage debt as satisfied. The defend-

**MORTGAGE—continued.****(8) FORECLOSURE—continued.****(a) RIGHT OF FORECLOSURE—concluded.**

ant might have pleaded, in 1877, that the plaintiff could not foreclose, unless he abandoned his claim to be repaid the second advance when due. His omission to do so could not deprive him of his right to insist that the foreclosure decree passed in 1878, either precluded the plaintiff from suing on the second debt, or that the foreclosure should be re-opened. *BAPU RAVJI v. RAMJI SVARUNJI*.

**[I. L. R. 11 Bom. 112]****(b) DEMAND AND NOTICE OF FORECLOSURE.**

43.—*Reg. XVII of 1806, s. 8—Provision as to the year of grace—Extension of time by mutual agreement—Transfer of Property Act, s. 2, cl. (c).* The year of grace allowed by s. 8, *Reg. XVII of 1806*, is a matter of procedure, which it was open to the parties to extend by mutual agreement without prejudice to the proceedings already had under the section, and upon the expiration of such extended period the mortgagee acquired an immediate right to have a decree declaring the property to be his absolutely. The right so acquired by the mortgagee while the Regulation was in force is a right which falls within the meaning of cl. (c), s. 2 of the *Transfer of Property Act*. Proceedings under s. 8 had come to a close by the expiration of the stipulated period of extension while the Regulation was still in force, and the mortgagee brought his suit for possession in pursuance thereof after the passing of the *Transfer of Property Act*. *Held*, that the mortgagee was entitled to a decree such as he would have had if the Regulation had been still in force. *BAJI NATH PERSHAD NARAIN SINGH v. MOHESWARI PERSAD NARAIN SINGH*.

**[I. L. R. 14 Calc. 451]**

44.—*Conditional Sale—Reg. XVII of 1806, s. 8—Transfer of Property Act (IV of 1882), s. 2, cl. (c), and ss. 86, 87—Procedure.* A suit was brought on the 24th January 1885 by a mortgagee upon a mortgage by conditional sale asking for a declaration that the mortgagor's right to redeem had been extinguished and that he was entitled to possession of the mortgaged properties. The mortgage was dated the 6th April 1881, and the mortgage-money was repayable on the 13th May 1881. On the 9th July 1881, the mortgagee caused a notice to be served on the mortgagor in compliance with the provisions of ss. 7 and 8 of *Reg. XVII of 1806*. The year of grace expired on the 10th July 1882. It was contended by the mortgagor that as the *Transfer of Property Act* came into force on the 1st July 1882, the proceedings taken by the mortgagee should be regulated by the procedure laid down in ss. 85 and 87 of that Act, and not by the procedure prescribed by *Reg. XVII of 1806*. *Held*, that the procedure laid down by the *Transfer of Property Act* could not be applied to the case. Although the year of grace had not

W., D.

**MORTGAGE—concluded.****(3) FORECLOSURE—concluded.****(b) DEMAND AND NOTICE OF FORECLOSURE—concluded.**

expired when that Act came into force, and the full and complete right of the mortgagee had not accrued, he had acquired the right to bring a suit under the provisions of *Reg. XVII of 1806*, at the expiration of the year of grace, and the mortgagor was under a liability to part with his property upon a suit being brought at the expiration of that year, and such right and liability came within the meaning of these terms as used in cl. (c), s. 2 of the *Transfer of Property Act*. *MOHABIR PERSHAD NARAIN SINGH v. GUNGADHUR PERSHAD NARAIN SINGH*.

**[I. L. R. 14 Calc. 599]**

45.—*Suit for foreclosure—Conditional Sale—Reg. XVII of 1806 s. 8—Transfer of Property Act (IV of 1882), s. 2—General Clauses Consolidation Act (I of 1868), s. 6—"Proceedings"* In a suit for foreclosure under a deed of conditional sale, where the due date of the deed expired and notice of foreclosure was served while *Reg. XVII of 1806* was in force, but before the expiration of the year of grace that Regulation had been repealed by the *Transfer of Property Act*. *Held*, following *Mohabir Pershad Narain Singh v. Gungadthur Pershad Narain Singh*, *I. L. R. 14 Calc. 599*, that proceedings for foreclosure having been commenced under the Regulation, those proceedings were saved by s. 6 of the *General Clauses Consolidation Act I of 1868*. The "proceedings" referred to in that section are not necessarily judicial proceedings only, but ministerial proceedings, as, in the present case, the service of notice of foreclosure. *UMESH CHUNDER DAS v. CHUNCHUN OJHA*.

**[I. L. R. 15 Calc. 357]****MOVEABLE PROPERTY.**

See REGISTRATION ACT 1877, s. 17.

**[I. L. R. 10 All. 20]**

See THEFT.

**[I. L. R. 10 Mad. 255]**See CASES UNDER SMALL CAUSE COURT,  
MOFUSSIL - JURISDICTION—MOVEABLE PROPERTY**[I. L. R. 11 Mad. 264]****MULTIFARIOUSNESS.**

1.—*Misjoinder of causes of action—Misjoinder of parties* The plaintiff, a talukdar, obtained a decree under s. 52 of the *Rent Act (Bengal Act VIII of 1869)* to eject his tenant for arrears of rent and to obtain possession of his tenure. In attempting to execute that decree he was opposed as regards certain plots, which he alleged were comprised in the tenure, by parties in possession, who instituted proceedings against him

**MULTIFARIOUSNESS—continued.**

under s. 332 of the Civil Procedure Code. These proceedings resulted in their claims being decided in their favour. The plaintiff thereupon instituted one suit against his judgment debtor and all parties who had opposed him in such proceedings to obtain a declaration that all the several plots claimed against him belonged to the tenure in respect of which he had obtained a decree for *khas* possession, and he also prayed for *khas* possession of the various plots. It was found that the titles relied on by the defendants, and which had been set up by them in the proceedings under s. 332, were quite distinct one from another, and that there had been no collusion or combination amongst them to keep the plaintiff out of possession, but on the contrary that the defences were *bonâ fide*: *Held*, that the suit was bad for misjoinder of causes of action and was properly dismissed. *RAM NARAIN DUT v. ANNODA PRASAD JOSHI*.

[I. L. R. 14 Calc. 681]

2.—*Suit by members of tarwad to set aside alienations by karnavan* [A suit was brought by the junior members of a *tarwad*, which consisted of three *stanoms* and three *tucaries*, against the *karnavan* and others, including certain persons to whom he had alienated some *tarwad* property. The plaint, as originally framed, prayed (1) for the removal of the *karnavan*, (2) for a declaration that defendants Nos. 2 to 8, the senior *anandravans*, had forfeited their right of succession to him, (3) for the appointment of the plaintiff in his place, (4) for a declaration that his alienations were invalid as against the *tarwad*, and (5) for possession of the property alienated. Subsequently, the plaint was amended by the order of the Court by striking out items 2 and 5 of the prayer, and finally the plaintiffs further amended the plaint and sued only for a declaration that the alienations in question were invalid: *Held*, that the suit was not bad for multifariousness. *Vasudava Shanbhaga v. Kulcadi Narnapar*, 7 Mad. 290, considered. *MAHOMED v. KRISHNAN*.

[I. L. R. 11 Mad. 106]

3.—*Misjoinder of causes of action—Civil Procedure Code, ss. 28, 45.* [The judgment of the majority of the Full Bench in *Narsingh Dass v. Mungai Dubey*, I. L. R. 5 All 163, except in its general observations as to the provisions of the Civil Procedure Code relating to joinder of parties and causes of action, proceeded upon and had reference to the special circumstances of the case, and to the allegations made by the plaintiff in his plaint, and was not intended to be carried further. In a suit for possession of immovable property part of which had been usufructually mortgaged by defendant No. 1 to defendant No. 2, the plaintiff alleged that the first defendant had no title to make such a mortgage, while both defendants maintained such title: *Held*, that inasmuch as the title of defendant No. 2 was derived from defendant No. 1, and stood or fell with the failure or success of the plaintiff's claim against

**MULTIFARIOUSNESS—concluded.**

the latter, there were not two causes of action but one, namely, the infringement of the plaintiff's right by the defendant No. 1, and hence the suit was not bad for misjoinder of causes of action. *INDAR KUMAR v. GUR PRASAD*.

[I. L. R. 11 All. 33]

4.—*Civil Procedure Code, s. 45—Suit for declaration that alienations were not binding—Malabar Law—Suit by junior members of tarwad.* [Suit by some of the junior members of a Malabar *tarwad* against the *karnavan* and the other members of the *tarwad*, and certain persons to whom some of the *tarwad* property had been alienated by the *karnavan*, for a declaration that the alienations were not binding on the *tarwad*: *Held*, that the suit was not bad for multifariousness. *Vasudera Shanbhaga v. Kulcadi Narnapar*, 7 Mad. 290, followed. *ABDUL v. AYAGA*.

[I. L. R. 12 Mad. 234]

**MUNSIF, JURISDICTION OF**

1.—*Suit brought for amount in excess of Court's Jurisdiction—Suit to declare land liable to be sold in execution of decree—Civil Procedure Code, s. 373—Withdrawal of part of claim* [In a suit brought in a District Munsif's Court to declare certain land liable to be sold in execution of a decree for more than Rs. 2,500, the defendants pleaded that the Court had no jurisdiction. The Munsif allowed the plaintiff to amend the plaint by stating that he abandoned his claim to execute the decree against the land for more than Rs. 2,500. On appeal the District Judge held that the plaint could not be amended after the first hearing: *Held*, on appeal to the High Court that the claim was not one which could be amended so as to bring the suit within the pecuniary jurisdiction of the Munsif. *ANNAJI RAU v. RAMA KURUP*.

[I. L. R. 10 Mad. 152]

2.—*Civil Procedure Code, ss. 93, 99—Decree passed in a restored suit pending appeal against order of restoration* [A suit was filed in a Munsif's Court, but neither party appeared for the hearing, and the suit was dismissed. The Munsif subsequently on review made an order restoring the suit and eventually decreed for the plaintiff. The defendant in the meanwhile appealed to the District Court against the order of restoration, and after the date of the decree, the District Court made an order allowing the defendant's appeal. The plaintiff appealed to the High Court and the order of the District Court was reversed and the order of restoration upheld: *Held*, that the Munsif's decree was not passed without jurisdiction. *ALWAR v. SESHAMMAL*.

[I. L. R. 10 Mad. 290]

3.—*District Munsifs—Suit for declaration of title to paid offices—Withdrawal of claim to some of the offices—Office still claimed involving the right to the others.* [In a suit to declare title to four



MUNSIF, JURISDICTION OF—*continued.*

paid offices in a temple, the plaintiffs asked that the issues with regard to three of them should not be tried, but on cross-examination asserted right to them; *Held*, that the plaintiffs were not shown to have relinquished their claim on the three offices for the purposes of the suit. On findings that the fourth office carried with it the right to the other three and that the united value of the four offices exceeded the jurisdiction of the District Munsif: *Held*, that the District Munsif had no jurisdiction to entertain the suit and that the plaint should be returned for presentation in the proper Court. *SUNDARA v. SUBBA.*

[I. L. R. 10 Mad. 371]

4.—*Suit for declaration that property is liable to sale in execution of decree—Valuation of suit.* In a suit to have it declared that certain property valued at Rs. 400 was liable to sale in execution of the plaintiff's decree for Rs. 1,500, *held* that in this case the value of the property determined the jurisdiction, that it was immaterial that the amount of the decree was higher than the limit of the Munsif's jurisdiction, and that the case was therefore triable by the Munsif. *Gulzari Lal v. Jadann Rai*, I L. R. 2 All. 799, distinguished. *DURGA PRASAD v. RACHLA KUAR.*

[I. L. R. 9 All. 140]

5.—*Bengal Civil Courts' Act (VI of 1871), s. 20—Value of the subject-matter in dispute—Civil Procedure Code (Act XIV of 1882), s. 283—Attached property, Suit to establish right to—Valuation of Suit* A Munsif has jurisdiction to try a suit brought under s. 283 of the Civil Procedure Code to test the question whether a property which has been attached in execution is liable to pay the claim of the creditor, the value of the property being over one thousand rupees, but the amount of the debt being less than that sum. In such suits the amount which is to settle the jurisdiction of the Court, is the amount which is in dispute, and which the creditor would recover if successful, *viz.*, the amount due to him and not the value of the property attached, unless the two amounts happen to be identical. *Janki Dass v. Badri Nath* I. L. R. 2 All. 698; *Gulzari Lal v. Jadann Rai*, I L. R. 2 All. 799; *Krishnama Chariar v. Srinivasa Ayyangar*, I L. R. 4 Mad. 339; and *Dayachand Nemchand v. Hemchand Dharamchand*, I L. R. 4 Bom. 515, followed. *MODHUSUDUN KOER v. RAKHAL CHUNDER ROY.*

[I. L. R. 15 Cal. 104]

6.—*Madras Civil Courts' Act (III of 1873) s. 12—Suit to recover share of inheritance—Subject-matter of Suit* The plaintiff sued to be declared an heir to a deceased Mahomedan and to recover her share of the inheritance, the share claimed being less than Rs. 2,500, while the value of the whole estate exceeded that amount. *Held*, that the suit was within the jurisdiction of a District Munsif. *KHANSA BIBI v. SYED ARBA.*

[I. L. R. 11 Mad. 140]

MUNSIF, JURISDICTION OF—*continued.*

7.—*Madras Civil Courts' Act, 1873—Suit for partition and mesne profits—Civil Procedure Code, s. 544* N sued S and others for partition of a share of certain land and claimed mesne profits from other defendants who were tenants of the land. S obtained a decree by consent for her share and a sum of 99 rupees was decreed to her against the tenants for mesne profits. Against this decree the tenants appealed. The Subordinate Judge finding that the subject-matter of the suit, the land of which partition was claimed, exceeded the jurisdiction of the Munsif, reversed the decree of the Munsif and directed the plaint to be returned for presentation in the proper Court. It was contended, on appeal to the High Court, that the Subordinate Judge could not set aside the decree against the tenants for mesne profits. *Held* that, as the Munsif's Court had no jurisdiction to entertain the suit for partition, it could make no decree for mesne profits. *NAGAMMA v. SUBBA.*

[I. L. R. 11 Mad. 197]

8.—*Civil Procedure Code, ss. 228, 229, 344, 360—Application to be declared insolvent made to Court to which decree was transferred for execution.* Where a decree had been transferred for execution from the Court of the District Munsif of E, to that of the District Munsif of B, and an application was made by the judgment debtor under s. 344 of the Code of Civil Procedure to be declared an insolvent and entertained by the latter Court. *Held* that the District Munsif of B had no jurisdiction to entertain the application. *VENKATASAMI v. NARAYANARATNAM.*

[I. L. R. 11 Mad. 301]

9.—*Madras Regulation IV of 1816—Power of Village Munsif to administer oath to witness—Criminal Procedure Code, s. 195—Sanction for prosecution of witness for perjury by Village Munsif.* V was tried and convicted under s. 193 of the Penal Code for giving false evidence before the Court of a Village Munsif in a suit in which V was defendant. The Village Munsif sanctioned the prosecution of V under s. 195 of the Code of Criminal Procedure. On appeal, the Sessions Judge acquitted V on the grounds that a Village Munsif had no power to administer an oath to V (the case not being one in which either party was willing to allow the cause to be settled by the oath of the other) and because s. 195 of the Code of Criminal Procedure did not apply. *Held*, that both objections to the conviction were bad in law. *QUEEN-EMPRESS v. VENKAYYA.*

[I. L. R. 11 Mad. 375]

10.—*Madras Forest Act, 1882, s. 10—Procedure—Remedy by ordinary suit barred.* Where by an Act of the Legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the ordinary jurisdiction of Civil Courts is

**MUNSIFF, JURISDICTION OF—concluded.**

ousted, and in the case of injury the party cannot proceed by action. Plaintiff sued in a Munsif's Court to cancel the decision of a Forest officer confirmed by a District Judge under s. 10 of the Madras Forest Act, 1882, and to recover certain land, a claim to which had been rejected under the said section: *Held*, that the Munsif had no jurisdiction to entertain the suit. **RAMACHANDRA v SECRETARY OF STATE FOR INDIA.**

[I. L. R. 12 Mad. 105]

11.—*Regulation XXV of 1802 (Madras), s. 11.—Regulation XXIX of 1802 (Madras), ss 5, 7, 10, 16, 18,—Sut for dismissal of a zemindari karnam* ] A suit by a zemindar for the dismissal of a zemindari karnam cannot be entertained by a District Munsif. The Subordinate Court, and the District Court where there is no Subordinate Court, is the tribunal that has taken the place of the Court of Adawlut of 1802. **VENKATANARASIMHA v. SURYANARAYANA.**

[I. L. R. 12 Mad. 188]

**MUTUAL ACCOUNTS.**

*See* CASES UNDER LIMITATION ACT, 1877,  
ART. 85

[I. L. R. 10 Mad. 199, 259]

**NAWAB OF SURAT.**

*Nawab of Surat Act XVIII of 1848, s. 1—“Sue forth,” meaning of—Sanction obtained after suit filed.* ] The expression “sue forth” in s. 1 of Act XVIII of 1848 does not mean to sue for and to obtain so as to make the consent of the Governor a condition precedent to the institution of a suit. Accordingly, where the grand-daughter of the Nawab of Surat was sued along with her husband without previously obtaining the required consent, and it was contended that the suit was irregularly instituted, and the proceedings thereunder void. *Held*, that the suit was rightly instituted, such a consent not being a condition precedent to the filing of the suit. **ZIAULNISSA BEGAM v MOTIRAM.**

[I. L. R. 12 Bom. 496]

**NAZIR.**

*See* GUARDIAN—APPOINTMENT

[I. L. R. 12 Bom. 553]

**NEGLIGENCE.**

*See* BILL OF LADING.

[I. L. R. 13 Bom. 157]

*See* MORTGAGE—MARSHALLING.

[I. L. R. 12 Mad. 424, 429]

*See* ONUS PROBANDI—BAILMENTS.

[I. L. R. 9 All. 398]

**NEGLIGENCE—continued.**

*See* SUPERINTENDENCE OF HIGH COURT  
—CIVIL PROCEDURE CODE, 1882.  
s. 622.

[I. L. R. 9 All. 398]

1.—*Unfenced hole—Damages for personal injuries—Licensee—Contractor* ] The plaintiff claimed to recover Rs. 63,500 from the defendants, as damages for injuries sustained by him by reason of his having fallen into a hole which had been dug upon certain land of the defendants on the 1st September 1885. The land in question was the property of the first defendants (the Port Trustees), and was in their possession at the date of the accident to the plaintiff; but an agreement had been made, whereby it was to be leased by them to the second defendant, who was accordingly let into possession in January 1886. For some years, the first defendants had been in the habit of letting out the greater part of the land for tenting purposes in lots marked out with pegs, but the tents were taken down each monsoon. For two or three years previously to the accident, people had been accustomed to cross the land without any hindrance or prohibition. The plaintiff himself had used the path across the land, as a short cut, for a period of eighteen months. This path led across the tenting ground to a gate which was generally open, and which opened upon the high road. No express permission had ever been given to any of the persons who were in the habit of using this path. It was a mere beaten track, and, so far from being a public way, it was from time to time obstructed, in the tenting season, by the ropes and pegs of the tents. The plaintiff had for some time been in occupation of a bungalow belonging to the first defendants, which was situated in that part of the land which was furthest away from the high road. There was a regularly constructed roadway from the bungalow to the high road, which the plaintiff might have used, but, as a short cut, he and others were in the habit of using the beaten track. For this he had merely a tacit permission. On the morning of the 1st September 1885, he left his bungalow and went to his business, as usual, by the shortcut across the land. When returning by the same way at about 11 o'clock at night he fell into the hole, which had been dug in the afternoon of that day, and sustained the injuries complained of. The hole was several feet deep, and was dug right across the pathway. The plaintiff had no notice of the hole being dug, or of any intention to dig it. The night was very dark, and there was no negligence on the part of the plaintiff, nor any want of ordinary care and caution. There was no watchman and no fence, nor was there any light which might enable persons using the path to avoid the danger. The second defendant, as above stated, had agreed to take the said land from the first defendants on lease for building purposes. On the day of the accident, some months before the execution of the lease the second defendant through his engineer and contractor II applied to the first defendants

**NEGLIGENCE—continued.**

for permission to make "borings" in the land, which permission was given. *H* thereupon caused the hole in question to be dug. In their written statement the first defendants contended that, in using the short cut across their land, the plaintiff was a trespasser, and that he had used it without their knowledge or consent; that the hole was dug without their knowledge, and that the "borings," for which they had given permission, were merely small holes of a diameter of six inches, or thereabouts, which could not have been a source of danger. The second defendant pleaded that at the time of the accident he was not in possession of the land, but had merely entered into an agreement for a lease of it; that he had employed a competent engineer and contractor, *H*, to make borings, in order to ascertain of what the sub-soil consisted, and that *H* contracted to do the work and obtain leave from the first defendants to enter on the land; that the said *H* subsequently entered on the land, and according to his own discretion and without any control or interference from him (the second defendant), took such steps as he thought necessary to ascertain the nature of the said sub-soil; and he (the second defendant), contended that, if there had been negligence in the performance of the work, he was not liable. *Held*, (1) that there was negligence in digging the hole across a path used by several licensees, and in not placing any person or light to warn passengers of the danger arising from the hole and the excavated earth which was heaped up near it. *Held*, (2) that the first defendants were not liable to the plaintiff. The permission which they had given to *H* was a permission to make "borings" only; and the hole, which was actually dug by *H* was dug without their knowledge or permission. *H* was not shown to be, in any sense their servant or agent. The plaintiff was a bare licensee, and the first defendants were under no obligation to him to keep the path in a safe state or in good order. *Held*, (3) that the second defendant was liable to the plaintiff. *H* was not a contractor, in the legal sense, so as to exempt the second defendant from responsibility, but was the servant of the second defendant *pro hac vice*, and that the digging of the hole was within the course of his employment, or within the scope of his authority. The Court of First Instance awarded, as damages, a sum of Rs. 33,000, which, on appeal, was reduced to Rs. 17,000. *EVANS v. THE TRUSTEES OF THE PORT OF BOMBAY.*

[I. L. R. 11 Bom. 329]

2.—Sale set aside—Decree in favour of vendor—Possession—Purchaser in possession after decree and pending appeal—Accident—Loss by fire—Liability for damage—*Maxim, Volenti non fit injuria.*] The plaintiff and the second defendant *A* were brothers, and worked a cotton press in partnership. In August 1884, *A* sold the press for Rs. 35,000 to *V* (the first defendant), who paid *A* Rs. 5,000 earnest-money, and was put into possession. The plaintiff then brought a suit

**NEGLIGENCE—continued.**

(No. 327 of 1884) against *A* praying for a dissolution of the partnership. *V* was also a party defendant to that suit. The plaintiff alleged that Rs. 35,000 was much too low a price for the press, and he objected to the sale. He prayed that *V* might be restrained from continuing in possession of the press and working it, and that a receiver might be appointed to take possession of it until further order. On the 21st April 1885, on a motion the Court refused to grant an injunction and receiver but ordered *V* to pay Rs. 30,000 (*i.e.*, the balance of the purchase-money), to the solicitors of the parties for investment until the hearing of the suit, and directed that if that sum was not paid by the 21st May 1885, a receiver should be appointed to take possession of the press. The suit (*i.e.*, No. 327 of 1884), was heard on the 15th February 1887, when it was held by the Court that the sale by *A* to *V* was without authority; that the defendant *V* took nothing under it, and that the plaintiff was entitled to have it set aside. Certain matters still remained to be decided but on the 28th February 1887, the decree in the suit was made, giving effect to the findings already arrived at on the 15th February. The decree by consent directed various accounts to be taken, and, among others, an account of the profits realized by the working of the press by the defendant *V* since his possession thereof, credit being given to him for all sums expended by him in the repairs, maintenance, and working of the said press and for the management thereof by him. The decree further ordered that the defendant *V* should be repaid the Rs. 30,000 which he had paid under the order of the 21st April 1885, and directed "that on such payment the said defendant *V* do forthwith give over possession of the press to the plaintiff and the defendant *A*." The defendant *V* at once gave notice of his intention to appeal. There was some delay in drawing up the decree. The minutes were spoken to on the 31st March 1887; the decree was sealed on the 13th April 1887. Meantime, on the 6th April 1887, and while the defendant *V* was still in possession, a fire broke out in the press, and much damage was done. Subsequently to the sealing of the decree as above stated, the press in its damaged condition was handed over to the plaintiff's firm by *V*, who also desisted from prosecuting his appeal, the injury to the press having made it contrary to his interest to appeal. In May 1887, the plaintiff filed the present suit, claiming to recover Rs. 50,000 from the defendant *V* as the value of the press or such further sum as might be necessary to rebuild and restore it. He alleged that the fire was caused by the working of the press, and contended that the working of the press by the defendant *V* after the decree of the 28th February was an act of trespass by him, and that, therefore, independently of the question whether the fire was caused by the negligence of *V* and his servants, the said *V* was liable for the loss occasioned by the fire. *Held*, that, independently of negligence

NEGLIGENCE—*concluded.*

the defendant was not liable to the plaintiff for the loss occasioned by the fire. Down to the decree of the 28th February 1887, the defendant in keeping possession of the press and working it was, no doubt, a trespasser, but subsequently to that decree he remained in possession and worked the press with the consent of the plaintiff. The maxim *volenti non fit injuria* applied to the circumstances of the case: *Held*, also, that no negligence having been proved against the defendant, the suit must be dismissed. *JAMSETJI BURJORJI BUHADURJI v. EBRAHIM VYDINA.*

[I. L. R. 13 Bom. 183]

NEGOTIABLE INSTRUMENTS ACT  
(XXVI OF 1881), s. 35.

*See* DECREE—FORM OF DECREE—BILL OF EXCHANGE.

[I. L. R. 16 Calc. 804]

NORTH-WESTERN PROVINCES LAND  
REVENUE ACT (XIX OF 1873).

—, ss. 72, 77

*See* JURISDICTION OF REVENUE COURT—N.-W. P. RENT AND REVENUE CASES.

[I. L. R. 9 All. 185]

*See* LANDLORD AND TENANT—CONSTITUTION OF RELATION—ACKNOWLEDGMENT OF TENANCY, &c.

[I. L. R. 9 All. 185]

—, ss. 94, 97.

*See* DURESS.

[I. L. R. 11 All. 399]

—, ss. 111, 112.

*See* JURISDICTION OF CIVIL COURT—REVENUE COURTS—PARTITION.

[I. L. R. 9 All. 429]

*See* PARTITION—JURISDICTION OF CIVIL COURT IN SUITS RESPECTING PARTITION.

[I. L. R. 9 All. 429]

*See* PARTITION—MISCELLANEOUS CASES.

[I. L. R. 9 All. 429]

—, s. 113.

*See* APPEAL—N.-W. P. ACTS

[I. L. R. 9 All. 445]

[I. L. R. 11 All. 328]

—, ss. 113, 114.

*See* JURISDICTION OF CIVIL COURT—REVENUE COURTS—PARTITION.

[I. L. R. 9 All. 429]

NORTH-WESTERN PROVINCES LAND  
REVENUE ACT (XIX OF 1873),  
ss. 113, 114—*concluded.*

*See* PARTITION—JURISDICTION OF CIVIL COURT IN SUITS RESPECTING PARTITION.

[I. L. R. 9 All. 429]

*See* PARTITION—MISCELLANEOUS CASES.

[I. L. R. 9 All. 429, 445]

*See* RES JUDICATA—COMPETENT COURT—REVENUE COURTS.

[I. L. R. 9 All. 388]

—, s. 15.

*See* JURISDICTION OF CIVIL COURT—REVENUE COURTS—PARTITION.

[I. L. R. 9 All. 429]

*See* PARTITION—JURISDICTION OF CIVIL COURT IN SUITS RESPECTING PARTITION.

[I. L. R. 9 All. 429]

—, ss. 131, 132.

*See* JURISDICTION OF CIVIL COURT—REVENUE COURTS—PARTITION.

[I. L. R. 9 All. 429]

*See* PARTITION—JURISDICTION OF CIVIL COURT IN SUITS RESPECTING PARTITION.

[I. L. R. 9 All. 429]

—, s. 135.

*See* JURISDICTION OF CIVIL COURT—REVENUE COURTS—PARTITION.

[I. L. R. 10 All. 5]

*See* PARTITION—JURISDICTION OF CIVIL COURT IN SUITS RESPECTING PARTITION.

[I. L. R. 10 All. 5]

—, s. 241.

*See* JURISDICTION OF CIVIL COURT—REVENUE COURTS—PARTITION.

[I. L. R. 9 All. 429]

[I. L. R. 10 All. 5]

*See* PARTITION—JURISDICTION OF CIVIL COURT IN SUITS RESPECTING PARTITION.

[I. L. R. 9 All. 429]

[I. L. R. 10 All. 5]

NORTH-WESTERN PROVINCES RENT  
ACT (XII OF 1881)

—, s 7.

*See* LANDLORD AND TENANT—PROPERTY  
IN TREES PLANTED ON LAND.

[I. L. R. 9 All. 88]

—, s 9.

*See* EXECUTION OF DECREE—APPLICA-  
TION FOR EXECUTION AND POWER  
OF COURT.

[I. L. R. 10 All. 130]

*See* JURISDICTION OF CIVIL COURT—RENT  
AND REVENUE SUITS, N-W. P.

[I. L. R. 10 All. 615]

*See* LANDLORD AND TENANT—EJECT-  
MENT—GENERALLY.

[I. L. R. 10 All. 615]

*See* LANDLORD AND TENANT—PROPERTY  
IN TREES PLANTED ON LAND.

[I. L. R. 9 All. 88]

[I. L. R. 10 All. 159]

—, ss. 36 39, &amp; 40.

*See* LANDLORD AND TENANT—EJECT-  
MENT—NOTICE TO QUIT.

[I. L. R. 10 All. 13]

*See* MESNE PROFITS—MODE OF ASSESS-  
MENT AND CALCULATION OF MESNE  
PROFITS.

[I. L. R. 10 All. 13]

—, s. 84

*See* RES JUDICATA—COMPETENT COURT  
—REVENUE COURTS.

[I. L. R. 10 All. 347]

—, s. 93

*See* JURISDICTION OF CIVIL COURT—  
RENT AND REVENUE SUITS,  
N-W. P.

[I. L. R. 11 All. 224]

*See* RIGHT OF OCCUPANCY—TRANSFER  
OF RIGHT.

[I. L. R. 9 All. 244]

—, s. 95.

*See* JURISDICTION OF CIVIL COURT—  
RENT AND REVENUE SUITS,  
N-W. P.

[I. L. R. 10 All. 615]

*See* JURISDICTION OF REVENUE COURT—  
N-W. P. RENT AND REVENUE  
CASES.

[I. L. R. 9 All. 185]

*See* LANDLORD AND TENANT—EJECT-  
MENT—GENERALLY.

[I. L. R. 10 All. 615]

NORTH-WESTERN PROVINCES RENT  
ACT (XII OF 1881)—*concluded.*

—, s. 106.

*See* JURISDICTION OF CIVIL COURT—  
RENT AND REVENUE SUITS  
N-W. P.

[I. L. R. 11 All. 224]

—, s 118.

*See* JURISDICTION OF CIVIL COURT—RENT  
AND REVENUE SUITS, N-W. P.

[I. L. R. 9 All. 394]

[I. L. R. 11 All. 224]

*See* PARTIES—PARTIES TO SUITS—RENT  
SUITS AND INTERVENORS IN SUCH  
SUITS.

[I. L. R. 9 All. 394]

*See* RES JUDICATA—COMPETENT COURT  
—REVENUE COURTS

[I. L. R. 10 All. 347]

—, s 208.

*See* REMAND—GROUND FOR REMAND.

[I. L. R. 10 All. 31]

## NOTICE.

*See* ROAD CESS ACT (BENGAL ACT IX OF  
1880).

[I. L. R. 15 Calc. 237]

*See* TRANSFER OF PROPERTY ACT, s. 2.

[I. L. R. 9 All. 591]

## — of Assignment.

*See* MORTGAGE — REDEMPTION — RIGHT  
OF REDEMPTION

[I. L. R. 12 Mad. 505]

*See* REGISTRATION ACT, 1877, s. 50.

[I. L. R. 12 Bom. 569]

*See* TRANSFER OF PROPERTY ACT, s 131.

[I. L. R. 10 Mad. 289]

*See* CASES UNDER VENDOR AND PUR-  
CHASER—NOTICE.*See* VENDOR AND PURCHASER—PUR-  
CHASE OF MORTGAGED PROPERTY.

[I. L. R. 12 Mad. 505]

[I. L. R. 12 Bom. 33]

## — of Charge.

*See* COVENANT.

[I. L. R. 9 All. 591]

## — of dissent to winding up.

*See* COMPANY.—WINDING UP—GENERAL  
CASES.

[I. L. R. 12 Bom. 526]

## NOTICE—concluded.

## — of Possession.

See FOREIGN JUDGMENT.

[I. L. R. 11 Bom. 241]

See VENDOR AND PURCHASER—NOTICE.

[I. L. R. 16 Calc. 414]

## — of Proceedings.

See COMPANY—WINDING UP—GENERAL CASES.

[I. L. R. 11 Bom. 241]

See INSOLVENCY—INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE.

[I. L. R. 11 Mad. 136]

See REVIEW—PROCEDURE ON RE-HEARING OF CASE.

[I. L. R. 11 Bom. 591]

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 11 Mad. 144]

## — of Sale.

See MORTGAGE—POWER OF SALE.

[I. L. R. 11 Mad. 201]

## — of Suit.

See BENGAL ACT IX OF 1871, s. 27.

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[I. L. R. 12 Mad. 475]

## (1) UNDER CRIMINAL PROCEDURE CODE.

1.—*Criminal Procedure Code* 1882, ss. 133 and 137—*Magistrate's duty to take evidence under s. 137.* Under s. 137 of the Criminal Procedure Code, a Magistrate is bound to take evidence as a basis for the order he has to make. Where a Magistrate had, without taking any evidence, ordered a privy to be removed, and it appeared that in so doing he had acted solely on his own opinion that the privy was a nuisance. *Held*, that he acted illegally and *ultra vires*. IN THE MATTER OF THE PETITION OF MAHADAJI SADASHIV TILAK.

[I. L. R. 11 Bom. 375]

2.—*Criminal Procedure Code (Act X of 1882)*, ss. 133—137, *Course to be followed in the administration of—Obstruction to highway—claim of title—Bona fides of claim of title, Right of Magistrate to enquire into—Jurisdiction.* The mere assertion of a claim of title made without reasonable ground, or honest belief in it, or honest intention to support it, will not oust a Criminal Court of its jurisdiction under ss. 133—137 of the Criminal Procedure Code. In proceedings under s. 133 of the Criminal Procedure Code with reference to obstructions to public ways it is open to the Magistrate to enquire into the *bona fides* of the claim. and where he decides against its *bona fides* he must state reasons for his decision, which will be subject to revision by the High Court. Such a claim must be set up at or before the hearing and not afterwards. *In re Chunder Nath Sen*, I. L. R. 5 Calc. 875; 6 C. L. R. 379; *Chun Lall v. Ram Krishen Sahoo*, I. L. R. 15 Calc. 460; *Mutty Ram Sahoo v. Mohi Lall Roy*, 7 C. L. R. 433, I. L. R. 6 Calc. 291; and *R. v. Sandford*, 30 L. T. 601, referred to. LUCKHEE NARAIN BANERJEE v. RAM KUMAR MUKERJEE.

[I. L. R. 15 Calc. 564]

3.—*Criminal Procedure Code*, 1872, s. 518, 1882, s. 144—*Duration of Magistrate's order—Penal Code, s. 188.* In 1876 a Magistrate passed an order under s. 518 of Act X of 1872 (Criminal Procedure Code), directing the Saraogis of Etah to take one of their annual religious processions along a particular route and at a particular hour. In 1886 in which year there was no fresh promulgation of the order, the Saraogis took their procession along another route and at a different hour, and for so doing some of them were convicted and sentenced under s. 188 of the Penal Code;

## NUISANCE—continued.

## (1) UNDER CRIMINAL PROCEDURE CODE—continued.

*Held*, that the conviction was wrong, the order of 1876 having a temporary operation only. *Gopi Mohun Mullick v. Taramoni Chowdhram*, I. L. R. 5 Calc. 7, referred to. *QUEEN-EMPRESS v. SHEODIN*.

[I. L. R. 10 All. 115]

4.—*Criminal Procedure Code*, ss. 134, 144—*Penal Code*, s. 188—*Disobeying order of public servant—Trader at Hât—Order prohibiting holding of Hât*.] A District Magistrate, by an order made under s. 144 of the Criminal Procedure Code, after stating that it appeared that one "G & S" has recently established a hât, at S. in the vicinity of K, an old-established hât, and held it on the same days, and that in consequence of the establishment of the new hât, and the endeavours made to induce or force people to frequent the new hât instead of the old one, a serious breach of the peace or riots are imminent," ordered "that the said G & S and all other persons abstain from holding such hât" on those days. The order was duly made and promulgated, but not strictly in accordance with s. 134 of the Code, and the orders of Government made thereunder. Notwithstanding the order one P C A was found exposing goods for sale as a trader at the hât on one of the prohibited days, and he was thereupon charged with disobeying the order of the Magistrate, and convicted of an offence under s. 188 of the Penal Code: *Held*, that the conviction was bad, as P C A did not come within the description of the persons intended by the order to be prohibited from "holding" the hât, which referred to "holding" as owner or manager, not as a trader: *Held*, also, that the terms of s. 134 of the Code and the notification made by Government thereunder as to promulgation and issue of an order, are directory, but an omission to follow strictly such direction, though it is an irregularity, does not invalidate the order: where therefore it is shown that the order has been brought to the actual knowledge of the person sought to be affected by it, such omission does not prevent the case coming within s. 188 of the Penal Code. IN THE MATTER OF THE PETITION OF PARBUTTY CHARAN AICH. *PARBUTTY CHARAN AICH v. QUEEN EMPRESS*.

[I. L. R. 16 Calc 9]

5.—*Criminal Procedure Code*, 1882, s. 144—*Order to abstain from certain act*.] A Deputy Commissioner passed an order under s. 144 of the Criminal Procedure Code, prohibiting a person from collecting, or attempting to collect, any rent, either herself, or through any of her officers or servants, from the ryots of two specified pergunnahs, and also from effecting any sale or putting in hand any transaction with regard to standing trees or collected timbers in an estate, or effecting any *adda* or *kachars* in such pergunnahs for a period of two months. Upon an application to set aside such order. *held*, that the acts which the petitioner was directed to abstain from were not acts which come within the meaning of the

## NUISANCE—continued

## (1) UNDER CRIMINAL PROCEDURE CODE—concluded.

words "a certain act" as used in s. 144 of the Code of Criminal Procedure, and that the order should be set aside. *ABAYESWARI DEBI v. SIDHESWARI DEBI*.

[I. L. R. 16 Calc 80]

6.—*Procedure—Criminal Procedure Code*, 1882, s. 133—*Service of notice of orders under s. 133*.] The mode of service of notice of an order under s. 133, considered. *QUEEN-EMPRESS v. NARAYANA*.

[I. L. R. 12 Mad. 475]

## (2) PUBLIC NUISANCE UNDER PENAL CODE.

7.—*Penal Code*, ss. 268, 283, 290—*Obstruction on tidal navigable river*.] Persons placing a bamboo stockade across a tidal navigable river for the purpose of fishing, although leaving in such stockade a narrow opening for the passage of boats, which passage was, however, kept closed except on the actual passage of a boat, were charged at the instance of a subdivisional officer with causing an obstruction under s. 283 of the Penal Code: *Held* that, although it was doubtful whether s. 283 applied to the case, they had committed an offence under s. 268 of the Penal Code, and were punishable under s. 290 of that Code. IN THE MATTER OF THE PETITION OF UMESH CHUNDEA KAR.

[I. L. R. 14 Calc. 653]

8.—*Penal Code (Act XLV of 1860)*, ss. 268 and 290—*Annoyance to a particular religious sect—Private nuisance*.] The accused cut up, on his verandah, meat that was to be cooked for a dinner-party, exposing it to the sight of persons passing along the road, among whom were some Jains, whose temple was close by. The Jains complained to the Magistrate that the accused had made the air offensive, and caused annoyance. The Magistrate found that the meat was not in an offensive state, but convicted the accused of committing a public nuisance, under s. 268 of the Penal Code, on the ground that he had done an act by which several persons, being Jains, were much annoyed, it being a well-known fact that they had great repugnance to the killing of animals of every sort: *Held*, reversing the conviction and sentence, that in this case no real damage or injury was caused to the public or to the people in general dwelling in the vicinity, and that it was a case of private rather than of public nuisance, and therefore not one falling within the purview of the criminal law. The applicant's act was an annoyance merely by reason of its hurting the feelings of the Jains who have a repugnance to the killing of animals, and did not constitute an offence under s. 291 of the Penal Code. *Muttumara v. Queen-Empress*, I. L. R. 7 Mad. 590, referred to. *QUEEN-EMPRESS v. BYRAMJI EDALJI*.

[I. L. R. 12 Bom. 437]



## NUISANCE—concluded.

## (2) PUBLIC NUISANCE UNDER PENAL CODE—concluded.

9—*Penal Code, ss. 268, 290—Slaughter of kine by Mahomedans on their own property.* A person wilfully slaughtering cattle in a public street, so that the slaughter could be heard and seen by the passers-by, would commit an offence punishable under s. 290 of Penal Code. But where certain Mahomedans, for a religious purpose, killed two cows before sunrise in a private compound partly visible from a public road, and the killing of one of the cows only was witnessed by one Hindu, *held* that the circumstances proved did not amount to the commission of a public nuisance as defined in s. 268 of the Code. *Muttumira v. Queen-Empress*, I. L. R. 7 Mad 590, referred to. *QUEEN-EMPRESS v. ZAKIUDDIN*.

[I. L. R. 10 All. 44]

## OATH, POWER TO ADMINISTER.

See MUNSIF, JURISDICTION OF.

[I. L. R. 11 Mad. 375]

## OATHS ACT (X OF 1873)

1—s 6 and s. 13—*Witnesses—Omission to take evidence on oath or affirmation.* S. 6 of the Oaths Act (X of 1873) imperatively requires that no person shall testify as a witness except on oath or affirmation, and notwithstanding s. 13 of the same Act, the evidence of a child of eight or nine years of age is inadmissible if it has been advisedly recorded without any oath or affirmation. *Queen v. Sewa Bhogta*, 14 B. L. R. 294, dissented from. The nature of judicial oaths and affirmations and the history of Indian legislation on the subject discussed. *QUEEN-EMPRESS v. MARU*.

[I. L. R. 10 All 207]

2.—s. 6 and s. 13.—*Omission to take evidence on oath or affirmation—Evidence Act I of 1872, s. 118—Competency of persons of tender years.* The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or has affirmed. In determining the question of competency, the Court, under s. 118 of the Evidence Act, has not to enter into inquiries as to the witness's religious belief, or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain, in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established. Having regard to the language of the Oaths Act (X of 1873), a Court has no option, when once it has elected to take the statements of a person as evidence, but to administer to such

## OATHS ACT (X OF 1873)—continued.

person either an oath or affirmation as the case may require. *Queen-Empress v. Maru*, I. L. R. 10 All. 207, referred to. In a trial for murder before the Court of Session, one of the witnesses was a boy of twelve years of age, and, in answer to questions put by the Sessions Judge, he said that he worshipped Debi and understood the difference between truth and falsehood, that he did not know what would be the consequences here and hereafter of telling lies, but that he would tell the truth. The Sessions Judge proceeded to record the boy's statement, but without administering to him any oath or affirmation: *Held* that there was nothing in law to sanction this procedure on the part of the Judge. The High Court required the attendance of the boy and of the accused, and, having satisfied itself of the competency of the former to depose as a witness, examined him as to his account of what had occurred. *QUEEN-EMPRESS v. LAL SAHAI*.

[I. L. R. 11 All. 183]

—, ss. 8, 9, 10, 11.—*Applicability to criminal proceedings—“Party to a judicial proceeding” does not include complainant or accused* The provisions of ss. 8—11 of the Oaths Act (X of 1873) do not apply to criminal proceedings. The expression “party to a judicial proceeding” in s. 8 of the Act does not include either the complainant or the accused in a criminal case. In the course of a trial on a charge of assault the complainant's pleader agreed to be bound by the evidence on oath of a maternal witness, provided he swore on the *gita* (a sacred book of the Hindus). The witness took the required oath, and stated that there was no assault, but merely a taking hold of the hand. The Magistrate did not believe this witness, and proceeded with the trial. He convicted the accused on the other evidence in the case, and sentenced him to a fine of Rs. 25: *Held* that the Magistrate was not bound to decide the case on the evidence of the witness who swore the special oath. *QUEEN-EMPRESS v. MURARI GOKUL DAS*.

[I. L. R. 13 Bom. 389]

—, s. 9.—*Consent by guardian of a minor defendant to accept the oath of the plaintiff.* It was agreed by the defendants who were majors and by the father and guardian of a minor defendant on his behalf, that one of the issues in a suit should be determined under the Oaths Act, s. 9, by the oath of the plaintiff. The oath was taken and a decree was passed accordingly: *Held* that the minor defendant was bound by the consent of his guardian since there was no evidence of fraud or gross negligence on the part of the latter, although the Court had not sanctioned the agreement under s. 462, Civil Procedure Code. *CHENGALREDDI v. VENKATAREDDI*.

[I. L. R. 12 Mad. 483]

See ARUNA CHALLAM v. MURUGAPPA.

[I. L. R. 12 Mad. 503]

**OATHS ACT (X OF 1873)—concluded.**

—, s. 14

See EVIDENCE ACT, s. 132.

[I. L. R. 12 Bom. 440]

**OBSTRUCTION TO NAVIGATION.**

See NUISANCE—PUBLIC NUISANCE UNDER PENAL CODE.

[I. L. R. 14 Calc. 656]

See PENAL CODE, s. 283.

[I. L. R. 14 Calc. 656]

**OFFENCE RELATING TO DOCUMENTS.**

1.—*Penal Code, ss. 426, 477—Destruction of promissory note—Mischief—Jurisdiction of Sessions Court.* *P M* was convicted by a Magistrate under s. 426 of the Indian Penal Code on a charge of mischief by tearing up a promissory note for Rs. 20 : Held that the offence charged fell under s. 477 of the Penal Code, and was therefore triable by a Sessions Court only. IN RE MADURAI.

[I. L. R. 12 Mad. 54]

2.—*Penal Code, ss. 95, 472—Destruction of a valuable security—Unstamped document purporting to be a valuable security—Act causing slight harm* *A* having had certain transactions with *B*, wrote out a rough account showing his indebtedness to *B* and signed the total. The paper was not stamped. *B* afterwards presented it to *A* and demanded payment of the total amount. *A* paid part only, and after an altercation tore up the paper. Held that the act of tearing up the paper constituted the offence of destroying a valuable security, and the harm caused was such that a person of ordinary sense and temper would complain of it. QUEEN-EMPRESS v. RAMASAMI.

[I. L. R. 12 Mad. 148]

**OFFICER OF GOVERNMENT, SUIT TO SET ASIDE ORDER OF.**

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[I. L. R. 11 Bom. 429]

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[I. L. R. 11 Bom. 620]

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See ATTACHMENT—MODE OF ATTACHMENT AND IRREGULARITIES IN ATTACHMENT.

[I. L. R. 12 Mad 250]

*Civil Procedure Code, s. 2—Public officer.* *Seemle*—The Official Trustee is a public officer within the meaning of s. 2 of the Civil Procedure Code. ABDUL LATEEF v. DOUTRE.

[I. L. R. 12 Mad 250]

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[I. L. R. 9 All. 452]

## (1) BAILMENTS.

1.—*Negligence — Hiring — Accident — Evidence* Act 1 of 1872, s. 106—*Contract Act IX* of 1872, ss. 150, 151, 152.] The question of the burden of proof in cases of accidental injury to goods bailed depends upon the particular circumstances of each case. In some cases, from the nature of the accident, it lies upon the bailee to account for its occurrence, and thus to shew that it has not been caused by his negligence. In such cases it is for him to give a *prima facie* explanation in order to shift the burden of proof to the person who seeks to make him liable. If he gives an explanation which is uncontradicted by reasonable evidence of negligence, and is not *prima facie* improbable, the Court is bound in law to find in his favour, and the mere happening of the accident is not sufficient proof of negligence. Shired a horse from W, and while it was in his custody it died from rupture of the diaphragm, which was proved to have been caused by over-exertion on a full stomach. In a suit by W against S to recover the value of the horse, the defendant gave evidence to the effect that the horse became restive and plunged about, that he might then have touched it with his riding cane, that it shortly afterwards again became excited, bolted for two miles, and at last fell down and died. This evidence was not contradicted on any point, nor was any other evidence offered as to how the horse came to run away. There was evidence that the horse was a quiet one, that, for some time previously, it had done hardly any work, that it was fed immediately before it was let out for hire, and that rupture of the diaphragm was a likely result of the horse running away while its stomach was distended with food. The Court of First Instance held that the defendant was bound to prove that he had taken such care of the horse as a man of ordinary prudence would under similar circumstances have taken of his own property, that he must have used his whip freely, or done something else which caused the horse to bolt, and that in so doing he acted without reasonable care, and had thus caused the animal's death. The Court accordingly decreed the claim: *Held* by EDGE, C. J., that if the burden of proof was originally upon the defendant, it was shifted by the explanation which he gave and which was neither contradicted nor *prima facie* improbable; and that the decree of the lower Court, being unsupported by any proof, and based on speculation and assumption, was one which that Court had no jurisdiction to pass, and should consequently be set aside in revision under s. 622 of the Civil Procedure Code. *Per* BRODHURST, J., that as the decree was not only unsupported by proof, but

## ONUS PROBANDI—continued

## (1) BAILMENTS—concluded.

opposed to the evidence on the record, the lower Court had "acted in the exercise of its jurisdiction illegally," within the meaning of s. 622. SHIELDS v. WILKINSON.

[I. L. R. 9 All. 398]

## (2) CLAIMS TO ATTACHED PROPERTY.

2.—*Suit by a claimant to property under attachment.*] The defendant having attached certain property as belonging to his judgment-debtor B, the plaintiff applied for the removal of the attachment, alleging that she had purchased the property from B prior to the defendant's decree. Her application was rejected, and an order maintaining the attachment passed. The plaintiff thereupon brought the present suit to establish her right to the property in question. The Court of First Instance dismissed the suit. The plaintiff appealed to the District Judge, who reversed the lower Court's decree, holding that it was incumbent on the defendant to show that the alleged transaction of sale was fictitious. On second appeal by the defendant to the High Court: *Held*, that the District Judge was wrong in throwing the burden of proof on the defendant. The defendant had obtained an order maintaining his attachment, and it was incumbent on the plaintiff, who impugned that order by the present suit, to prove her case. For this purpose it was necessary for the plaintiff to prove the payment of the purchase-money, and that she had been in possession since the alleged sale. GOVIND ARMARAM v. SANTAI.

[I. L. R. 12 Bom. 270]

## (3) DOCUMENTS RELATING TO LOANS, EXECUTION OF AND CONSIDERATION FOR, AND CASES OF MONEY LENT.

3.—*Judge's duty to decide secundum allegata et probata.*] The plaintiffs sued upon two bonds executed by the defendant in their father's favour, one for Rs. 200, and the other for Rs. 99-15 annas. The defendant in his written statement, as well as in his deposition, admitted execution of the bonds in question, but pleaded non-receipt of consideration. The Subordinate Judge held that the bond for Rs. 200 was not proved, but awarded the claim upon the other bond. On appeal, one of the issues raised by the Assistant Judge was—*are the bonds in suit proved?* He held that the plaintiffs had failed to prove execution of the bonds, and dismissed the claim *in toto*: *Held*, reversing the decision of the lower Court, that the defendant having admitted execution of the bonds in question, the Assistant Judge acted illegally in the exercise of his jurisdiction in raising the question of the execution. The first rule of adjudication is that a Judge shall decide *secundum allegata et probata*. The only question that could be tried in the present case was non-receipt of consideration. GORAKH BABAJI v. VITHAL NARAYAN.

[I. L. R. 11 Bom. 435]

ONUS PROBANDI—*continued*.(3) DOCUMENTS RELATING TO LOANS, EXECUTION OF AND CONSIDERATION FOR, AND CASES OF MONEY LENT—*concluded*.

4.—*Suit on bond—Non-receipt of full consideration.*] In a suit for money due on a bond between the representatives of the original parties to it, the defendant attempted to reduce the claim on the ground that the money had not been received in full, the bond having been given partly in respect of an old debt, and partly in respect of a credit in account, upon which the debtor had not, in fact, drawn certain items. The Judicial Committee concurred with the High Court, which had reversed so much of the decree of the Court of First Instance as disallowed these items, the latter Court not having correctly adjusted the burden of proof, and having acted as if the plaintiff had relied on his own books to prove the debt, besides having erred in weighing the evidence. *RAJESWARI KUAR v. RAI BAL KRISHAN*.

[I. L. R. 9 All. 713]

[L. R. 14 I. A 142]

## (4) HINDU LAW.

## (a) ALIENATION.

5.—*Joint Hindu family—Mortgage by father—Suit to enforce the mortgage against son's shares—Legal necessity—Burden of proof.*] As a general rule, a creditor endeavouring to enforce his claim under a hypothecation-bond given by a Hindu father against the estate of a joint Hindu family in respect of money lent or advanced to the father having only a limited interest, should, if the question is raised, prove either that the money was obtained by the father for a legal necessity, or that he made such reasonable inquiries as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt, or for the other legal necessities of the family. There is a distinction between such cases as this and cases in which a decree has been obtained against the father and the property sold, or cases in which the sons come into Court to ask for relief against a sale effected by their father for an antecedent debt. Where a decree was obtained against the father, and a sale effected, the presumption is that the decree was properly made. Where a son comes into Court to ask for relief against a sale effected by his father for an antecedent debt, it is for the son to make out a case for the relief asked for. In a suit against the members of a joint Hindu family upon a bond given by their father, and in which family property was hypothecated, no evidence was given on either side as to the circumstances in which the bond was given. There was no evidence to show that any inquiry had been made by the plaintiff as to the objects for which the bond was executed by the father: *Held* that the burden of proof was upon the plaintiff to show either that the money was obtained for a legal necessity, or that he had made reasonable inquiries and obtained such information as would satisfy a prudent man that the

ONUS PROBANDI—*continued*.(4) HINDU LAW—*concluded*.(a) ALIENATION—*concluded*.

loan was contracted to pay off an antecedent debt or for the other legal necessities of the family, and that, no evidence having been given, the suit must be dismissed. *JAMNA v. NAIN SUKH*.

[I. L. R. 9 All 493]

## (5) LANDLORD AND TENANT.

6.—*Transferability of tenure—Resumption.*]

There is no presumption that any tenure held is not a transferable tenure, and a landlord who sues for *khush* possession on the ground that a tenure sold was not transferable must establish his case as an ordinary plaintiff. *DOYA CHAND SHAHA v. ANUND CHUNDER SEN MOZUMDAR*.

[I. L. R. 14 Calc. 382]

7.—*Transferability of tenures.*] In a suit brought to recover possession of certain lands forming part of the *putni* estate of the plaintiffs and constituting the ryoti holding of one *M*, which lands were sold in execution of a money-decree against *M* and purchased by the defendant, the defendant set up that the tenure held by *M* was of a permanent and transferable nature: *Held* that the onus of proving the transferability of this tenure was upon the defendant. *Doya Chand Shaha v. Anund Chunder Sen*, I. L. R. 14 Calc. 382, not followed. *KRIPAMOYI DABIA v. DURGA GOVIND SIKHAR*.

[I. L. R. 15 Calc. 89]

8.—*Sonthal Pergunnahs Settlement Regulation (III of 1873), ss. 24, 25—Suit to set aside order of Settlement Officer.*] In a suit instituted in January 1887 by a plaintiff to set aside a settlement made under Reg. III of 1872, and to recover *khush* possession of a mouzah, alleging that the defendant held the lands as *chakran*, and that the services for which he held them had ceased, the defendant pleaded that the tenure was *dur-mokurari*, that the lands had been settled as such in June 1877, and that the suit was consequently barred by the special limitation provided by s. 25 of the Regulation. It was contended that the onus of proving the tenure to be *dur-mokurari*, which had been thrown on the defendant, had been wrongly so thrown on him, as the suit was substantially one to set aside a decree. *Held* that the onus of proving the validity and propriety of the settlement-proceedings upon which he relied had been properly thrown on the defendant. *NADIAR CHAND SINGH v. CHUNDER SIKHUR SADHU*.

[I. L. R. 15 Calc. 765]

9.—*Right of occupancy—Permanent cultivator—Paracudu.*] The defendants' ancestors or predecessors in title were the cultivating tenants of the lands of a certain temple from a date not later than 1827, in which year they were so described in the *paisharsh* accounts. In 1830, they

## ONUS PROBANDI—continued.

## (5) LANDLORD AND TENANT—concluded.

executed a *muchalka* to the Collector who then managed the temple, whereby they agreed among other things to pay certain dues. They were described in the *muchalka* as *paracudis*. In 1857 the plaintiff's predecessors took over the management of the temple from, and executed a *muchalka* to, the Collector, whereby he agreed among other things not to eject the raiyats as long as they paid *kist*. In 1882, the dues (which were payable separately) having fallen into arrear, the manager of the temple sued to eject the defendants: *Held* that the burden of proving the permanent character of the tenure set up by the defendants lay on them. *Krishnasami v. Varadaraja*, I. L. R. 5 Mad. 345, discussed and distinguished. *THIAGARAJA v. GIYANA SAMBANDHA PANDARA SANNADHI*.

[I. L. R. 11 Mad. 77]

## (6) LIMITATION AND ADVERSE POSSESSION.

10.—*Suit for possession by member of family admittedly not joint—Partition.* The plaintiff sued for possession of certain property, alleging that it had belonged to a joint family, of which he had been a member, and had been allotted to him on partition. The partition was not proved, and the suit was dismissed on the ground of limitation. On second appeal it was contended that if the partition was held not to be proved the family must be held to be joint; and as the possession of one member could not be adverse to another, the decree dismissing the suit on the ground of limitation was erroneous. *Held* that as the family was admittedly not joint the plaintiff was bound to remove the bar of limitation by showing some sort of possession by himself within twelve years before his suit could be entertained, and as he had not done so his suit was properly dismissed. *TULSHI PERSHAD v. RAJA MISSEK*.

[I. L. R. 14 Calc. 610]

11.—*Limitation Act 1877, Art. 144* Under Art. 144 of the Limitation Act (XV of 1877) it is not for the plaintiff to prove that he has been in possession within twelve years before suit, but it is for the defendant to shew that he has held adversely to the plaintiff for twelve years. *NYAMTULA v. NANA VALAD FARIDSHA*.

[I. L. R. 13 Bom. 424]

12.—*Limitation Act 1877, Sch. II, Art. 112—Burden of proof—Date of dispossession or discontinuance of possession.* The claimants had shown that they formerly were proprietors of the land to which they alleged title, and from which they claimed to oust the defendants but they had been dispossessed, or their possession had been discontinued, some years before this suit was brought by them, and the land was occupied by the defendants who denied their title. That being

## ONUS PROBANDI—continued.

## (6) LIMITATION AND ADVERSE POSSESSION—concluded.

so the burden of proof was on the claimants to prove their possession at some time within the twelve years (prescribed by Art. 152 of Sch. II of Act XV of 1877) next preceding the suit. That the claimants certainly showed an anterior title was not enough without proof of their possession within twelve years, to shift the burden of proof on to the defence to show that the defendants were entitled to retain possession. *MOHIMA CHUNDER MOZUMDAR v. MOHESH CHUNDER NEOGI*.

[I. L. R. 16 Calc. 473]

[L. R. 16 I. A. 23]

13.—*Suit for redemption of usufructuary mortgage—Plaint, form of—Proof of Title—Act 1 of 1872 (Evidence Act), s. 118.* There is a clear distinction as to the onus of proof between cases where a plaintiff sues for possession of land by redemption of mortgage and cases where the defence to a suit for possession of land is twelve years' adverse possession by the defendant. In each case the plaintiff must plead his title; and if that title is in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence. Where the defence is twelve years' adverse possession, the defendant must plead and make out the title he alleges, and thus show that the title of the plaintiff, which otherwise had been proved or admitted, was lost. In a suit for possession of land by redemption of mortgage, the very nature of which presupposes that the possession of the defendant or his predecessor was lawful, the plaintiff must in his plaint show the title upon which he relies, and therefore a title subsisting at the date of suit. Unless he gives *prima facie* evidence to show that his suit is within time, he fails to prove his title or subsisting right to the property. *Philipps v. Philipps*, L. R. 4 Q. B. D. 127; *Dawkins v. Lord Penrhyn*, L. R. 4 Ap. Cas 51; *Radha Gobind Roy Sahib v. Inglis*, 7 O. L. R. 364; *Rao Karan Singh v. Bakur Ali Khan*, L. R. 9 I. A. 99; *Raja Kissen Dutt Panday v. Narendar Bahadur Singh*, L. R. 3 I. A. 85; *Ram Chandra Apaji v. Balaji Bhaurav*, I. L. R. 9 Bom. 137, and other cases referred to. *PARMANAND MISR v. SAHIB ALI*.

[I. L. R. 11 All. 438]

## ●(7) PARTITION.

14.—*Suit to stay Partition by Collector—Specific Relief Act (1 of 1877), s. 42—Declaration of specific rights.* A person bringing a suit under s. 42 of the Specific Relief Act to stay a partition directed by the Collector under Bengal Act VIII of 1876, on the ground that a private partition has already been come to, must prove not only that there has been a private partition, but also that, under that partition, he is entitled to, and was in possession of in severalty, some specific portion of the property again sought to be

ONUS PROBANDI—*continued*.(7) PARTITION—*concluded*.

partitioned by the Collector and such person is entitled to no declaration effecting the rights of other shares in the parent estate. *Khoobun v Wooma Churn Singh*, 3 C. L. R., 453, distinguished. *KALUP NATH SINGH v. LALA RAMDEIN LAL*.

[I. L. R. 16 Calc. 117

## (8) POSSESSION AND PROOF OF TITLE.

15.—*Person out of possession—Evidence of title.* Possession is evidence of title, and is primarily exclusive. It is for him who impugns this exclusive title to show that the possession arose in some way which has preserved his own right. In every case the person who has been out of possession for more than twelve years must make out some *prima facie* title, and some agreement or acknowledgment of that title, such that possession is deprived of its ordinary effect though being held on a joint right, or a subordinate right. *RAMCHANDRA NARAYAN v. NARAYAN MAHADEV*.

[I. L. R. 11 Bom. 216

See also *TATYA v. ANAJI*.

[I. L. R. 11 Bom. 220 note

and *VITHOBA v. NARAYAN*.

[I. L. R. 11 Bom. 221 note

## (9) PRE-EMPTION.

16.—*Purchase-money—Evidence of consideration* In suits for pre-emption, where the amount of the consideration for the sale is in dispute, the rule as to the burden of proof is that, in the first instance, the plaintiff who alleges the price stated in the deed of sale to be fictitious must give some *prima facie* evidence leading to the presumption that the price so stated was not the true price. Having done that, it then lies upon the vendor and vendee to give such an explanation by evidence as will go to rebut the presumption raised by the plaintiff's evidence. In the majority of cases the only *prima facie* evidence which the plaintiff-preemptor could produce would be either evidence showing that the vendor or the vendee had made an admission that the price was fictitious, or else evidence showing that the market-value of the property was so much less than the alleged price as would lead any reasonable man to come to the conclusion that the alleged price was not the real price. Where the price stated in the deed of sale was nearly five times the market-value of the property sold, and the purchaser gave no explanation showing why he was willing to buy the property at a price apparently so extravagant—*held* that there was sufficient evidence upon which to find that the price alleged in the contract was fictitious. *Bhagwan Singh v. Mahabir Singh* I. L. R. 5 All. 184, followed. *SHEOPARGASH DUBE v. DHANRAJ DUBE*.

[I. L. R. 9 All. 225

ONUS PROBANDI—*concluded*.

## (10) SALE FOR ARREARS OF REVENUE.

17.—*Revenue Sale Law—Act XI of 1859, s. 37* —*Purchaser of estate sold at auction, Rights of.* The onus of proving that under-tenures in a taluk sold at a revenue-sale under Act XI of 1859 fall under any of the exceptions to s. 37 of that Act is on the person alleging the under-tenures to be within such exceptions. *RASH BEHARI BOSU v. HARA MONI DEBYA*.

[I. L. R. 15 Calc. 555

## (11) SALE IN EXECUTION OF DECREE.

18.—*Suit for confirmation of sale—Suit to set aside order cancelling sale—Sale for inadequate price, allegation of—Material irregularity, proof of* In a suit for confirmation of a sale held in execution of a decree by the Collector under s 320, Civil Procedure Code, and to set aside an order by the Collector cancelling the sale, where it is pleaded in defence that the property was sold for an inadequate price, it lies on the defendant to show that there has been a material irregularity in publishing or conducting the sale. *BANDI BIBI v. KALKA*.

[I. L. R. 9 All. 602

## ORDER FOR ISSUE OF NOTICE UNDER s 494 OF CIVIL PROCEDURE CODE.

See APPEAL—ORDERS.

[I. L. R. 12 Mad. 186

See SUPERINTENDENCE OF HIGH COURT  
—CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 12 Mad. 186

## ORDER GRANTING LEAVE TO APPEAL TO PRIVY COUNCIL.

See REVIEW—ORDERS SUBJECT TO REVIEW.

[I. L. R. 16 Calc. 292 note

## ORDER OF SPECIAL JUDGE AS TO SETTLEMENT OF RENTS.

See SPECIAL OR SECOND APPEAL—  
ORDERS SUBJECT TO APPEAL.

[I. L. R. 16 Calc. 596

See SUPERINTENDENCE OF HIGH COURT—  
CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 16 Calc. 596

## ORDER REFUSING LEAVE TO APPEAL IN FORMA PAUPERIS.

See LETTERS PATENT, HIGH COURT,  
N.-W. P. CL. 10

[I. L. R. 11 All. 375

# **OUDH ESTATES ACT (I OF 1869).**

*See* HINDU LAW—PARTITION—RIGHT TO PARTITION—GENERALLY.

[1 L. R. 16 Calc. 397

1.—*Interest of registered talukdar—Trust—Joint estate.*] A talukdar estate, though entered in the name of one member of a joint family in the lists prepared in conformity with the Oudh Estates Act, I of 1869, may be subject to a trust, implied from the acts and declarations of the talukdar, for the joint family as a joint estate. *Hardeo Baksh v. Jawahar Singh*, 1 L. R. 3 Calc. 522. L. R. 4 I. A. 178. *PIRTHI LAL v. JOWAHIR SINGH*.

[1 L. R. 14 Calc 493

[L. R. 14 I. A. 37

2.—*Sanad, construction of—Grant of absolute beneficial interest*] *Held*, that a talukdar was entitled as proprietor to the lands included in his *sanad* where he had not been by agreement or otherwise clothed with any trust as regards the same. *HAIDAR ALI KHAN v. NAWAB ALI KHAN*.

[L. R. 16 I. A. 183

[1 L. R. 17 Calc. 311

—, ss. 8, 18 and 22

*See* HINDU LAW—WILL—CONSTRUCTION —SPECIAL CASES OF CONSTRUCTION.

[1 L. R. 15 Calc. 725

—, s. 13.

1.—*Registration in accordance with the rules of 1862, regulating the place and mode of it, in Oudh.*] An Oudh talukdar made a grant of a village, part of her talukdari, to her adopted daughter; the instrument requiring, in order to be valid under Act I of 1869, s. 13, to be registered within one month after execution. With a view to its registration, she, being a *purda-nashin*, sent for the neighbouring pargana registrar, who attended at her house for her convenience, took her acknowledgment of the document, recorded the registration, and filed a copy of the document in his office. *Held*, that this proceeding was a registration of the document, complete and effective,—having been substantially a registration at the pargana office. *MAJID HOSSEIN v. FAZI-UL-NISSA*.

[1 L. R. 16 Calc. 468

[L. R. 16 I. A. 19

2.—s. 13, Sub-section 1—*Meaning of “intestate” as there used—Written but unregistered authority to adopt—Registration Act (III of 1877), s. 17.*] The Oudh Estates' Act, 1869, requires the registration of the writing by which an authority to adopt is exercised; but not the registration of the authority, which is required by the Act to be in writing. The Indian Registration Act III of 1877, which does require

# **OUDH ESTATES ACT (I OF 1869)—*conold*.**

authorities to adopt to be registered, expressly excepts authorities conferred by will. The word ‘intestate,’ in s. 13, sub-section 1, of the Oudh Estates' Act, 1869, means intestate as to the talukdari estate; and the use of the word does not exclude from the exception in that sub-section a son adopted under an authority conferred by a talukdar's unregistered will. A talukdar by his will authorized his senior widow to select and adopt a minor male child of his family to be the owner of the entire *riyasat*. This power having been exercised, the following objections to the adoption were disallowed: 1st, one founded on the will not having been registered, and, consequently, the authority not having been registered. 2ndly, one founded on the erroneous argument that the adopted son was not within the class excepted in s. 13, sub-section 1, and therefore could not take under an unregistered will. *BHAIYA RABIDAT SINGH v. INDAR KUNWAR*.

[1 L. R. 16 Calc. 556

[L. R. 16 I. A. 53

# **OUDH LAND REVENUE ACT (XVII OF 1876), s. 158.**

*See* JURISDICTION OF REVENUE COURT—OUDE RENT AND REVENUE CASES.

[1 L. R. 15 Calc. 515

# **OUDH RENT ACT (XIX OF 1868), ss. 41 and 83, cl. 4.**

*See* JURISDICTION OF REVENUE COURT—OUDE RENT AND REVENUE CASES.

[1 L. R. 15 Calc. 515

# **OUDH SUB-SETTLEMENT ACT (XXVI OF 1866).**

*See* JURISDICTION OF REVENUE COURT—OUDE RENT AND REVENUE CASES.

[1 L. R. 15 Calc. 515

# **OWNERSHIP.**

*See* KHOTI TENURE.

[1 L. R. 11 Bom. 680

# **PARDA-NASHIN WOMEN**

*See* COMMISSION—CRIMINAL CASES.

[1 L. R. 15 Calc. 775

*See* REGISTRAR OF HIGH COURT, AUTHORITY OF

[1 L. R. 16 Calc. 330

*See* WILL—ATTESTATION.

[1 L. R. 16 Calc. 19

—*Mahomedan law—Sale of an undivided share—Burden of proving validity of sale by a gosha woman.*] Suit for partition and possession of an undivided share of property sold to plaintiff by



**PARDANASHIN WOMEN—concluded.**

an aged gosha lady of the class of Canarese Mahomedans called Navayats. The property sold was the vendor's share as heiress of her father, brother, and sister, who died in 1856, 1866 and 1871, respectively; but it appeared that the property of the family had been in the possession of one managing member since 1856. *Held* that the plaintiff having discharged the burden of proving that the conveyance to him was voluntarily executed, and that the transaction evidenced by it was real and *bonâ fide*, the conveyance was operative. **KHATTA v. ISMAIL.**

[I. L. R. 12 Mad. 380]

**PARDON.**

—*Criminal Procedure Code, ss. 337, 389—Accomplice—Tender of pardon, effect of—Subsequent trial of accomplice for connected offences* ] A prisoner charged before a Magistrate at Benares with offences punishable under ss. 471, 472, and 474 of the Penal Code, made a confession to the Magistrate in respect of those offences. He was then sent in custody to Calcutta, and was there, together with other persons, charged before a Magistrate with offences punishable under ss. 467, 473, and 475. The conduct to which these charges related was closely connected and mixed up with that to which the charges first-mentioned had reference. Under s. 337 of the Criminal Procedure Code, the Magistrate at Calcutta tendered a pardon to the prisoner upon the condition specified in that section, and the prisoner accepted the pardon, and gave evidence for the prosecution. The Magistrate held that this evidence was not sufficiently corroborated, and accordingly discharged all the accused, but the pardon was not withdrawn, and there was nothing to show that the Magistrate was dissatisfied with the prisoner's statements or considered that he had not complied with the conditions on which the pardon was tendered. Subsequently the prisoner was committed by the Magistrate of Benares for trial before the Court of Sessions upon the charges under ss. 471, 472 and 474 of the Penal Code. He pleaded not guilty, but did not in terms plead the pardon as a bar to the trial, though he made some reference to the subject; and the Sessions Judge having made a brief inquiry as to the proceedings at Calcutta, came to the conclusion that there was no sufficient proof of any conditional pardon, and convicted and sentenced the accused: *Held* that by the terms of the conditional pardon granted to the accused by the Calcutta Magistrate, the conditions of which were satisfied as was shown by its never having been withdrawn, the accused was protected from trial at Benares in respect of the offences under ss. 471, 472, and 474, and was not liable to be proceeded against in respect of them, and that the trial and conviction were therefore illegal. Although s. 337 of the Criminal Procedure Code does not in terms cover a case where a Magistrate holding a preliminary inquiry for committal against several persons, tenders a conditional pardon to one of them, examines him as a witness, and

W., D.

**PARDON—concluded.**

subsequently discharges all the accused for want of a *prima facie* case against them, the words "every person accepting a tender under this section shall be examined as a witness in the case" mean that for all purposes (subject to failure to satisfy the conditions, if the pardon as provided for by s. 339) such a person ceases to be liable for the offence or offences under inquiry or (with reference to s. 339) for "any other offence of which he appears to have been guilty in connection with the same matter" while making "a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences" directly under inquiry. The words last quoted refer to the importance, when a pardon is tendered, of encouraging the approver to give the fullest details, so that points may be found in his evidence which may be capable of corroboration. The question of how far the pardon protects him, and what portion of it should not protect him, ought not to be treated in a narrow spirit. **QUEEN-EMPRESS v. GANGA CHARAN.**

[I. L. R. 11 All. 79]

**PARSIS.**

1—*Infant marriage among Parsis—Consent of father or guardian—Suit to declare an infant marriage null and void—High Court—Parsi Matrimonial Court—Jurisdiction—Act XV of 1865—Letters Patent, s. 12—English law—Subsequent consent or repudiation—Adoption of Hindu practice by Parsis.* ] In 1868 the plaintiff and defendant, then of the ages of seven and six years respectively, went through the ceremony of marriage in the presence of their respective parents and according to the rites of their religion. The formal consent on behalf of the plaintiff was not given by his father, but by his uncle, with whom he was living and by whom he had been adopted. Nineteen years afterwards the plaintiff filed this suit praying for a declaration that the pretended marriage was null and void and did not create the *status* of husband and wife between the plaintiff and defendant. The defendant resisted the suit, and claimed to be the lawful wife of the plaintiff. The plaintiff and defendant never lived together as man and wife, nor was the marriage ever consummated: *Held* that under the circumstances the formal consent of the uncle and the tacit consent of the father were enough to satisfy the requirements of s. 8 of Act XV of 1865, which requires the previous consent of the father or guardian to the marriage: *Held*, further, that such a suit not being in the category of suits relegated to a special Court by Act XV of 1865, the jurisdiction to try it remained in the High Court, to which it had been given by s. 12 of the Letters Patent: *Held*, also, that the law to be applied was the English law (subject, however, to any well-established usage): that by the English law such a marriage would be an inchoate and imperfect marriage capable of repudiation by either party after arriving at years of discretion, but capable also of being made a valid and binding marriage by the consent of the

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**PARSIS—concluded.**

Parties thereto after they had arrived at such age. *Held*, further, that the circumstances of the case showed that there had been such acquiescence in, and acceptance of, the marriage by the plaintiff after arriving at years of discretion as to render the marriage valid and binding on him, and incapable of subsequent repudiation. Consummation is the best proof of consent to a marriage, but is not the only proof. And, *semble*, that although the practice of infant marriages is one which finds no variant in their own religious system—the Parsis in Western India have in the course of centuries so generally adopted such practice from their Hindu neighbours as to give such marriages amongst themselves all the validity they possess amongst Hindus, making them independent of any question of subsequent consent or non-consent by the parties thereto. **PER SHOTAM HORMUSJI DUSTOOR v MEHERBAI.**

**[I. L. R. 13 Bom. 302]**

**2—Parsi Succession Act XXI of 1865, s. 5**—“Widower,” meaning of word—A widower on second marriage is still a widower relatively to deceased wife.] In s. 5 of the Parsi Succession Act XXI of 1865 the word “widower” means a widower relatively to the deceased wife only, and without consideration of the fact or possibility of the widower remarrying. *D*, a Parsi, died intestate on the 19th September 1885, leaving a widow (the defendant), and two daughters, and the heirs of a predeceased daughter, *J*, him surviving. *J* had been the wife of the plaintiff, and had died thirty-four years before the date of this suit, leaving, as her heirs, her husband (the plaintiff) and one daughter, who was still living. After *J*’s death the plaintiff married again, and his second wife was living at the date of this suit. Letters of administration to *D*’s estate were granted to his widow, the defendant. The plaintiff claimed a share in *D*’s estate, contending that he was the widower of *J*, one of the daughters of the intestate, and entitled as such under s. 5 of the Parsi Intestate Succession Act XXI of 1865. *Held* that he was the widower of *J* within the meaning of the section, and, as such, was entitled to a share in *D*’s estate. **JEHANGIR DHANJIBHAI SURTI v. PEROZBAI.**

**[I. L. R. 11 Bom. 1]****PARTIES.**

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**See MINOR—REPRESENTATION OF MINOR IN SUITS.**

**[I. L. R. 13 Bom. 7]**

**See OATHS ACT, ss. 8, 9, 10, 11**

**[I. L. R. 13 Bom. 389]**

**See RIGHT OF SUIT—CHARITIES.**

**[I. L. R. 10 All. 18]****—Substitution of.**

**See PRIVY COUNCIL, PRACTICE OF.**

**[I. L. R. 16 Calc. 184]****(1) PARTIES TO SUITS.****(a) BENAMIDARS.**

**1.—Right of suit—Suit for declaration of title to, and for possession of, immoveable property—Disclaimer of real owner.]** In a suit for a declaration of the plaintiff’s right by purchase to, and for possession of, certain immoveable property, it was found on the evidence that the plaintiff was merely a *benamidar* for one of the defendants, and had no right to the property. That defendant in his evidence disclaimed any title to the property: *Held* that the plaintiff had no right to sue, being a mere *benamidar*, and neither the disclaimer of the real owner, nor the fact that he was a party to the suit, was sufficient to enable the plaintiff to maintain the suit when instituted, or to entitle him to have the real owner added as a co-plaintiff. *Prosunno Coomar Roy Chowdhry v. Gooroo Churn Sen*, 3 W. R. 159, followed. **HARI GOBIND ADHIKARI v. AKHOY KUMAR MOZUMDAR.**

**[I. L. R. 16 Calc. 364]****(b) EXECUTORS.**

**2.—Will—Hindu Wills Act (XXI of 1870)—Succession Act (X of 1865), s. 179—Probate and Administration Act (V of 1881), s. 4—Hindu will made outside Bombay relating to property situate partly within and partly outside Bombay—Probate of such will—Effect of—Representation of the estate.]** One *L* died at Surat in 1873, possessed of ancestral property situate partly in Bombay and partly in the Surat District. He left a widow, *B*, and a minor son, *M*. At his death he made a will bequeathing his property to his son and appointing certain executors to manage the

## PARTIES—continued

## (1) PARTIES TO SUITS—continued.

## (b) EXECUTORS—concluded

property during the son's minority. The son died in 1877, leaving a minor widow, *V*. In 1879 one of the executors obtained probate of *L*'s will from the High Court. In 1884 a suit was filed, on behalf of the minor *V*, against her mother-in-law, *B*, to recover possession of the property covered by the will of *L*. One of the defences to the suit was that the property in dispute had vested in the executor, who had obtained probate of the will, and that as the defendant held the estate under the executor, the suit was not maintainable without impleading the executor: *Held* that the executor was not a necessary party to the suit. S. 179 of the Indian Succession Act (X of 1865) as incorporated into the Hindu Wills Act (XXI of 1870) did not apply so far as it related to property outside Bombay. The property in dispute was situate in the Surat District. It was joint ancestral property. On the father's death it vested in the son by survivorship, and on the son's death it vested in the son's widow, the plaintiff in the present suit. Under the provisions, therefore, of the Probate and Administration Act (V of 1881), s. 4 (if that Act can be held to operate at all in the Mofussil before a notification is issued under s. 2,) the estate could not vest in the executor, as it had passed by survivorship to another person long before the Act came into operation. *BAI HARKOR v. MANEKLAL RASIKDAS*.

[I. L. R. 12 Bom. 621]

## (c) GOVERNMENT.

3.—*Secretary of State—Cause of action—Statute 21 and 22 Vic., c. 106, s. 65* [S. 65 of 21 and 22 Vic., c. 106, does not constitute the Secretary of State a body corporate, but simply lays down that that officer and department are to be sued as a body corporate. A suit, therefore, brought against the Secretary of State is not one against any person or any real body corporate, but is one brought against a nominal defendant, such nominal defendant being put upon the record merely to enable the plaintiff to obtain the remedy secured to him by s. 65. *DOYA NARAIN TEWARY v. SECRETARY OF STATE FOR INDIA*.

[I. L. R. 14 Cal. 256]

4.—*Bombay Abkari Act (V of 1878), ss. 29 and 67—Suit for money illegally levied by a farmer of abkari revenue—Collector.* The Collector is not a necessary party to a suit brought against a farmer of abkari revenue for a refund of money illegally levied at his instance by the Collector under s. 29 of the Bombay Abkari Act (V of 1878). S. 67 of the Act expressly exempts the Collector from responsibility. *NARAYAN VENKU v. SAKHARAM NAGU*.

[I. L. R. 11 Bom. 519]

5.—*Specific Relief Act (I of 1877), s. 42—Obstruction to alleged highway.* To a suit by an

## PARTIES—continued.

## (1) PARTIES TO SUITS—continued.

## (c) GOVERNMENT—concluded.

owner of land under s. 42 of the Specific Relief Act against one of the public who formally claims to use such lands as a public road, and who thereby has endangered the title of the owner, it is unnecessary to make the Secretary of State a party. *CHUNI LALL v. RAM KISHEN SAHU*

[I. L. R. 15 Cal. 460]

## (d) HUSBAND AND WIFE.

6.—*Practice—Wife having an English domicile suing without her husband.* Case in which it was held that a wife having an English domicile is capable of suing without joining her husband as a co-plaintiff. *HUGHES v. DELHI AND LONDON BANK*

[I. L. R. 15 Cal. 35]

## (e) JOINT FAMILY.

7.—*Manager of joint family—Suit by manager alone—Co-parceners whether necessary parties—Civil Procedure Code (Act XIV of 1882), s. 30—Amendment of pleadings—Plaint amended in second appeal by adding parties.* The plaintiff as manager of an undivided Hindu family sued to recover possession of certain lands from the defendant. The defendant contended that the plaintiff's minor brother and uncle, who were his undivided co-parceners, should be made parties to the suit. The Court of First Instance held that the plaintiff, as manager, could sue alone, and passed a decree for the plaintiff. The first Appellate Court reversed the decree, holding that the plaintiff could not sue alone, except under the provisions of s. 30 of the Civil Procedure Code, which had not been complied with. On second appeal to the High Court *held* that the defendant was entitled to have the plaintiff's uncle and minor brother placed on the record either as co-plaintiffs or as defendants. The right of a plaintiff to assume the character of manager, and to sue in that character, raises a question of fact and law which varies as the other members of the family are minors or adults, and, therefore, the defendant is always entitled in such suits, when the objection is taken at an early stage, to have the other members of the family, when they are known, placed on the record, to ensure him against the possibility of the plaintiff's acting without authority. The plaintiff was allowed on second appeal to amend his plaint by making the other members of the family parties to the suit. *HARI GOPAL v. GOKALDAS KUSHABASHET*.

[I. L. R. 12 Bom. 158]

## (f) LANDLORD AND TENANT.

8.—*Joint lease—Suit by one of joint lessors who has acquired interest of the other—Co-owners—Suit in ejectment by one co-owner—Parties—Oral agreement inconsistent with written contract—Evidence Act (I of 1872), s. 92.* *K* and *P* were co-owners of certain property in Bombay, and by a writing,

PARTIES—*continued*.(1) PARTIES TO SUITS—*continued*(f) LANDLORD AND TENANT—*concluded*.

dated January 1883, they granted a lease of the whole of the said property to the defendant for a term of three years, from the 1st March 1883 to the 28th February 1886, at a monthly rent of Rs. 705. Subsequently to the granting of the said lease, *viz.*, on the 1st September 1883, *P* conveyed her equal and undivided moiety of the said property to the plaintiff. On the 30th January 1886—*i.e.*, a month before the expiration of the lease—the plaintiff gave the defendant notice to determine the tenancy, and required him to quit on the 1st March then next. The defendant refused, and the plaintiff brought this suit for possession and for occupation rent from the 1st March 1886. The defendant pleaded that the plaintiff was not entitled to sue alone. *Held* that the suit was maintainable by the plaintiff alone. **EBRAHIM PIR MAHOMED v. CURSETJI SORABJI DE VITRE.**

[I. L. R. 11 Bom. 644]

## (g) MORTGAGES, SUITS CONCERNING.

9.—*Suit for redemption or recovery of property on payment of a charge—Possession after redemption by one of several mortgagors—Adverse possession—Limitation*]. The plaintiff sought to recover his father's share in two portions of family property, one of which had been mortgaged by the plaintiff's father and the father of the defendant No. 1 jointly; the other had been mortgaged by the plaintiff's father jointly with the father of defendant No. 1 and the husband of defendant No. 2. The first was redeemed by the father of defendant No. 1 alone in 1868; the second was redeemed by the defendant No. 1 more than twelve years before the suit. The parties were Mahomedans, and the plaintiff had a brother and three sisters, only one of whom (defendant No. 2) was a party to the suit. Defendant No. 1 contended that the suit was defective for want of parties, and that it was time-barred. The Subordinate Judge awarded the plaintiff's claim. The Assistant Judge, on appeal, held that the plaintiff's brothers and sisters were necessary parties, but that it was too late to join them, the suit with regard to them having become barred by limitation. He therefore dismissed the suit. On second appeal, *held* by the High Court that all persons interested in a property, which it is sought to redeem or recover on payment of a charge, are necessary parties, as otherwise the possessor may be exposed to many suits upon the same cause of action: *Held*, also, that the plaintiff's brother and sisters ought to have been joined as co-plaintiffs, the defendant No. 1's possession after redemption not being adverse to them. If it was adverse at all, it was adverse to the whole of the plaintiff's branch of the family, so as to bar the right of the group altogether. But that was no reason why the co-owners should not be admitted as co-plaintiffs, and the suit go on upon its merits. **BHAUDIN v. ISMAIL.**

[I. L. R. 11 Bom. 425]

PARTIES—*continued*.(1) PARTIES TO SUITS—*continued*.(g) MORTGAGES, SUITS CONCERNING—*continued*.

10.—*Right to sale—Death of sole mortgagor leaving several heirs—Sale of mortgagee's rights by one of such heirs—Suit by purchaser for sale of mortgaged property—Transfer of Property Act IV of 1882, s. 67.*] Upon the death of a sole mortgagee of *zeinindan* property, his estate was divided among his heirs, one of whom, a son, was entitled to fourteen out of thirty-two shares. The son executed a sale-deed whereby he conveyed the mortgagee's rights under the mortgage to another person. In a suit for sale brought against the mortgagor by the representative of the purchaser, it was found that the plaintiff acquired, under the deed of sale, only the rights in the mortgage of the son of the mortgagee, though the deed purported to be an assignment of the whole mortgage. *Held* by the Full Bench that the plaintiff was not entitled, in respect of his own share, to maintain the suit for sale against the whole property, the other parties interested not having been joined. **PARSOTAM SARAN v. MULU.**

[I. L. R. 9 All. 63]

11.—*First and second mortgages—Second mortgagee not made party to suit by first mortgagee for sale of mortgaged property—Transfer of Property Act (IV of 1882), s. 85—Notice*]. Certain immoveable property was mortgaged in 1865 to *H*, in 1871 to *G*, and in 1873 again to *H*. In 1883 the property was purchased by *M*, the representative of *G*, in execution of a decree obtained in 1877 by *G* in a suit for sale brought by him upon the mortgage of 1871. To this suit and decree the mortgagee under the deeds of 1865 and 1873 was not a party. In 1885, *M* sued the representatives of *H* for redemption of the mortgage of 1865. One of the defendants pleaded that as he was a puisne incumbrancer in the property in suit at the time of the plaintiff's suit against the mortgagors in 1877, he ought to have been made a party to that suit, and thus afforded "an opportunity of protecting his rights by payment of the mortgage-money." He did not in the Court below ask in express terms to be allowed to redeem the plaintiff's mortgage, but he did so in appeal to the High Court. *Held*, with reference to the terms of s. 85 of the Transfer of Property Act, that inasmuch as the defendant was in possession of the mortgaged property at the time of the suit of 1877, and his mortgage was a registered instrument, it must be presumed that the plaintiff had notice of its existence and should therefore have made him a party, and that, under the circumstances, he should be placed in the same position as he would have held if the decree of 1877 had never had been passed. **MUHAMMAD SAMI UDDIN v. MAN SINGH.**

[I. L. R. 9 All. 125]

11.—*Suit to determine rights of mortgagee—Representatives of mortgagors*]. Case in which the representatives of certain mortgagors were held

**PARTIES—continued.****(1) PARTIES TO SUITS—continued****(g) MORTGAGES, SUITS CONCERNING—concluded**

to be necessary parties to the suit (which was one to determine the rights of mortgagees (*inter se*) on the following grounds (a) that the rights of the mortgagees could not be determined without at the same time determining the liability of the mortgagors, (b) to avoid multiplicity of suits (c) to give them an opportunity of being present at the taking of any account that might be ordered as between the mortgagees; and (d) to entitle the plaintiff or defendant to obtain costs out of the proceeds of the sale of the mortgaged property *HUGHES v. DELHI AND LONDON BANK.*

[I. L. R. 15 Cal. 35]

13.—*Suit for redemption—Parties to such Suit—Equity of redemption, interest in of persons related to the mortgagor.*] The plaintiff sued the defendant to redeem certain *khoir* lands mortgaged by the plaintiff's father to the defendant's uncle. The defendant objected that the separated uncle and cousins of the plaintiff should be made co-plaintiffs in the suit. These relations of the plaintiff were not joint members of the plaintiff's family at the time of the mortgage, nor did they claim any interest in the equity of redemption: *Held* that the plaintiff's uncle and cousins were not necessary parties. In the absence of evidence to the contrary it must be presumed that the mortgage was made by the plaintiff's father in his individual capacity. If the defendant had shown that at the date of the mortgage the plaintiff's father and uncles were undivided, it might have been presumed that the mortgage was on their behalf as well as on his own. But this the defendant had failed to do. The mortgage did not purport to have been made by the plaintiff's father as manager of the family, nor did it appear that the plaintiff's uncle and cousins claimed any interest in the equity of redemption. The mere fact of their relationship gave them no interest in it *RAGHO VINAYAK v. DAUD*

[I. L. R. 13 Bom 51]

**(h) PARTNERSHIP, SUITS CONCERNING.**

14.—*Plaintiffs—Partnership debt—Suit by sole surviving partner—Representatives of deceased partner—Contract Act IX of 1872, s. 45—Civil Procedure Code, s. 26.*] The rule of English law that, in trading partnerships, although the right of a deceased partner devolves on his representative, the remedy survives to his co-partner, who alone must enforce the right by action, and is liable on recovery to account to the representative for the deceased's share, should be applied in India, in the absence of statutory authority to the contrary. The effect of s. 45 of the Contract Act (IX of 1872) is to extend the English law applicable to trading partnerships to all cases of partnership. There is nothing either in that section nor in s. 26 of the Civil Procedure Code, read with it, to show that the representatives of a

**PARTIES—continued****(1) PARTIES TO SUITS—continued.****(h) PARTNERSHIPS, SUITS CONCERNING—concl'd.**

deceased partner must be joined in an action for a partnership-debt brought by the surviving partner, though it may be that they might be joined in such an action. *GOBIND PRASAD v. CHANDAR SEKHAR.*

[I. L. R. 9 All. 486]

**(i) RENT SUITS, AND INTERVENORS IN SUCH SUITS.**

15.—*N.-W. P. Rent Act XII of 1881, s. 148—Landholder and tenant—Suit for rent where the right to receive it is disputed—Third person who has received rent made party—Jurisdiction of Rent Court to pass decree for rent against such party—Question of title.*] In a suit by a landholder for recovery of rent, the defendants pleaded that they had paid the rent to a co-sharer of the plaintiff. The co-sharer made a deposition in which he alleged that he was entitled to the rent not only as a co-sharer, but also as the appointed agent of the plaintiff. The Court thereupon made him a party to the suit under s. 148 of the Rent Act, and passed a joint-decree against him and the tenant for rent. *Held*, that the Court was justified in making him a party under s. 148 of the Rent Act, but was not competent to pass a decree for rent against him. A party who is brought in under s. 148 of the Rent Act cannot be made subject to the decree for rent so as to allow execution to be taken out against him, whether his *bonâ fide* receipt and enjoyment of the rent is proved or not. The only person against whom such a decree can be passed is the tenant *Madho Prasad v. Amba*, I. L. R. 5 All. 503, referred to. *Per* EDGE. C. J., *semble*, that the intention of the Legislature in allowing a third person who claims under s. 148 of the Rent Act to be made a party to the suit may possibly have been that, by bringing him in, he may be bound by a declaration in the suit that he had in fact received the rent, so as to prevent him in the civil suit from denying the fact that he had received it. In a suit by a landholder for recovery of rent in which a third person alleged to have received such rent is made a party under s. 148 of the N.-W. P. Rent Act (XII of 1881), the question of title to receive the rent cannot be determined between the plaintiff and such person, but can only be litigated and determined in a subsequent suit in the Civil Court. The only question between the plaintiff and the person so made a party which can be determined in the Rent Court under s. 148 is the actual receipt and enjoyment of the rent *GOBIND RAM v. NARAIN DASS.*

[I. L. R. 9 All. 394]

**(j) REVERSIONERS.**

16.—*Right of reversioner to sue for declaratory decree.*] A *pollam* was granted to a Hindu on service tenure, and the last male holder died in 1860, leaving him surviving a widow *K* and a

## PARTIES—continued.

## (7) PARTIES TO SUITS—concluded.

## (j) REVERSIONERS—concluded.

daughter *C*. In 1865 the Government discontinued the service, and in lieu thereof and of the reversionary interest of the Crown imposed a quit-rent, and an *inam potthi* was issued to *K* by the *inam* Commissioner by which her title to the estate was acknowledged by the Government, and the estate was confirmed to her as her absolute property subject to the quit-rent. In 1882 *C* and her minor son *A* sued *K* and others to whom *K* had alienated portions of the estate for a declaration that they were the reversionary heirs of *K*, and that the alienations made by *K* were good only during the lifetime of *K*. The District Judge held that there being no collusion between *C* and the defendants, *A* was not entitled to join in the suit: *Held*, that *A* was entitled to join *C* as co-plaintiff. *NARAYANA v. CHANGALAMMA*.

[I. L. R. 10 Mad. 1

## (k) TRUSTS, SUITS RELATING TO.

17.—*Suit as to trust for specific purpose—Surplus after performance of trust.* Where a trust had been created for specific purposes, viz., the performance of religious and other duties, and the trustee had duly appointed another trustee in his place, the latter being entitled to hold the trust estate. *Held*, that in a suit in which all the parties interested were not before the Court, there could be no decision as to the extent of the trusts nor as to whether any surplus profits of the trust estate would, or would not, after the performance of the trusts, belong to the trustee personally. *BISHEN CHAND BASAWAT v. NADIR HOSSEIN*.

[I. L. R. 15 Calc. 329

[L. R. 15 I. A. 1

## (2) SUITS BY SOME OF A CLASS AS REPRESENTATIVES OF CLASS.

18.—*Civil Procedure Code, s. 30—Malabar Law—Joinder of parties—Suit for cancellation of deeds—Declaratory suit—Withdrawal of part of claim.* *A* and *B*, junior members of a Malabar *tarwad*, sued to cancel certain mortgages executed by their *karnavan* and senior *anandravan*, on the ground that the secured debt was not binding on the *tarwad*, and to appoint *A* to the office of *karnavan*. The last part of the prayer was withdrawn. The mortgages were executed to secure a decree-debt, the decree having been passed *ex-parte* against the late *karnavan* of the *tarwad*. No fraud was alleged, but the lower Courts found that the *karnavan* had been guilty of fraud in allowing the decree to be passed *ex-parte*. The plaintiffs had not been parties to the decree, and the other junior members of the *tarwad* who had been joined, were exempted from liability: *Held per cur.*—All the members of the plaintiffs' *tarwad* should have been joined actually or constructively under s. 30 of the Civil Procedure Code. *MOIDIN KUTTI v. KRISHNAN*.

[I. L. R. 10 Mad. 322

## PARTIES—continued.

## (2) SUITS BY SOME OF A CLASS AS REPRESENTATIVES OF CLASS—concluded

19.—*Civil Procedure Code, s. 30—Irregularity in civil case.* The plaintiffs were fishermen belonging to the village of *A*. They claimed in this suit for themselves and the other fishermen of their village, the exclusive right of fishing in the Nagothna Creek, between high and low water mark, within certain limits set forth in the plaint, and under s. 9 of the Specific Relief Act they sought to recover possession of that right from the defendants, who, they contended, had dispossessed them within six months before suit. It was contended by the defendants that the plaintiffs, who claimed on behalf of other fishermen of the village, should have proceeded under s. 30 of the Civil Procedure Code (Act XIV of 1882). *Held*, that the objection was a good one; but, inasmuch as it was still open to the defendants to establish their right by a regular suit, the irregularity in the present suit was not such as to call for the exercise of the powers of the High Court under s. 622 of the Civil Procedure Code. *BHUNDAL PANDA v. PANDOL POS PATIL*.

[I. L. R. 12 Bom. 221

## (3) ADDING PARTIES TO SUITS.

## (a) PLAINTIFFS.

20.—*Civil Procedure Code, ss. 27 and 32—Limitation—Institution of suits—Change of parties.* The change of parties as plaintiffs, in conformity with the provisions of s. 27 of the Code, does not give rise to such a question of limitation as arises upon the addition of a new person as a defendant under s. 32. *SUBODINI DEBI v. GANODA KANT ROY*.

[I. L. R. 14 Calc. 400

21.—*Civil Procedure Code, 1882, s. 30—Joinder of parties—Suit for cancellation of deeds—Declaratory suit—Withdrawal of part of claim.* *A* and *B*, junior members of a Malabar *tarwad*, sued to cancel certain mortgages executed by their *karnavan* and senior *anandravan*, on the ground that the secured debt was not binding on the *tarwad*, and to appoint *A* to the office of *karnavan*. The last part of the prayer was withdrawn. The mortgages were executed to secure a decree-debt, the decree having been passed *ex-parte* against the late *karnavan* of the *tarwad*. No fraud was alleged, but the lower Courts found that the *karnavan* had been guilty of fraud in allowing the decree to be passed *ex-parte*. The plaintiffs had not been parties to the decree, and the other junior members of the *tarwad*, who had been joined, were exempted from liability: *Held per cur.*—All the members of the plaintiffs' *tarwad* should have been joined actually or constructively under s. 30 of the Civil Procedure Code. *MOIDIN KUTTI v. KRISHNAN*.

[I. L. R. 10 Mad. 322

## PARTIES—continued.

## (3) ADDING PARTIES TO SUITS—continued.

## (b) DEFENDANTS

22.—*Limitation—Suit for partnership account—Joint contract—Necessary parties, Omission of—Addition of new defendant—Time of joinder, how material.* A suit was brought for partnership accounts. Upon the objection of the defendant it was found that a necessary party defendant had been omitted, and such party was afterwards added as a defendant at a time when the suit as against him was barred. *Held*, that the whole suit was rightly dismissed. *RAMDOYAL v. JUNMENJOY COONDOL*.

[I. L. J. 14 Calc. 791]

23.—*Suit originally against owners—Amendment of plaint—Ship added as party defendant* In a suit for collision originally filed against the owners of a ship. *Held*, that the plaintiffs might amend the plaint by adding the ship as a party defendant. *BOMBAY AND PERSIA STEAM NAVIGATION COMPANY v. SHEPHERD*.

[I. L. R. 12 Bom. 237]

## (c) APPELLANTS.

24.—*Appeal by widow of judgment-debtor—Alleged adopted son* A judgment-debtor died. His widow was thereupon placed on the record as his legal representative. In the execution-proceedings which followed, the widow made an appeal to the High Court against a certain order passed by the Court executing the decree. To this appeal, a person alleging himself to be the adopted son of the deceased judgment-debtor applied to be made a party. The widow opposed the application denying the fact of the adoption. *Held* that whether the applicant was or was not the adopted son of the deceased judgment-debtor, there was no objection to entering his name on the record if the decree holder consented, as it tended to his security that this should be done. The applicant was accordingly made a co-appellant with the widow. *LAKSHMIBAI v. SANTAPA REVAPA SHINTRE*.

[I. L. R. 13 Bom. 22]

## (d) RESPONDENTS.

25.—*Practice—Parties to cross-appeals.* Suit by the adoptive son of the obligee (deceased) of a hypothecation-bond to recover principal and interest due on the bond against the land comprised in the hypothecation. Defendant No. 1, the obligor of the bond, had executed it as manager of a joint Hindu family, of which defendant No. 2 was a member, and for the rightful purposes of the family. The family subsequently became divided, and the hypothecated property was divided between defendants Nos 1 and 2. Defendant No. 1 afterwards hypothecated part of his share for a private debt to defendant No. 3, who having sued on his hypothecation and brought the land to sale in execution became the purchaser. The District Munsif passed a decree for the

## PARTIES—continued.

## (3) ADDING PARTIES TO SUITS—concluded.

## (d) RESPONDENTS—concluded.

plaintiff, against which defendants Nos. 2 and 3 preferred separate appeals, the plaintiff being the sole respondent to each appeal. The District Judge on appeal passed a decree directing that the plaintiff should first proceed against all the property which was not subject to the hypothecation to defendant No. 3, including the share of defendant No. 2. Defendant No. 2 preferred a second appeal joining all the other parties. *Held* that though both defendants Nos 2 and 3 preferred separate appeals from the original decree, they only made the plaintiff respondent, and defendant No. 3 omitted to make the appellant (defendant No. 2) a party to his appeal, but the relief prayed for in each appeal was that the original decree might be set aside so far as it was in plaintiff's favor and against each appellant. . . . Having regard to the relief claimed, there was no reason to hold that the appellant (defendant No. 2) was a necessary party to the appeal preferred by defendant No. 3. *GOPALA v. SAMINATHAYYAN*.

[I. L. R. 12 Mad. 255]

## (4) SUBSTITUTION OF PARTIES.

## (a) PLAINTIFFS.

26.—*Making defendants plaintiffs after suit by them would be barred—Limitation—Civil Procedure Code, 1882, s. 32—Suit to set aside sale.* A *mitta* held by tenants in common was sold for arrears of revenue at a time when the owners of a moiety thereof were minors. In a suit brought by the mother of these minors on their behalf against the Collectors to set aside the sale, the plaintiffs impleaded also the other previous owners, of whom one was the purchaser at the sale. Two others, in their written statement, pleaded that the purchase had been made in fraud of their rights, and claimed to be still entitled to their shares in the *mitta* on the ground that the purchaser must be held to have purchased for their benefit (Indian Trusts Act, 1882, s. 90). They further claimed that should the sale be set aside so far as the plaintiff's interests were concerned, the sale of their interests also should be held to be null and void. Before the suit came on for hearing the District Judge *suo motu* ordered that these two defendants should be made plaintiffs in the suit under s. 32 of the Code of Civil Procedure. At the date when this order was made, the claim of these defendants, had they sued to set aside the sale in their own interest, was barred by limitation. *Held* that the order was illegal. *KRISHNA v. MEKAMPERUMA. KRISHNA v. COLLECTOR OF SALEM*.

[I. L. R. 10 Mad. 44]

27.—*Death of plaintiff after judgment.* When a person desires to be added as representative upon the death of a plaintiff after judgment, he must satisfy the Court that he is the proper person to be so added. *MUHAMMAD HUSAIN v. KHUSHALO*.

[I. L. R. 9 All. 131]



## PARTIES—continued.

## (4) SUBSTITUTION OF PARTIES—continued.

## (b) JUDGMENT-DEBTORS.

28.—*Civil Procedure Code, ss. 372, 647—Assignment after decree in Court of First Instance—Assignee made party after appellate decree for purposes of execution.*] S. 372 of the Civil Procedure Code cannot be applied to the assignment, creation, or devolution of an interest subsequent to the decree in a suit. The section has no application to proceedings in execution of decree; and a Court has no jurisdiction, reading s. 372 with s. 647, to bring in a party after decree and make him a judgment-debtor for the purposes of execution. *Gocool Chunder Gossamee v. Administrator-General of Bengal*, I. L. R. 5 Calc. 726, and *Attorney-General v. Corporation of Birmingham*, L. R. 15 Ch. D. 423, referred to. Where a Court had so acted, by an order which might have been, but was not, made the subject of appeal under s. 588 of the Code,—*held* that as there was no jurisdiction to make such an order, the party aggrieved was competent to object thereto on appeal from a subsequent order enforcing execution against him as a judgment-debtor. *GOODALL v. MUSSOORIE BANK*.

[I. L. R. 10 All. 97]

29.—*Civil Procedure Code, ss. 234, 332, 588—Death of judgment debtor between order for possession in execution of decree and delivery of possession—Appeal against appellate order reversing an order under s. 332.*] A decree-holder in a District Munsif's Court obtained an order for possession of land in execution of his decree on 20th August, on which day the judgment debtor died. Possession was delivered on 28th August. The persons possessed presented a petition under s. 332 of the Code of Civil Procedure disputing his right to be put into possession, on the ground, *inter alia*, that the judgment-debtor was not represented on the record. On appeal against the appellate order of the District Judge *held*, assuming that the order for possession was made prior to the death of the judgment-debtor, there was no necessity for the decree-holder to bring any other person on to the record between the date of that order and the date on which the order was executed. *Ramasami v. Bagirathi*, I. L. R. 6 Mad. 180, distinguished. *BIYYAKKA v. FAKIRA*.

[I. L. R. 12 Mad. 211]

## (c) RESPONDENTS.

30.—*Death of plaintiff-respondent during pendency of appeal—Application by defendant-appellant for substitution of deceased's legal representative—Application by third person claiming to be such representative and to be substituted as respondent—Civil Procedure Code, ss. 32, 365, 367, 368.*] During the pendency of an appeal, the plaintiff-respondent died, and, on the application of the appellant, the name of *H* was entered on the record as respondent in place of the deceased. Subsequently *K* applied to be substituted as respondent, alleging that he and

## PARTIES—continued.

## (4) SUBSTITUTION OF PARTIES—continued.

## (c) RESPONDENTS—continued.

not *H* was the legal representative of the plaintiff. The Court passed an order making *K* a joint respondent with *H*. To this *H* objected, but he did not appeal from the order. Ultimately the Court dismissed the appeal, and passed a decree that the money claimed in the suit was payable to the two respondents: *Held* that s. 32 of the Civil Procedure Code did not apply to the case so as to authorize the Court below to add *K* as a respondent; that the only other section under, which he might possibly have been brought in was s. 365; that even assuming s. 365 to apply to such a case, the Court had no power to make *K* a respondent jointly with *H*, but should have taken one or the other of the courses specified in s. 367, so as to determine who was the legal representative of the deceased plaintiff; and that the course adopted by the Court was an exceedingly inconvenient one, which ought not to have been taken, even if the Court had power under the Code to take it. The "questions involved in the suit" referred to in the second paragraph of s. 32 of the Civil Procedure Code, are questions between the plaintiff and the defendant, and not questions which may arise between co-defendants or co-plaintiffs *inter se*. The section does not apply to questions which are not involved in the suit, but crop up incidentally during the pendency of an appeal, such as the question whether one person or another is the legal representative of a deceased plaintiff-respondent. *HAR NARAIN SINGH v. KHARAG SINGH*.

[I. L. R. 9 All. 447]

31.—*Civil Procedure Code, ss. 365, 366, 367, 368, 582, 587—Death of plaintiff-respondent pending appeal—Substitution of alleged legal representative on her own application—Application by defendants-appellants to substitute another person as true legal representative—Power of Court to determine which of such persons is the true legal representative.*] In a suit for declaration of title to, and for possession of a share in alleged ancestral property with mesne profits, the plaintiff obtained a decree in the lower Appellate Court from which the defendants appealed to the High Court. Pending the appeal, the plaintiff died childless, and, on her application, his widow was substituted for him as respondent. Subsequently the defendants-appellants applied to the High Court to have the deceased's father brought upon the record as respondent, alleging that he, and not the widow, was the deceased's legal representative and solely entitled to be placed on the record as such. The father made no objection to the proposed substitution. It was common ground that either the father alone or the widow alone was the deceased plaintiff-respondent's true legal representative: *Held* by the Full Bench (MAHMOOD, J., dissenting) that, having regard to the words "as nearly as may

**PARTIES—continued.****(4) SUBSTITUTION OF PARTIES—continued.****(c) RESPONDENTS—continued.**

be" and "as far as may be" in s. 582 of the Civil Procedure Code, ss. 365, 366, and 367 might be applied, at all events analogically, to the case, so as to enable the real legal representative of the deceased plaintiff-respondent to be ascertained and brought upon the record; that the latter portion of s. 582 did not limit the earlier words of the section so as to make s. 368 the only provision applicable to the case; that a Court of record must have an inherent power to ascertain whether or not it has before it the proper parties to an appeal if the question be substantially raised; and that, therefore, the Court could and should, either before or at the hearing of the appeal, ascertain and determine for the purposes of the prosecution of the appeal the preliminary question whether the father or the widow was the legal representative of the deceased, and should act accordingly: *Held* also by the Full Bench (MAHMOOD, J., dissenting) that s. 32 of the Code did not apply to the case, and that if it did apply, it would be the duty of the Court to decide whether the father or the widow was the legal representative of the deceased plaintiff-respondent: *Held* by MAHMOOD, J., *contra*, that the effect of s. 582 read with s. 587 was to place the defendants-appellants in the position of plaintiffs and the deceased respondent in that of a defendant for the purposes of array of parties; that consequently the provisions of ss. 363, 364, 365, 366, and 367 had no application; that, applying s. 368, the Court was bound to implead the person named by the defendants-appellants as a respondent to the appeal; that applying s. 32, the widow occupied a position which gave her a sufficient *prima facie* status to be impleaded as respondent; and that as there existed no authority in the Code allowing the Court to hold an enquiry whether the father or the widow was the true legal representative of the deceased plaintiff-respondent, the Court should bring both upon the record as respondents and proceed to decide the appeal after hearing both. *Narain Dass v. Lajja Ram*, I. L. R. 7 All. 693; *Har Narain Singh v. Kharag Singh*, I. L. R. 9 All. 447; *Lukshmibar v. Bal-Krishna*, I. L. R. 4 Bom. 654; *Baymonee Dabee v. Chunder Kanto Sandel*, I. L. R. 8 Cal. 440; *Narain Kuar v. Durjan Kuar*, I. L. R. 2 All. 738; and *Athapa v. Ayanna*, I. L. R. 8 Mad. 300, referred to. MUHAMMAD HUSAIN v. KHUSHALO

[I. L. R. 10 All. 223]

32.—*Civil Procedure Code*, ss. 368, 582—*Appeal—Abatement—Death of plaintiff-respondent—Application by defendants-appellants for substitution—Application presented after the 1st July 1888—Limitation—Civil Procedure Code Amendment Act (VII of 1888)*, ss. 53, 66—*Act XV of 1877 (Limitation Act)*, *sch. ii*, *Act 175C*.] The plaintiff-respondent in an appeal pending before the High Court died on the 17th September 1885.

**PARTIES—concluded.****(4) SUBSTITUTION OF PARTIES—concluded.****(c) RESPONDENTS—concluded.**

Subsequently *D* applied to the High Court to be brought on the record as legal representative of the deceased; on the 15th April 1886, he was referred to a regular suit to establish his title as such representative, and on the 25th February 1887, such suit was dismissed. On the 8th February 1886, the defendants-appellants applied to the High Court for judgment; but the application was dismissed under the decision of the Full Bench in *Chajmal Dass v. Jagdamba Prasad*, I. L. R. 10 All. 260. On 24th July 1888, they applied to the High Court to bring certain persons upon the record as the legal representatives of the deceased plaintiff-respondent. *Held* that the application having been made subsequent to the 1st July 1888, when the Civil Procedure Code Amendment Act (VII of 1883) came into force, and being an entirely fresh application not in continuation of any former proceedings between the same parties, must be dealt with under that Act and not under the Civil Procedure Code as it stood before the amendment; and that as it was made more than six months after the death of the deceased plaintiff-respondent, the appeal abated, with reference to s. 368 of the Code and art. 175C of the Limitation Act (XV of 1877). *Held* also that the petitioners had not shown "sufficient cause" within the meaning of s. 368 of the Code for not making the application within the prescribed period. *Ram Jiwan Mal v. Chand Mal*, I. L. R. 10 All. 587, referred to. CHAJMAL DAS v. JAGDAMBA PRASAD.

[I. L. R. 11 All. 408]

**PARTITION.**

Col.

1. Form of partition ..	755
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(a) Partition of portion of property ..	755
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See COLLECTOR.

[I. L. R. 12 Bom. 371]

See HINDU LAW—PARTITION.

See CASES UNDER JURISDICTION OF CIVIL COURT—REVENUE COURTS—PARTITION.

See KHOJA MAHOMEDANS.

[I. L. R. 12 Bom. 280]

[I. L. R. 13 Bom. 534]

See RES JUDICATA—COMPETENT COURT—REVENUE COURTS.

[I. L. R. 9 All. 388]

## PARTITION—continued.

—, Instrument of.

See STAMP ACT, 1879, s. 3, cl. 11.

[I. L. R. 12 Mad. 198]

## (1) FORM OF PARTITION.

1.—*Declaration of title to continue to enjoy separate possession of land—Suit for Partition* ] The plaintiffs having obtained a declaration of title to continue to enjoy separate possession of certain lands sued the former defendants again for partition of the same lands: *Held*, that the suit was unnecessary and should be dismissed. *ANDI v. THATHA*.

[I. L. R. 10 Mad. 347]

## (2) RIGHT TO PARTITION.

## (a) PARTITION OF PORTION OF PROPERTY

2.—*Partition of a portion of joint family property—Suit for partition of a portion of joint property* ] A suit will not lie for partition of a portion only of joint family property. *JOGENDRO NATH MUKERJI v. JUGOBUNDU MUKERJI*.

[I. L. R. 14 Calc. 122]

3.—*Partial partition—Jurisdiction of High Court, Original Side—Properties situate partly within and partly without jurisdiction* ] On the Original Side of the High Court a suit for partition of joint estate, part of the property of which estate is situate within and part without the jurisdiction (there having been no leave granted under s. 12 of the Charter to sue concerning the portion outside the jurisdiction), is not liable to be dismissed on the ground that partial partition of a property cannot be granted, but may be decreed as far as the property within the jurisdiction is concerned. The ruling of *JACKSON, J.*, in *Rattan Monee Dutt v. Brojo Mohun Dutt*, 22 W. R. 333, explained. *PUNCHANUN MULLICK v. SHIB CHUNDER MULLICK*.

[I. L. R. 14 Calc 835]

## (3) JURISDICTION OF CIVIL COURT IN SUITS RESPECTING PARTITION

4.—*Partition of Mehal—Application by co-sharer for partition—Notice by Collector to other co-sharers to state objections upon a specified day—Objection raised after day specified by original applicant—Question of title—Distribution of land* *Jurisdiction—Civil and Revenue Courts—Act XIX of 1873, ss. 111, 112, 113, 131, 132, 241 (f)—Civil Procedure Code, s. 11.* ] Reading together ss. 111, 112, and 113 of the N.-W. P. Land Revenue Act (XIX of 1873), as they must be read, the objection contemplated in each of them is an objection to be made by the person upon whom the notice required by s. 111 is to be served, i.e., a person who is a co-sharer in possession, and who has not joined in the application for partition. So far as ss. 111, 112, 113, 114, and 115 are concerned, a Civil Court is the Court which has jurisdiction to adjudicate upon questions of title or

## PARTITION—continued

## (3) JURISDICTION OF CIVIL COURT IN SUITS RESPECTING PARTITION—continued.

proprietary right, either in an original suit in cases in which the Assistant Collector or Collector does not proceed to inquire into the merits of an objection raising such a question under s. 113, or on appeal in those cases in which the Assistant Collector or Collector does decide upon such questions raised by an objection made under s. 112. The remaining sections relating to partition do not provide for or bar the jurisdiction of the Civil Court to adjudicate upon questions of title which may arise in partition-proceedings or on the partition after the time specified in the notice published under s. 114. S. 132 is not to be read as making the Commissioner the Court of Appeal from the Assistant Collector or the Collector upon such questions, nor does s. 241 (f) bar the jurisdiction of the Civil Court to adjudicate upon them. Where, therefore, after the day specified in the notice published by the Assistant Collector under s. 111, and after an Amin had made an apportionment of lands among the co-sharers of the *mehal*, the original applicants for partition raised for the first time an objection involving a question of title or proprietary right, and this objection was disallowed by the Assistant Collector and the partition made, and confirmed by the Collector under s. 131. *Held* that the objection was not one within the meaning of s. 113, that the remedy of the objectors was not an appeal from the Collector's decision under s. 132, and that a suit by them in the Civil Court to establish their title to the land allotted to other co-sharers was not barred by s. 241 (f), and, with reference to s. 11 of the Civil Procedure Code, was maintainable. *Habibullah v. Kungi Mal*, I L. R. 7 All. 447, distinguished. *Sudar v. Khuman Singh*, I. L. R. 1 All. 613, referred to. *MUHAMMAD ABDUL KARIM v. MUHAMMAD SHADI KHAN*.

[I. L. R. 9 All. 429]

5.—*Suit for partition—Revenue-paying estate—Proceedings under Bengal Act VIII of 1876, s. 31, Effect of.* ] The jurisdiction of the Civil Court in matters of partition of a revenue-paying estate is restricted only in questions affecting the right of Government to assess and collect in its own way the public revenue: *Held*, accordingly, that the pendency of partition-proceedings before the Collector, under s. 31 of Bengal Act VIII of 1876, was no bar to a suit for a declaration that under a partial partition effected between the co-sharers a portion of land had been separately allotted to the plaintiff. *ZAHRUN v. GOWRI SUNKAR*.

[I. L. R. 15 Calc. 198]

6.—*Jurisdiction of Revenue Court—Suit for partition and possession of a share in a particular plot in a parti—N.-W. P. Land Revenue Act XIX of 1873, ss. 135, 241 (f)* ] A suit by a co-sharer in a joint *zemindari* estate for partition and possession of his proportionate share of an isolated plot of land is not maintainable in a Civil Court, with reference

## PARTITION—continued.

## (3) JURISDICTION OF CIVIL COURT IN SUITS RESPECTING PARTITION—concluded.

to ss. 135 and 241 of the N.-W. P. Land Revenue Act (XIX of 1873). *Ram Dayal v. Megu Lal*, I. L. R. 6 All. 452, distinguished. *IJBAIL v. KANHAI*.

[I L R. 10 All. 5]

7.—*Partition by Civil Court of a portion of a revenue-paying estate—Civil Procedure Code (Act XIV of 1882), s. 265—Revenue-paying estate, partition of into several revenue-paying estates.* The meaning of s. 265 of the Code of Civil Procedure is that where a revenue-paying estate has to be partitioned into several revenue-paying estates, such partition must be carried out by the Collector. *Zahrun v. Gouri Sunhar*, I. L. R. 15 Calc. 198, approved. *DEBI SINGH v. SHEO LALL SINGH*.

[I L R. 16 Calc. 203]

## (4) MODE OF EFFECTING PARTITION.

8.—*Civil Procedure Code, 1882, s. 265—Execution—Decree for partition referred to Collector—Collector bound to partition and deliver over possession to several allottees under decree—Practice.* The duty of the Collector, to whom a decree has been referred under s. 265 of the Civil Procedure Code (Act XIV of 1882) for partition, is not confined to mere division of the lands decreed to be divided, but includes the delivery of the shares to their respective allottees. *PARBHUDAS LAKHMIDAS v. SHANKARBHAI*.

[I L R. 11 Bom. 662]

## (5) EFFECT OF PARTITION.

9.—*Family dwelling-house—Partition wall—Open space of ground—Easement.* Upon partition of joint property in Calcutta by mutual conveyances whether under the direction of a Court of law or otherwise, it is implied that the parties take their respective shares with easements of light and air as between themselves in accordance with the existing state of the premises. In a suit for the partition of a family dwelling-house, it was directed that the parties should take their respective shares by mutual conveyances with liberty to the plaintiff to raise a partition wall. The shares were allotted, but no conveyances executed. *Held*, that in equity the parties must be deemed to have taken as if under mutual conveyances, in so far as concerned easements of light and air. *BOLYE CHUNDER SEN v. LALMONI DAS*.

[I L R. 14 Calc. 797]

## (6) MISCELLANEOUS CASES.

10.—*Application by co-sharer for partition—Objection by co-sharer in possession—N.-W. P. Land Revenue Act (XIX of 1873), ss. 111–113.* Reading together ss. 111, 112, and 113 of the N.-W. P. Land Revenue Act (XIX of 1873), as they must be read, the objection contemplated in each of them is an objection to be made by the person upon whom the notice required by s. 111 is to be served, i. e., a person who is a co-sharer in possession,

## PARTITION—concluded.

(6) MISCELLANEOUS CASES—concluded. and who has not joined in the application for partition. *MUHAMMAD ABDUL KARIM v. MUHAMMAD SHADI KHAN*.

[I L R. 9 All. 429]

11.—*Order for partition by Assistant Collector confirmed by Collector—Objection subsequently made to mode of partition—Question of title—N.-W. P. Land Revenue Act XIX of 1873, s. 113.* Upon an application made under s. 108 of the N.-W. P. Land Revenue Act (XIX of 1873) for partition of a share in a *mehal*, no question of title or proprietary right of the nature contemplated by s. 113 was raised, nor any serious objection made by any of the co-sharers, and the Assistant Collector recorded a proceeding setting forth the rules which were to govern the partition, and this proceeding was confirmed by the Collector under s. 131. An Amin was ordered to carry out the partition, and, in taking steps to do so, stated the principle upon which he proposed to distribute the common land. An objection was then for the first time raised by two of the co-sharers in the Court of the Assistant Collector to the inclusion of a particular piece of land in the partition, on the ground that it appertained exclusively to their share. This objection was disallowed by the Assistant Collector, and, on appeal, by the District Judge. *Held* that, at the stage of the proceedings when objections were taken, it was too late to determine questions of title under s. 113 of the Act; that accordingly the Assistant Collector could not be said to have done so; that the objections could therefore only be regarded in the light of objections to the mode in which it was proposed to make the partition; and that consequently there was no appeal from the order of the Assistant Collector to the District Judge, or from the District Judge to the High Court. *TOTA RAM v. ISHUR DAS*.

[I L R. 9 All. 445]

12.—*Suit to stay partition by Collector—Bengal Act VIII of 1876, s. 26—Specific Relief Act (I of 1877), s. 42—Declaration of specific rights—Limitation.* A person bringing a suit under s. 42 of the Specific Relief Act to stay a partition directed by the Collector under Bengal Act VIII of 1876, on the ground that a private partition has already been come to, must prove not only that there has been a private partition, but also that, under that partition, he is entitled to, and was in possession of, in severalty, some specific portion of the property again sought to be partitioned by the Collector; and such person is entitled to no declaration affecting the rights of other shares in the parent estate. *Khoobun v. Wooma Churn Singh*, 3 C. L. R. 453, distinguished. *Semble*—S. 26 of Bengal Act VIII of 1876 does not bar the right to bring an action, but merely limits the effect of the decree unless the action is brought within a certain time. *KALUP NATH SINGH v. LALA RAMDEIN LAL*.

[I L R. 16 Calc. 117]

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ANABA

**PARTNERSHIP.**

See CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—GENERALLY.

[I. L. R. 12 Bom. 422]

See CASES UNDER PARTIES—PARTIES TO SUITS—PARTNERSHIPS, SUITS CONCERNING.

See CASES UNDER PLAINT—FORM AND CONTENTS OF PLAINT—FRAME OF SUITS GENERALLY—PARTNERSHIP SUIT.

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622

[I. L. R. 9 All. 486]

—, suit for dissolution of—

See APPEAL—BOMBAY ACTS—BOMBAY CIVIL COURTS ACT.

[I. L. R. 10 All. 587]

See SET-OFF—SET-OFF ALLOWED.

[I. L. R. 10 All. 587]

1.—*Liability of partners to account—Suit for an account—Suit by partner to recover from co-partner share of losses and advances.* [It is only in exceptional cases that a suit can be brought by one partner against another, which involves the taking of partnership accounts prior to dissolution. A suit was brought by the widow of a partner in an indigo concern against her deceased husband's co-partner in respect of certain alleged losses of the concern, and to recover a moiety of moneys expended by her husband in advances made to indigo cultivators on behalf of the partnership. At the time when the suit was brought, the partnership had not been dissolved: *Held* that the partnership not having been dissolved, the plaintiff was not entitled to an account and the suit must therefore fail. *Brown v. Lapscott*, 6 M. and W. 119, and *Helme v. Smith*, 7 Bing. 709, distinguished. *KASSA MAL v. GOPI*.

[I. L. R. 9 All. 120]

2.—*Suit by sole surviving partner—Representatives of deceased partner—Contract Act IX of 1872, s. 45—Civil Procedure Code, s. 26* [The rule of English law that, in trading partnerships, although the right of a deceased partner devolves on his representative, the remedy survives to his co-partner, who alone must enforce the right by action, and is liable on recovery to account to the representative for the deceased's share, should be applied in India, in the absence of statutory authority to the contrary. The effect of s. 45 of the Contract Act (IX of 1872) is to extend the English law applicable to trading partnerships to all cases of partnership. There is nothing either in that section nor in s. 26 of the Civil Procedure Code, read with it, to show that the representatives of a deceased partner must be joined in an action for a partnership debt brought

**PARTNERSHIP—concluded.**

by the surviving partner, though it may be that they might be joined in such an action. *GOBIND PRASAD v. CHANDAR SEKHAR*.

[I. L. R. 9 All. 486]

3.—*Suit by Assignee of executors of deceased partner—Suit for declaration of right to share of partnership and for an account.* [R prior to his death was a partner with defendants in the firm of *N C & Co*. He died on 8th November 1884. On the 9th November 1885, his executors passed a release to the defendants, which recited that R's share in the firm and future business had ceased on his death; that the surviving partners had requested the executors to settle the account of their testator with the firm, and that after examining the books and taking accounts, &c., a balance of Rs. 8,395-11-0 was found due, on payment whereof the executors released the defendants from all claims in respect of the share and interest of R. On the 7th April 1887, the executors assigned over to the plaintiff a one-anna share in the said firm, and the plaintiff, as assignee, brought this suit for a declaration of his right to the share and for an account. He alleged that there had been no accurate examination of the books at the time of the release, that the amount really due to the testator's estate by the firm had not been ascertained; and that it had been agreed on by the partners, at the time of the release, that in addition to the sum therein mentioned, the executors, as representing the testator's estate, should receive a one-anna share in the partnership. *Held* on the evidence that it had not been proved that all the partners consented to the alleged new partnership, and that on this ground alone the plaintiff could not succeed in his suit. *COWASI RUTTONJI LIMBOOWALLA v. BURJORJI RUSTOMJI LIMBOOWALLA*.

[I. L. R. 12 Bom. 335]

**PATENT.**

1.—*Act XV of 1859, s. 24—Licensee, Application by, under s. 24 of Patent Act—Petitioner under Patent Act and licensee having no separate interest.* [A licensee under a patent cannot as between himself and the patentee challenge the soundness of the patent during the continuance of his license. Case in which the petitioner on the record in a proceeding under s. 24 of Act XV of 1859 was found to have had no real interest in the matter apart from that of the licensee; and in which the petition, having been taken to be in reality that of the licensee, was dismissed accordingly. *IN THE MATTER OF ACT XV OF 1859. IN THE MATTER OF MOSES*.

[I. L. R. 15 Calc. 244]

2.—*Act XV of 1859, s. 34—Statute 15 and 16 Vic., c. 82, s. 41—Particulars of infringement of patent, sufficiency of—Practice* [The sole object of s. 34 Act XV of 1859 "an Act for granting exclusive privileges to inventors" (substantially the same as s. 41 of the English Act of 1852, 15

**PATENT—concluded.**

and 16 Vic., c. 82) is to compel the plaintiff to give the defendant fair notice of the case which he has to meet, and it is quite immaterial whether the requisite information is given in the plaint itself or in a separate paper *Talbot v Roche*, 15 C. B. 310; and *Needham v. Oxley*, 1 H. and M. 248, referred to and followed. Particulars of breaches upon an alleged infringement are distinguished from particulars of objection for want of novelty in this, that, in the latter case, instances of use may not be within the knowledge of the patentee, and therefore must be specified, while in the former, the defendant must himself know whether and in what respects he has infringed the patent. The plaintiff had three patents relating to one article, a brick-kiln, the second and third being for improvements upon the invention specified in the first. The plaintiff indicated a kiln, constructed and used by the defendant, showing as to each of his patents the distinctive features of invention alleged to have been appropriated: *Held* a sufficient compliance with s. 34. **LEDGARD v. BULL.**

[I. L. R. 9 All. 191  
[L. R. 13 I. A. 134]

**PAUPER SUIT**

See COSTS—SPECIAL CASES—GOVERNMENT

[I. L. R. 13 Bom. 234]

1.—*Civil Procedure Code*, ss. 404, 406—*Application for permission to sue as paupers, presented by several paupers jointly.* The mere fact that several persons jointly present an application for permission to sue as paupers does not authorize the Court to entertain it on behalf of applicants who do not appear in person. **BURGESS v. SIDDEN.**

[I. L. R. 10 Mad. 193]

2.—*Court-fees, recovery of, by Government—Civil Procedure Code*, s. 411—*Subject-matter of suit—Cross-decrees under same decree.* A plaintiff suing *in forma pauperis* to recover property valued at Rs. 60,000 obtained a decree for Rs. 1,439. The Court, with reference to the provisions of s. 411 of the *Civil Procedure Code*, directed that the plaintiff should pay Rs. 1,196 as the amount of Court-fees which would have been paid by him if he had not been permitted to sue as a pauper. The Collector having applied under s. 411 to recover this amount by attachment of the Rs. 1,439 payable to the plaintiff, the defendant objected that (i) certain costs payable to her by the plaintiff under the same decree, and (ii) a sum of money payable to her by the plaintiff under a decree which he had obtained in a cross-suit in the same Court, should be set off against the Rs. 1,439 payable by her to him, with reference to ss. 246 and 247 of the Code, and that thus nothing would remain due by her which the Government could recover. No application for execution was made by the plaintiff for his Rs. 1,439 or by the defendant for her costs. On appeal from an order

**PAUPER SUIT—continued.**

allowing the Collector's application, it was contended that the 'subject-matter of the suit' in s. 411 of the Code meant the sum which the successful pauper-plaintiff is entitled to get as a result of his success in the suit; but that in the suit and the cross-suit taken together, the plaintiff ultimately stood to lose a small sum, the defendant being the holder of the larger sum awarded altogether: *Held* that the contention had no force, as execution had not been taken out by the plaintiff or the defendant or both, and it could not be said that the Government had been trying to execute the plaintiff's decree, or was a representative of the plaintiff as holder of the decretal order in his favor for Rs. 1,439, so as to bring into operation the special rules of ss. 246 and 247 of the Code between him and the defendant: *Held*, also, that the plaintiff was one who, in the sense of s. 411, had succeeded in respect of part of the "subject-matter" of his suit, and on that part therefore a first charge was by law reserved and secured to the Government, which was justified in recovering it in these proceedings from the defendant, who was ordered by the decree to pay it in the same way as costs are ordinarily recoverable under the Code: *Held* that the decrees in the suit and the cross-suit not having reached a stage in which the provisions of ss. 246 and 247 of the Code would come into play, no question of set-off and consequent reduction or other modification of the "subject-matter" of the suit decreed against the defendant as payable by her to the plaintiff had arisen or could be entertained. **JANKI v. COLLECTOR OF ALLAHABAD.**

[I. L. R. 9 All. 64]

3.—*Civil Procedure Code*, s. 401, *Explanation, and 407.* On an application to sue *in forma pauperis* the Court is required to deal with the question of the applicant's pauperism with reference to the definition of that word as given in the Explanation to s. 401 of the Code of Civil Procedure and in deciding it to ascertain the exact property, its market value, and the title thereto, and then to deal with the case under s. 407 of the Code, irrespective of any surmises as to the reason why the applicant has valued his claim at a high figure. **MUHAMMAD HUSAIN v. AJUDHIA PRASAD.**

[I. L. R. 10 All. 467]

4.—*Petition for leave to sue as a pauper—Practice—Requisites for success of application—Civil Procedure Code (Act XIV of 1882), s. 407.* The plaintiff applied for leave to sue as a pauper. She stated as her cause of action that a young girl had been left in her charge and had been maintained by her for a number of years; that in January, 1888, arrangements had been made with a Bhatia to get this girl married, and that she (the plaintiff) was to receive Rs. 2,500 on the marriage; that the defendant had also agreed to pay her (the plaintiff) Rs. 2,000 if she would give the girl to him in marriage; that before the marriage ceremony could be performed the defend-

**PAUPER SUIT—concluded.**

ant had induced the girl to quit the plaintiff's house for immoral purposes. She claimed Rs. 2,500 as damages, and prayed leave to sue as a pauper: *Held*, following *Chatterpal Sing v. Raja Ram*, I. L. R. 7 All. 661, that the facts being clear and the law evident, the case might be finally disposed of on the plaintiff's application to sue as a pauper. *DULARI v. VALLABDAS PRAGJI*.

[I. L. R. 13 Bom. 126]

**PAWNEE OF MEDAL OR MILITARY DECORATION.**

*See* ARMY ACT, 1881, s. 156.

[I. L. R. 10 Mad. 108]

**PAYMENT INTO COURT.**

*See* CIVIL PROCEDURE CODE, s. 257.

[I. L. R. 12 Mad. 121]

**PEDIGREE.**

*See* EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—PEDIGREE

**PENAL CODE (ACT XLV OF 1860).**

—, s. 22.

*See* THEFT.

[I. L. R. 10 Mad. 255]

—, s. 24.

*See* THEFT.

[I. L. R. 10 Mad. 186]

—, s. 52.

*See* CULPABLE HOMICIDE.

[I. L. R. 14 Calc. 566]

*See* WRONGFUL RESTRAINT.

[I. L. R. 12 Bom. 377]

—, s. 65.

*See* SENTENCE—IMPRISONMENT—IMPRISONMENT IN DEFAULT OF FINE

[I. L. R. 10 Mad. 165, 166 note]

—, s. 71.

*See* SENTENCE — CUMULATIVE SENTENCES.

[I. L. R. 9 All. 645]

[I. L. R. 10 All. 58]

[I. L. R. 12 Mad. 36]

[I. L. R. 16 Calc. 442]

—, s. 72.

*See* SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 12 Mad. 36]

**PENAL CODE (ACT XLV OF 1860)—continued.**

—, s. 75.

*See* MAGISTRATE, JURISDICTION OF—COMMITMENT TO SESSIONS COURT.

[I. L. R. 11 All. 393]

*See* SENTENCE — CUMULATIVE SENTENCES.

[I. L. R. 11 All. 393]

*See* SENTENCE—SENTENCE AFTER PREVIOUS CONVICTION

[I. L. R. 14 Calc. 357]

—, s. 79.

*See* WRONGFUL RESTRAINT.

[I. L. R. 12 Bom. 377]

—, s. 84.

*See* INSANITY.

[I. L. R. 12 Mad. 459]

—, s. 88.

*See* CULPABLE HOMICIDE.

[I. L. R. 14 Calc. 566]

—, 95.

*See* OFFENCE RELATING TO DOCUMENTS.

[I. L. R. 12 Mad. 148]

—, s. 99.

*See* CASES UNDER PRIVATE DEFENCE, RIGHT OF

*See* WRONGFUL RESTRAINT.

[I. L. R. 12 Bom. 377]

—, s. 141.

*See* RIOTING.

[I. L. R. 16 Calc. 206]

*See* UNLAWFUL ASSEMBLY.

[I. L. R. 16 Calc. 206]

—, 144.

*See* SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 16 Calc. 442]

—, s. 147.

*See* PRIVATE DEFENCE, RIGHT OF.

[I. L. R. 16 Calc. 206]

*See* RIOTING.

[I. L. R. 16 Calc. 206]

*See* SENTENCE — CUMULATIVE SENTENCES.

[I. L. R. 9 All. 645]

[I. L. R. 16 Calc. 442, 725]



PENAL CODE (ACT XLV OF 1860)  
s. 147—continued.

See UNLAWFUL ASSEMBLY.

[I. L. R. 16 Calc. 206]

—, s. 148.

See SENTENCE — CUMULATIVE SENTENCES.

[I. L. R. 16 Calc. 442]

—, s. 149

See UNLAWFUL ASSEMBLY.

[I. L. R. 9 All. 645]

—, s. 174

See CASES UNDER CONTEMPT OF COURT  
—PENAL CODE, s. 174.

—, s. 175.

See PRODUCTION OF DOCUMENTS.

[I. L. R. 12 Bom. 63]

See WITNESS—CIVIL CASES—ABSCONDING WITNESSES.

[I. L. R. 12 Bom. 63]

—, s. 176.

See CASES UNDER INFORMATION OF COMMISSION OF OFFENCE.

—, s. 177—*Furnishing false information for the purpose of preventing the commission of an offence, Meaning of.* The information which, under the second branch of s. 177 of the Penal Code, a person is legally bound to give "for the purpose of preventing the commission of the offence" relates not to the commission of offences generally but to the commission of some particular offence. IN THE MATTER OF THE PETITION OF PANATULLA, PANATULLA v. QUEEN-EMPRESS.

[I. L. R. 15 Calc. 386]

—, s. 179—*Witness refusing to answer—Complainant—Criminal Procedure Code, 1882, s. 485.* *Semble*—A complainant is not a witness punishable for refusal to answer under s. 485 of the Code of Criminal Procedure, or under s. 179 of the Penal Code. IN RE GANESH NARAYAN SATHE.

[I. L. R. 11 Bom. 600]

—, s. 181.

See s. 182.

[I. L. R. 12 Mad. 451]

1.—s. 182—*False information to the police—Charge made against no specific person—Specific Charge.* S. 182 of the Penal Code must be read as an entire section, and, when so read, it applies to those cases in which the police are induced, upon information supplied to them, to do or omit to do something which might effect some third person, and which they would not have done

PENAL CODE (ACT XLV OF 1860),  
s. 182—continued.

had they known the truth of matter laid before them. IN THE MATTER OF THE PETITION OF GOLAM AHMED KAZI.

[I. L. R. 14 Calc. 314]

2.—s. 182.—*Criminal Procedure Code, ss. 342, 428, 540—Examination on affirmation of one preferring a criminal appeal—Verification of petition of appeal* In a petition of appeal from a conviction, the appellant falsely stated that the convicting Magistrate declined to summon his witnesses. The Magistrate to whom the appeal was preferred called upon the appellant to verify the allegations in the petition of appeal on solemn affirmation, and he did so. *Held* that the appellant had not committed an offence under s. 181 or 182 of the Penal Code. QUEEN-EMPRESS v. SUBAYYA.

[I. L. R. 12 Mad. 451]

3.—s. 182.—*Giving false information to a public servant.* Under s. 182 of the Penal Code (Act XLV of 1860) the giving of false information to a public servant is penal, when either of two consequences is intended to be caused, or is known to be likely to be caused, by the false information, the first being the causing the public servant "to use the lawful power of such public servant to the injury or annoyance of any person," the second being the causing the public servant "to do or omit anything which such public servant ought not to do or omit, if the true state of facts respecting which such information is given were known to him." To constitute an offence under the latter part of the section, it is not necessary to show that the act done would be to the injury or annoyance of any third person. A personated B at an examination, called the Vernacular Sixth Standard Examination. A passed the examination, and obtained a certificate from the educational authorities in B's name. B thereupon applied to the Assistant Collector to have his name entered in the list of candidates for service in the Revenue Department. He attached to this application the certificate issued in his name, as it was a rule of Government that only those who had passed the Sixth Standard Examination were eligible for employment in the Revenue Department. On receipt of this application the Assistant Collector ordered B's name to be entered on the list of candidates. *Held* that B was guilty of the offence of giving false information to a public servant, within the meaning of the latter part of s. 182 of the Penal Code, QUEEN-EMPRESS v. GANESH KHANDERAO.

[I. L. R. 13 Bom. 506]

—, s. 186.—*Voluntarily obstructing a public servant in discharge of his duties—Mamlatdar's decree—Execution by a surveyor under Collector's orders—Public junction—Right of private defence.* In a suit filed in a Mamlatdar's Court under Bombay Act III of 1876 the plaintiff obtained a decree against the accused for possession of a certain

PENAL CODE (ACT XLV OF 1860),  
s. 186—continued

piece of land. When the Mamlatdar proceeded to execute the decree, he found that there was no land corresponding to the boundaries set forth in the plaint, and that the parties were joint owners and in joint occupation of the land in dispute. Finding himself unable to execute the decree, the Mamlatdar referred the matter to the Collector for advice. The Collector, on looking into the papers of the case, ordered a surveyor to execute the decree by dividing the land in dispute, and putting the decree-holder in possession of his share. The surveyor, in attempting to execute the decree, was obstructed by the accused, who was thereupon tried and convicted of the offence of voluntarily obstructing a public servant in the discharge of his public functions, under s. 186 of the Penal Code (Act XLV of 1860). *Held*, reversing the conviction, that as the Collector had no legal authority to issue the order to the surveyor in execution of the Mamlatdar's decree, the surveyor acting under that order was not discharging a public function, and the act of the accused was not an offence against s. 186 of the Penal Code. *Held*, further, that the Collector's order was so entirely *ultra vires* as to leave no room for the operation of either the first or the second clause of s. 99 of the Penal Code. *QUEEN-EMPRESS v. TULSIRAM*

[I. L. R. 13 Bom. 168]

—, s. 188

See NUISANCE—UNDER CRIMINAL PROCEDURE CODE.

[I. L. R. 10 All 115]

1.—s. 188—*Order to abate nuisance—Criminal Procedure Code, ss. 133, 134—Notice of order and subsequent disobedience.* [The terms of s. 134 of the Criminal Procedure Code, and the notification made by Government thereunder as to promulgation and issue of an order, are directory but an omission to follow strictly such direction, though it is an irregularity, does not invalidate the order: where therefore it is shown that the order has been brought to the actual knowledge of the person sought to be affected by it, such omission does not prevent the case coming within s. 188 of the Penal Code. IN THE MATTER OF THE PETITION OF PARBUTTY CHARAN AICH PARBUTTY CHARAN AICH v. QUEEN-EMPRESS.

[I. L. R. 16 Calc 9]

2.—s. 188—*Criminal Procedure Code, ss. 133, 134, 135, 136—Service of notice of order under s. 133—Disobedience of order where notice was affixed to house of accused.* [A Magistrate made an order under s. 133 of the Code of Civil Procedure requiring *N* to fence a certain well in a public street or to appear before him and move to have the order set aside; a copy of this order was affixed to the house of *N*, but he did not appear. The Magistrate then adopted the procedure prescribed by ss. 136, 140, and made

PENAL CODE (ACT XLV OF 1890),  
s. 188—continued.

an order requiring *N* to fence the well by a certain date. *N* who was personally served with notice of the above order did not comply with it. The Magistrate then sanctioned the prosecution of *N* under s. 188 of the Penal Code. *N* appeared and produced evidence to prove that he was not liable to fence the well. *Held* that the accused was guilty of the offence of disobedience to an order duly promulgated by a public servant and was not entitled to go behind the order and show that it was one which ought not to have been made. *QUEEN-EMPRESS v. NARAYANA*.

[I. L. R. 12 Mad 475]

—, ss. 191 192.

See CONFESSION — CONFESSIONS TO MAGISTRATE.

[I. L. R. 11 Bom. 702]

—, s. 193,

See FALSE EVIDENCE—GENERALLY.

[I. L. R. 14 Calc. 653]

—, s. 196.

See SESSIONS JUDGE, JURISDICTION OF.

[I. L. R. 16 Calc 766]

—, s. 199

See FALSE EVIDENCE—GENERALLY.

[I. L. R. 14 Calc. 653]

—, s. 210.

See CRIMINAL PROCEDURE CODE, 1882 s. 487.

[I. L. R. 16 Calc 121]

—, s. 219—*Civil Procedure Code (Act XIV of 1882), s. 258—Satisfaction of decree—Execution of decree—Fraudulently executing decree after it has been satisfied when satisfaction has not been certified to Court.* [A decree-holder having proceeded to execute his decree against his judgment-debtor the latter objected, stating that the decree had been already satisfied, although the adjustment thereof had not been certified to the Court as required by s. 258 of the Code of Civil Procedure. The judgment-debtor being under the circumstances compelled to deposit the amount of the decree in Court, applied for and obtained sanction to prosecute the decree-holder for an offence under s. 210 of the Penal Code. It was contended that the case did not fall within that section, as the satisfaction, not having been certified to the Court, could not be recognised by the Court executing the decree, and that consequently no offence had been committed: *Held* that the words "after it has been satisfied," used in s. 210 of the Penal Code, indicate only the fact of the satisfaction of the decree. The fact that the satisfaction is of such a nature that the Court executing the decree could not recognise it, does

PENAL CODE (ACT XLV OF 1860),  
s. 210—*continued*.

not prevent the decree-holder from being properly convicted of an offence under that section  
MADHUB CHUNDER MOZUMDAR v. NOVODEEP  
CHUNDER PUNDIT.

[I. L. R. 16 Calc. 123]

See QUEEN-EMPRESS v. BAPUJI DAYARAM.

[I. L. R. 10 Bom. 283]

—, s. 211.

See CASES UNDER FALSE CHARGE.

—, s. 224.

See ESCAPE FROM CUSTODY.

[I. L. R. 11 Mad. 480]

—, s. 225.

See ESCAPE FROM CUSTODY.

[I. L. R. 11 Mad. 441]

—, s. 268

See NUISANCE—PUBLIC NUISANCE UNDER PENAL CODE

[I. L. R. 14 Calc. 656]

[I. L. R. 12 Bom. 437]

[I. L. R. 10 All. 44]

—, s. 269.

See PUBLIC HEALTH, OFFENCE AFFECTING.

[I. L. R. 11 Bom. 59]

—, s. 283 and ss. 268 and 290 — *Obstruction on tidal navigable river* ] Persons placing a bamboo stockade across a tidal navigable river for the purposes of fishing, although leaving in such stockade a narrow opening for the passage of boats, which passage was, however, kept closed except on the actual passage of a boat, were charged at the instance of a sub-divisional officer with causing an obstruction under s. 283 of the Penal Code. *Held* that, although it was doubtful whether s. 283 applied to the case, they had committed an offence under s. 268 of the Penal Code, and were punishable under s. 290 of that Code. IN THE MATTER OF THE PETITION OF UMESH CHANDRA KAR.

[I. L. R. 14 Calc. 656]

—, s. 290.

See CASES UNDER NUISANCE—PUBLIC NUISANCE UNDER PENAL CODE.

—, s. 295.

See RELIGION, OFFENCES RELATING TO.

[I. L. R. 10 Mad. 126]

[I. L. R. 10 All. 151]

W., D.

PENAL CODE (ACT XLV OF 1860)—  
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—, s. 297.

See RELIGION, OFFENCES RELATING TO.

[I. L. R. 10 Mad. 126]

—, s. 304A

See CULPABLE HOMICIDE.

[I. L. R. 14 Calc. 466]

[I. L. R. 12 Mad. 56]

—, s. 324.

See SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 16 Calc. 442]

—, s. 325.

See SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 9 All. 645]

[I. L. R. 16 Calc. 725]

—, s. 330.

See CASES UNDER HURT—CAUSING HURT.

—, ss. 339, 340, 342.

See WRONGFUL CONFINEMENT.

[I. L. R. 13 Bom. 376]

See WRONGFUL RESTRAINT.

[I. L. R. 12 Bom. 377]

—, s. 352.

See SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 12 Mad. 36]

—, s. 352

See JOINDER OF CHARGES.

[I. L. R. 12 Mad. 273]

—, ss. 372 and 373.—*Obtaining a minor for prostitution—Dancing girl caste—Adoption.* ] A woman, being a member of the dancing girl caste, obtained possession of a minor girl and employed her for the purpose of prostitution; she subsequently obtained in adoption another minor girl from her parents, who belonged to the same caste. She and the parents of the second girl were charged together under ss. 372, 373 of the Penal Code. The charges related to both girls: *Held*, that ss. 372, 373 of the Penal Code may be applicable in a case where the minor concerned is a member of the dancing girl caste. *Per* MUTUSAMI AYYAR, J.—It would be no offence if the intention was that the girl should be brought up as a daughter, and that when she attains her age she should be allowed to select either to marry or follow the profession of her prostitute mother. QUEEN-EMPRESS v. RAMANNA.

[I. L. R. 12 Mad. 273]

PENAL CODE (ACT XLV OF 1860)—  
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—, s. 378.

*See* THEFT.

[I. L. R. 10 Mad. 186, 255

[I. L. R. 15 Calc. 388, 390 note, 392 note, 402

—, s. 379.

*See* SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 10 All 146

*See* THEFT.

[I. L. R. 10 Mad. 255

[I. L. R. 15 Calc. 388, 390 note, 392 note, 402

—, s. 380.

*See* SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 10 All 146

—, s. 403.

*See* CRIMINAL MISAPPROPRIATION

[I. L. R. 11 Mad 145

[I. L. R. 12 Mad 49

*See* STOLEN PROPERTY—OFFENCES RELATING TO.

[I. L. R. 11 Mad 145

—, ss. 410, 411.

*See* STOLEN PROPERTY—OFFENCES RELATING TO.

[I. L. R. 9 All 348

[I. L. R. 15 Calc. 511

—, s. 411.

*See* MAGISTRATE, JURISDICTION OF—COMMITMENT TO SESSIONS COURT

[I. L. R. 11 All 393

*See* SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 11 All 393

—, ss. 415, 419.

*See* CHEATING BY PERSONATION.

[I. L. R. 12 Mad 151

—, s. 417.

*See* CHEATING.

I. L. R. 12 Mad. 114

[I. L. R. 11 Bom. 59

—, s. 420.

*See* CHEATING.

[I. L. R. 11 Bom 59

PENAL CODE (ACT XLV OF 1860)—  
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—, s. 428

*See* OFFENCE RELATING TO DOCUMENTS.

[I. L. R. 12 Mad. 54

*See* SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 12 Mad. 36

*See* THEFT.

[I. L. R. 15 Calc 388, 390 note, 392 note, 402

—, s. 441.

*See* CASES UNDER CRIMINAL TRESPASS

—, s. 447.

*See* CRIMINAL TRESPASS.

[I. L. R. 16 Calc. 715

*See* THEFT.

[I. L. R. 15 Calc. 388, 390 note, 392 note, 402

—, s. 454

*See* SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 10 All 146

—, s. 456

*See* CRIMINAL TRESPASS.

[I. L. R. 16 Calc. 657

—, s. 457.

*See* SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 12 Mad. 36

—, s. 463.

*See* FORGERY.

[I. L. R. 12 Bom. 36

[I. L. R. 12 Mad. 151

*See* SANCTION TO PROSECUTION—WHERE SANCTION IS NECESSARY.

[I. L. R. 12 Bom. 36

—, s. 466

*See* FORGERY.

[I. L. R. 14 Calc. 513

—, s. 467

*See* FORGERY.

[I. L. R. 12 Bom. 36

*See* SANCTION TO PROSECUTION—WHERE SANCTION IS NECESSARY.

[I. L. R. 12 Bom. 36

PENAL CODE (ACT XLV OF 1860)—  
*concluded.*

—, s. 471.

*See* FORGERY.

[I. L. R. 11 Mad 411

[I. L. R. 13 Bom. 515 note

—, s. 477.

*See* OFFENCE RELATING TO DOCUMENTS.

[I. L. R. 12 Mad 54, 148

—, s. 498.—*Detaining with criminal intent married woman*)] The words "such woman" in s. 498 of the Penal Code do not mean such a woman as has been so enticed as mentioned in that section, but mean such woman whom the accused knows or has reason to believe to be the wife of any other man, the detention of such a woman with the particular intent defined in the section is one of the offences made punishable under that section.

QUEEN-EMPRESS *v.* NIADAR

[I. L. R. 10 All 580

—, s. 499.

*See* DEFAMATION.

[I. L. R. 9 All. 420

—, s. 500.

*See* DEFAMATION.

[I. L. R. 11 Mad. 477

*See* WITNESS—CIVIL CASES—PRIVILEGES  
OF WITNESSES.

[I. L. R. 11 Mad. 477

—, s. 503

*See* CRIMINAL INTIMIDATION.

[I. L. R. 11 Bom 376

[I. L. R. 15 Calc. 671

—, s. 504

*See* INSULT.

[I. L. R. 10 Mad 353

—, s. 507

*See* CRIMINAL INTIMIDATION

[I. L. R. 11 Bom 376

—, s. 511

*See* CRIMINAL INTIMIDATION.

[I. L. R. 11 Bom. 376

*See* CHEATING.

[I. L. R. 12 Mad 114

## PENALTY.

*See* CASES UNDER INTEREST—STIPULA-  
TIONS AMOUNTING TO PENALTIES  
OR OTHERWISE.

[I. L. R. 14 Calc. 248

[I. L. R. 10 Mad. 203

PENSIONS, CONTRACT FOR, BY SOVE-  
REIGN POWERS.*See* TREATY, CONSTRUCTION OF

[L. R. 16 I. A. 175

[I. L. R. 17 Calc. 234

## PENSIONS ACT (XXIII OF 1871).

1.—s. 4.—*Jurisdiction of Civil Court—Suit against Government for mam lands and mokasa amals—Bom Regulation XXIX of 1827, S 6—Bombay Revenue Jurisdiction Act (X of 1876), s. 4—Mokasa amals, meaning of*] In 1826, A obtained a decree on a mortgage, awarding him possession and enjoyment of certain *nam* property, consisting of lands and of cash allowances annually paid from the Government treasury, called *mokasa amals*. A and his successors continued in possession down to 1852, when the *nam* was attached on behalf of Government pending an inquiry, under Bombay Act XI of 1852, into the title of the holders of the *nam*. The attachment remained in force till 1865, when Government finally decided that the *nam* property, with the exception of a certain portion should be restored to those from whose possession it had been taken in 1852. Thereupon D, the successor in interest of A, applied to the Collector to be restored to possession. The Collector refused. D therefore sued him for arrears of the *mokasa amals*, and obtained a decree in 1868. Thereafter D did not receive any payment from the Government treasury. In 1883, D filed the present suit against Government to recover possession of the *nam* lands together with arrears of the *amals*: *Held*, that the suit against Government was not cognizable by the Civil Courts both under the Pensions Act (XXIII of 1871), s. 4, and under the Bombay Revenue Jurisdiction Act (X of 1876), s. 4. Both these Acts, though not retrospective in their operation, still do not create rights to relief against the Government where none subsisted before. Accordingly, the suit being barred under Bombay Regulation XXIX of 1827, was equally barred under the later Acts XXIII of 1871 and X of 1876. SHIVRAM DINKAR GHARPURAY *v.* SECRETARY OF STATE FOR INDIA.

[I. L. R. 11 Bom, 222

2.—s. 4.—*Yaumia granted to mosque—Jurisdiction of Civil Court*] S. 4 of the Pensions Act, 1871, provides that no Civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted: *Held*, that a *yaumia* allowance granted to a religious institution did not fall within the purview of the Pensions Act. ATHAVULLA *v.* GOUSE.

[I. L. R. 11 Mad 283

**PENSIONS ACT (XXIII OF 1871)—*conold.***

3.—s. 4.—*Grant of villages enabling grantee to receive the land revenue.*] Suit to recover a moiety of two villages granted as a jaghi. *Held* that, as the original grant was not of the freehold or full ownership in the soil, the suit was barred by s. 4 of the Pensions Act, 1871]. RAMA v. SUBBA.

[I. L. R. 11 Mad. 98]

4.—s. 4 and ss 6 and 9.—*Grant of land revenue—Suit by assignees, zemindars, for arrears—Right of plaintiff's admitted by Government—Want of Collector's certificate effect of.*] The sections of the Pensions Act (XXIII of 1871) restricting the jurisdiction of the Civil Courts to entertain suits relating to pensions of grants of money or land revenue must be construed strictly. *Held* that a suit by the assignees from Government of land revenue, whose rights were admitted by Government, to recover arrears from persons admittedly liable to pay revenue to somebody, but who disputed plaintiff's right thereto, came within s. 9 of the Pensions Act (XXIII of 1871) and was not barred by ss. 4 and 6 by reason of no certificate having been obtained as therein provided. NAGAR MAL v. ALI AHMAD

[I. L. R. 10 All 396]

—, s. 6.

See s. 4.

[I. L. R. 10 All. 396]

—, s. 7

See MAHOMEDAN LAW — GIFT — VALIDITY.

[I. L. R. 9 All 213]

—, s. 9.

See s. 4.

[I. L. R. 10 All. 396]

**PERSONATING PUBLIC SERVANT.**

See SENTENCE—CUMULATIVE SENTENCES.

[I. L. R. 10 All 58]

**PETITION.**

See EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—PETITIONS.

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**PLAINT.**

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See ISSUES—FRESH OR ADDITIONAL ISSUES.

[I. L. R. 13 Bom. 664]

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**—, Return of.**

See APPELLATE COURT—EXERCISE OF POWERS IN VARIOUS CASES—PLAINT.

[I. L. R. 9 All. 191]

[L. R. 13 I. A. 134]

**(1) FORM AND CONTENTS OF PLAINT.****(a) FRAME OF SUITS GENERALLY.**

1.—*Partnership suit—Suit by sole surviving partner to recover partnership debt.*] In a suit brought by a sole surviving partner to recover a partnership debt, the plaint, if properly framed, ought to allege that the debt of which recovery is prayed was a partnership debt, that the deceased partner had died before the suit, and that the suit was brought by the plaintiff as surviving partner for his own benefit and that of the estate: but the suit should not be dismissed merely because the plaint did not contain these averments. *Jell v. Douglas*, 4 B. & Ald. 374. GOBIND PRASAD v. CHANDRA SEKHAR.

[I. L. R. 9 All. 486]

2.—*Charges of fraud—Pleading*] A plaint charging fraud must set forth particulars; general allegations, however strong the words, not even amounting to an averment of fraud of which a Court can take notice. GUNGA NARAIN GUPTA v. TILUCKRAM CHOWDRY.

[I. L. R. 15 Cal. 533]

3.—*Suits for money—Suits for sums due on taking accounts—Civil Procedure Code, s. 50.*] Under s. 50 of the Code of Civil Procedure (Act XIV of 1882) if a plaintiff seeks the recovery of money, the plaint must state the precise amount so far as the case admits; while in a suit for the amount which will be found due on taking unsettled accounts, the plaint need only state approximately the amount sued for. As in the former instance the precise amount, so in the latter the approximate amount stated in the plaint, must be taken to be the amount of value of the subject-matter of the suit for purposes of jurisdiction. KHUSHALCHAND MULCHAND v. NAGINDAS MOTICHAND.

[I. L. R. 12 Bom. 675]

**(b) DEFENDANTS.**

4.—*Suit by Bank for money against excoautrix—Description of parties—Order returning plaint for amendment.*] A suit was brought by the

PLAINT *continued.*(1) FORM AND CONTENTS OF PLAINT—*concluded.*(b) DEFENDANTS—*concluded.*

manager of the *M* Bank against the executrix of *B* to recover a sum of money as due upon a bond executed by *B* in favour of the Bank. The plaintiff described the defendant as "Mis Sarah G Barlow of Mussoorie," and stated that she was executrix of the deceased *B*. The Court of First Instance returned the plaint for amendment under s. 53 of the Civil Procedure Code, because the defendant was not properly described. *Held*, that this ground failed, because it was clear that the defendant was stated to be the executrix of the deceased, and the suit was brought against her in that capacity. *MUSSOORIE BANK v. BARLOW.*

[I. L. R. 9 All. 188]

## (c) SPECIAL CASES.

5.—*Suit for redemption of mortgage—Title, existence and proof of—Limitation.* In a suit for possession of land by redemption of a mortgage, the very nature of which presupposes that the possession of the defendant or his predecessor was lawful, the plaintiff must in his plaint show the title upon which he relies, and therefore a title subsisting at the date of suit. Unless he gives *prima facie* evidence to show that his suit is within time, he fails to prove his title or subsisting right to the property. *Philippus v. Philippus.* L.R. 4 Q. B. D. 127; *Dawkins v. Lord Penrhyn*, L.R. 4 Ap. Cas. 51; *Radha Gobind Roy Sahab v. Inglis*. 7 C. L. R. 364; *Rao Karan Singh v. Bakar Ali Khan*, L. R. 9 I. A. 99; *Rajah Kishen Dutt Panday v. Narendar Bahadur Singh*, L. R. 3 I. A. 85; *Ram Chandra Apaji v. Balaji Bhaurav*, I. L. R. 9 Bom. 137, and other cases referred to. *PARMANAND MIER v. SAHIB ALI.*

[I. L. R. 11 All. 438]

## (2) VERIFICATION AND SIGNATURE.

6.—*Sufficiency of verification—Civil Procedure Code, s. 53.* A suit was brought by the Manager of the *M* Bank against the executrix of *B* to recover a sum of money as due upon a bond executed by *B* in favor of the Bank. The plaint began thus:—"George Henry Webb, manager of the above-named plaintiff's business, states as follows," and proceeded to state that the deceased was at the time of his death, "indebted to the plaintiff," and to set forth the cause of action in detail. It was signed and verified thus.—"For the *M* Bank, Limited, G. H. Webb, Manager." The Court of First Instance returned the plaint for amendment under s. 53 of the Civil Procedure Code, because the plaint was set out as made by George Henry Webb as manager, and not as on the part of the Bank. *Held* that this ground did not come within s. 53 of the Code, as it was clear that the circumstances set out in the plaint applied to the case of the plaintiff Bank, and the plaint sufficiently fulfilled the requirements of the Code that the facts which the plaintiff considers essential should be concisely and clearly

PLAINT—*continued.*(2) VERIFICATION AND SIGNATURE—*could.*

set out, and that the verification should be made by some one acquainted with these facts. *MUSSOORIE BANK v. BARLOW.*

[I. L. R. 9 All. 188]

7.—*Allegation of fraud.* Where a plaint contained numerous allegations of fraud, some of which must have been true or false to the plaintiff's own knowledge, and was signed and verified on the plaintiff's behalf by his general attorney: *Held* that the defendants must reasonably require the plaintiff to subscribe and verify the plaint himself, and that he should so subscribe and verify. *RAJAH OF TOMKUIH v. BRAIDWOOD.*

[I. L. R. 9 All. 505]

## (3) AMENDMENT OF PLAINT.

8.—*Suit brought for amount in excess of jurisdiction of munsif—Suit to declare land liable to be sold in execution of decree—Civil Procedure Code, ss 50 and 373—Withdrawal of part of claim.* In a suit brought in a District Munsif's Court to declare certain land liable to be sold in execution of a decree for more than Rs. 2,500, the defendants pleaded that the Court had no jurisdiction. The Munsif allowed the plaintiff to amend the plaint by stating that he abandoned his claim to execute the decree against the land for more than Rs. 2,500. On appeal, the District Judge held that the plaint could not be amended after the first hearing. *Held*, on appeal to the High Court, that the claim was not one which could be amended, so as to bring the suit within the pecuniary jurisdiction of the District Munsif. *ANNAJI v. RAMA KURUP.*

[I. L. R. 10 Mad. 152]

9.—*Allegation of Fraud—Alteration of nature of fraud charged* Where in a suit for repayment of a certain sum which had after a compromise made by the official assignee been paid to a person who had assisted in taking the accounts, such payment being unauthorized by the Court, the plaint, as presented, alleged the fraudulent concealment of the payment from the assignee and afterwards, when all the evidence had been taken, and it had been established that the assignee knew of the payment, this was amended to the statement that if he did know of it he had no power to consent to it, and that his consent would not be binding, the payment being a fraud upon the Court. *Held* that the amendment at the stage when it was made was not permissible. *ABDUL HOSSEIN ZENAIL v. TURNER.*

11 Bom. 620

[L. R. 14 I. A. 111]

10.—*Civil Procedure Code, s. 53—Suit by Bank for money against executrix—Order returning plaint for amendment—Form of suit* A suit was brought by the manager of the *M* Bank against the executrix of *B* to recover a sum of



## PLAINT—continued.

## (3) AMENDMENT OF PLAINT—continued.

money as due upon a bond executed by B in favour of the Bank. The plaint described the defendant as "Mrs. Sarah G. Barlow of Mussoorie," and stated that she was executrix of the deceased B. It began thus:—"George Henry Webb, manager of the above-named plaintiff's business, states as follows," and proceeded to state that the deceased was, at the time of his death, indebted to the plaintiff, and to set forth the cause of action in detail. It was signed and verified thus:—"For the M Bank, Limited, G. H. Webb, Manager." The Court of First Instance returned the plaint for amendment under s. 53 of the Civil Procedure Code, because the suit should not have been brought in the form in which it was brought, but in the form referred to in s. 213 and No. 105 of sch. IV of the Code. *Held*, with reference to this ground, that the plaintiff was at liberty to bring a suit for money against any person administering to or representing the estate; and if such suit should be found with reference to the facts in evidence not maintainable, it should be dismissed; but there was no authority for returning a plaint for amendment, when it was found that the suit was not maintainable in the form in which it was brought, in order to amend it so as to convert the suit into one of a different character. *MUSSOORIE BANK v. BARLOW*

[I. L. R. 9 All. 188]

11.—*Civil Procedure Code*, ss. 31, 53—*Suit to restrain interference with private right.* A sued for an injunction to restrain interference with his right to graze cattle on the bed of a certain tank. The other raiyats of the village in whom the same right vested were originally joined as plaintiffs, but the plaint was amended under s. 53 of the Code of Civil Procedure, and their names were struck off the record. A proved no special damage: *Held* (1) that the fact that the other raiyats of the village had similar rights did not make A's right a public right in the sense that no action could be brought upon it unless special damage was proved: (2) that the right claimed vested in A severally as well as jointly with the other raiyats, and the amendment of the plaint was not contrary to the provisions of s. 31 or 53 of the Code of Civil Procedure. *VENKATACHALA v. KUPPUSAMI*.

[I. L. R. 11 Mad. 42]

12.—*Civil Procedure Code*, 1882, s. 53—*Change in form of suit, the cause of action being unchanged.* The plaintiffs alleged that the defendants had encroached on the bed of a tank, raised embankments, and cultivated crops which interfered with the plaintiffs' supply of water; and they prayed for a decree ejecting the defendants from the land encroached on and restraining them from interfering with it: *Held*, that the Court was not precluded by s. 53 of the Code of Civil Procedure from passing a decree declaring the plaintiffs' right to the water of the tank directing the defendants' embankments, &c., to be removed

## PLAINT—continued.

## (3) AMENDMENT OF PLAINT—continued.

and regulating the cultivation of their lands, but that the defendants' liberty of cultivation should not be restricted more than was necessary to secure the plaintiff's supply of water. *PULAMADA v. RAVUTHU*.

[I. L. R. 11 Mad. 94]

13.—*Civil Procedure Code* 1882, s. 54—*Amendment of plaint—Multifarious suit—Malabar law—Stanom.* A suit was brought by the junior members of a *tarwad*, which consisted of three *stanoms* and three *tararies*, against the *karnavan* and others, including certain persons to whom he had alienated some *tarwad* property. The plaint, as originally framed, prayed (1) for the removal of the *karnavan*, (2) for a declaration that defendants Nos. 2 to 8, the senior *anandravans*, had forfeited their right of succession to him, (3) for the appointment of the plaintiff in his place; (4) for a declaration that his alienations were invalid as against the *tarwad*, and (5) for possession of the property alienated. Subsequently, the plaint was amended by the order of the Court by striking out items 2 and 5 of the prayer, and finally the plaintiffs further amended the plaint and sued only for a declaration that the alienations in question were invalid. The lower Court passed the declaratory decree prayed for. *Held*, that the lower Court was wrong in allowing the plaint to be amended after the first hearing, because the case on which the decree was passed was essentially different from that disclosed in the plaint, and that the appeal must be allowed accordingly. *MAHOMED v. KRISHNAN*.

[I. L. R. 11 Mad. 106]

14.—*Addition of parties on second appeal.* In a suit by the manager of a Hindu joint family to recover possession of certain lands from the defendant the plaintiff was allowed on second appeal to amend his plaint by making other members of the family parties to the suit. *HARI GOPAL v. GOKALDAS KUSHABASHET*.

[I. L. R. 12 Bom. 158]

15.—*Addition of parties—Suit originally against owner—Ship added as party defendant.* In a suit for collision originally filed against the owners of a ship. *Held*, that the plaintiffs might amend the plaint by adding the ship as a party defendant. *BOMBAY AND PERSIA STEAM NAVIGATION COMPANY v. SHEPHERD*.

[I. L. R. 12 Bom. 237]

16.—*Joint family—Mortgage by a father—Decree against father on mortgage giving possession with interest and costs—Son's liability to satisfy the decree as to interest and costs.* The plaintiff's father mortgaged certain ancestral property for a limited term. A suit was brought on the mortgage against the father, and a decree was passed directing the mortgaged property to be handed over to the mortgagee for a certain time, and

**PLAINT—continued.****(3) AMENDMENT OF PLAINT—continued.**

awarding payment of interest and costs by the father. In execution of this decree, the mortgagee sought to recover the costs by sale of the property in question. Thereupon the plaintiffs sued for a declaration that the property was not liable to be sold in execution of the decree against the father, on the ground that the debts contracted by the father were for immoral purposes, and that, therefore, the estate could not be bound by the decree at all. The Court of First Instance found that the debts had not been incurred for any immoral purpose, and dismissed the suit. At the hearing of the appeal to the High Court it was alleged that the plaintiffs had separated from their father before the mortgage-decree was passed against him, and an application was made on their behalf that the plaintiff in this case should be amended by inserting an allegation to that effect. *Held* that the amendment could not be allowed. Such an amendment would entirely alter the points of contention between the parties. In suing in the form adopted by the plaintiffs, they doubtless intended to take the chance of getting a greater advantage than they would have obtained if they had sued merely as separated sons. They sought to liberate the property altogether from liability, on the ground that the debt was immoral, and that the estate could not, therefore, be bound by the decree at all. That being so, and the plaintiffs having omitted to allege partition, they could not now ask the Court to put their suit on a new footing. *NARAYANRAV DAMODAR v JAVHERAVALU*.

[I. L. R. 12 Bom. 431]

**17.—Specific Relief Act, s. 42—Civil Procedure Code, s. 53—Amendment of plaint—Suit to declare alienation by Hindu widow invalid—Death of widow pending appeal by plaintiff—Right of appellant to proceed with appeal—Plaint not to be amended by claim for possession.** The proviso to s. 42 of the Specific Relief Act that "no Court shall pass a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so," refers to the position of the plaintiff at the date of suit. Where a suit was brought for a declaration that certain alienations of land made by a Hindu widow to the defendants were not binding on the plaintiff, her reversionary heir, and pending appeal by the plaintiff, the widow died. *Held*, (1) that the plaintiff was entitled to proceed with his appeal; (2) that the plaintiff could not be permitted to amend his plaint and claim possession. *GOVINDA v. PERUMDEVI*.

[I. L. R. 12 Mad. 136]

**18.—Civil Procedure Code, s. 53—Madras Rent Recovery Act (Madras Act VIII of 1865)—Suit in Civil Court to enforce exchange of patta and muchalka—Declaratory decree.** A suit in the Court of a District Munsif to enforce acceptance of a patta and execution of a muchalka by defen-

**PLAINT—continued.****(3) AMENDMENT OF PLAINT—concluded.**

dant in respect of a holding in a village to which the plaintiff claimed title, was dismissed as not being maintainable. *Held*, that the suit should not have been dismissed, but the plaint should have been amended by the addition of a prayer for a declaration of the plaintiff's title and that the Court then would have had jurisdiction to grant by way of consequential relief the relief originally sought. *NARASIMMA v. SURYANARAYANA*.

[I. L. R. 12 Mad. 481]

**19.—Objection to plaint not taken—Ground for dismissal of suit—Plaint for declaratory decree without consequential relief.** A suit should not be dismissed by an Appellate Court on the ground of its being one asking merely for a declaratory decree and, no consequential relief, where that objection has never been taken by the defendants to the suit. The plaintiffs should in such a case be allowed an opportunity of amending their plaint. *LIMBA BIN KRISHNA v RAMA BIN PIMPLU*.

[I. L. R. 13 Bom. 548]

**(4) RETURN OF PLAINT.**

**20—Civil Procedure Code, s. 57—Plaint presented in a wrong Court.** In all cases where no option as to the selection of the Court is allowed by law to the plaintiff, a plaint presented in a wrong Court must be returned for presentation in the proper Court. *MUTTIRULANDI v. KOTTYAN*.

[I. L. R. 10 Mad 211]

**21.—Civil Procedure Code, s. 57—Return of plaint when Court has no jurisdiction.** An Appellate Court is not bound to return the plaint under all circumstances where defect of jurisdiction appears. *YACOOB v. MOHAN SINGH*

[I. L. R. 11 Mad. 482]

**(5) REJECTION OF PLAINT.**

**22—Plea of misjoinder, when sustainable—Suit against several persons claiming under different titles, Effect of—Civil Procedure Code, ss. 31 and 53.** A, as auction-purchaser at a revenue sale, brought a suit against a number of persons for possession of some *chur* land. The defendants claimed portions of the land under different titles and pleaded misjoinder. The Court upon the Amin's report gave A the option to amend the plaint by withdrawing the suit against any particular sets of defendants. A elected to go to trial on the suit as brought, and it was dismissed. *Held*, that, having regard to the provisions of ss. 31 and 53 of the Civil Procedure Code, the proper order of the Court should have been to reject the plaint and not dismiss the suit on the ground

## PLAINT—continued.

## (5) REJECTION OF PLAINT—concluded.

misjoinder. SUDHENDU MOHUN ROY v. DURGA DASI.

[I. L. R. 14 Calo. 435]

23—*Civil Procedure Code*, 1882, ss 50 and 53, sub-section (d)—*Amendment of plaint—Rejection of plaint.* After an examination of the plaintiff's pleader by the Court to discover whether there were grounds, which did not appear, for an amendment, a suit was dismissed on the defects of the plaint, which, charging fraud, did not set forth a good cause of action in regard to the above: *Held*, that dismissal was not the proper mode of disposal of the suit; but the plaint should have been rejected, a course which would have enabled the plaintiff, if he found himself at a future time in a position to make averments giving relevancy to an action to present a fresh plaint. GUNGA NARAIN GUPTA v. TILUCKRAM CHOWDHRY.

[I. L. R. 15 Calo. 533]

[I. L. R. 15 I. A. 119]

24—*Suit brought different from suit sanctioned—Religious Endowments Act XX of 1863, s 18.* A and B, being worshippers at a Hindu temple, obtained sanction under s. 18 of the Religious Endowments Act to sue for the removal of the managers of the temple on the ground of breach of trust and for damages. A and B sued to remove the managers, but claimed no damages in their plaint. *Held*, that, as the suit instituted differed from the one for which sanction was given, the plaint was properly rejected. SRINIVASA v. VENKATA.

[I. L. R. 11 Mad 148]

25.—*Subordinate Judge's power to make valuation—Court Res Act (VII of 1870, s. 7 cl. iv (f)—Civil Procedure Code (Act XIV of 1882), s. 51, cls. (a) and (b).* The plaintiffs brought a suit for an account, and approximately valued their claim at Rs. 16 15-0. The Subordinate Judge was of opinion that the claim was for recovery of money, and should have been valued at Rs. 1,000. He therefore called on the plaintiffs to make up the stamp to that required on this valuation, and the plaintiffs refusing he dismissed their suit under s. 54 (b) of the Civil Procedure Code (Act XIV of 1882). *Held*, that in any case the Subordinate Judge was wrong. If the suit was really one for an account the plaintiffs were entitled to value the relief they sought approximately, as they had done; if it were not one for an account but for recovery of money, still the Subordinate Judge had no power himself to value the relief sought, but should have called on the plaintiffs to value the relief they sought, and then if he had thought such relief was undervalued, he could have applied s 51 (a) of the Code of Civil Procedure (Act XIV of 1882), and rejected the suit. BALANTRAO v. BHIMASHANKAR.

[I. L. R. 13 Bom. 517]

## PLEADER

1. Appointment and appearance ..	781
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See BARRISTER.

[I. L. R. 9 All 180]

—, Inquiry into professional conduct of.

See REFERENCE TO HIGH COURT—CIVIL CASES.

[I. L. R. 12 Bom. 78]

## (1) APPOINTMENT AND APPEARANCE.

1 *Rule of Court of 22nd May 1883—Practice—Vakalatnama—Pleader handing over his brief to another—Civil Procedure Code, ss 36, 37, 39, 635.* The Rule of Court, dated the 22nd May 1883, and authorising legal practitioners in certain cases to appoint other legal practitioners to hold their briefs and appear in their place was passed to facilitate the work of the Court and for the convenience of the pleaders practising before it, and was fully within the powers conferred upon the High Court by s. 635 of the Civil Procedure Code. MATADIN v. GANGA BAT.

[I. L. R. 9 All. 613]

2 —*Practice—Second Appeal—Vakeel, Right of, to be heard without certified grounds of appeal or without any order admitting the appeal—Rules and Orders of Court (Appellate Side), 86 and 162.* A vakeel will not be heard on behalf of an appellant on second appeal, when neither duly certified ground or grounds of appeal have been filed, nor the appeal been admitted by order of Court under Rules 86 and 162 of Court. *Kishen Chunder Roy v. Hurish Chunder Bose*, 3 W. R. 216, followed. OLIULLAH v. BACHU LAL KHOTTA.

[I. L. R. 15 Calo. 706]

3.—*Pleaders and their clients, their rights and obligations inter se—Bom. Reg. II of 1827—Confidential communications made in the course of professional employment.* The rules prevailing in England with regard to the rights and obligations of solicitors in relation to their clients apply, with slight difference, to pleaders practising in India. The principles deducible from the English cases are as follows—1 A party to a judicial proceeding is entitled to such professional assistance as he thinks will best suit him. 2 A pleader is free to place his service at the disposal of any such party upon such terms as he may think most advantageous to himself consistently with the honour of his profession and the due administration of justice. 3. A pleader who receives any confidential information from his client in the course of his professional employment is not at liberty to carry that information into the

**PLEADER**—*continued*.**(1) APPOINTMENT AND APPEARANCE**—*continued*

service of his antagonist, or any one who in that very litigation or in any subsequent litigation may be opposed to the client furnishing the information. 4. Under Reg II of 1827, pleaders receive certain fees, in return for which they are not at liberty to act against those retaining them, whether they are retained by one client singly or by two or more clients jointly. A pleader who has acted for several persons will not be restrained from afterwards acting for some of them only as against the others, unless it be shown that he is possessed of knowledge arising from his previous employment which might be prejudicial to his other clients. As a general rule, the Court will require a very strong case to be made out before it will interfere by way of injunction, restraining a pleader from appearing for a client, and there must be clear affidavits made to show that special knowledge was acquired by the pleader during his employment by the former client. In case of his possessing such knowledge, he will not be allowed to throw up the conduct of the case and transfer his services. He will never be allowed to discharge himself from the conduct of the case if the case raises even a probability of prejudice to his former employers. *K*, a pleader, was at first retained by *P* and *N* jointly to defend a suit on their behalf. At a later stage of the case, *P* and *N* quarrelled. Thereupon *K* applied to the Court for leave to withdraw from the conduct of the case, on the ground that he could not attend to the interests of both *P* and *N*. The Court allowed him to withdraw. A few days afterwards *K* appeared in Court, and filed a *vakalatnama*, or warrant of attorney, signed by *N*, and claimed to conduct the case on behalf of *N* alone. *P* objected to this, but the Court disallowed this objection. Thereupon, *P* made an application to the High Court for an injunction restraining *K* from acting on behalf of *N* alone. *Held* that as it was not made out that *K* was in possession of any confidential information either from *P*, or from *P* and *N* together, such as would give him an unfair advantage when acting on behalf of *N*, the Court would not interfere or restrain *K* from serving *N* alone. *Held* further, that a pleader in such circumstances should take the direction of the Court as to which of two or more clients he is to serve, and as to the disposal of the fees he has received from them jointly. *PAILONJI MERWANJI v. KALLABHAI LALLUBHAI*.

[I. L. R. 12 Bom. 85]

REG. v. BEZONJI NOWROJI

[I. L. R. 12 Bom. 91 note]

4.—*Practice of Privy Council—Admission to practice in the Privy Council—Rules of 31st March 1871—Vakil of High Court*]. The words of ss 2 and 3 of the Rules of 31st March 1871 are such that classes of persons to be admitted to practise in the Privy Council must be either Solicitors or

**PLEADERS**—*continued***(1) APPOINTMENT AND APPEARANCE**—*continued*.

others practising in London, or Solicitors admitted by the High Court in India or in the Colonies respectively, and have not left an undefined class admissible at the discretion of the Judicial Committee. IN THE MATTER OF THE PETITION OF TWIDALE.

[1 L. R. 16 Cal. 686]

[L. R. 16 I. A. 163]

**(2) AUTHORITY TO BIND CLIENT.**

5.—*Consent—Dekkan Agriculturists Relief Act s. 3 cl 3—Consent to proceeding under Act, withdrawal of*]. If a party or his pleader gives consent under cl 3 of s 3 of the Dekkan Agriculturists Relief Act (XVII of 1879) to the disposal of a suit according to the provisions of Chapter II of the Act, the consent so given cannot be withdrawn after the hearing has begun and the suit has proceeded on the footing of such consent. *RUPCHAND KHEMCHAND v. BALVANT NARAYAN*

[I. L. R. 11 Bom. 591]

**(3) REMUNERATION.**

6.—*Transfer of Property Act, ss. 67, 83—Suit by mortgagee instituted before payment into Court—Right of mortgagee to a decree and to full costs.*] In a suit to recover money due on a mortgage, defendant paid the money into Court and a notice was issued to the mortgagee under s. 83 of the Transfer of Property Act. The mortgagee filed his suit before notice was served on him, and it was not proved that the mortgagee was aware of the fact of the payment into Court when he filed his suit. *Held*, that the plaintiff was not debarred by s. 67 of the Transfer of Property Act from obtaining a decree, and that under the rules of Court the pleader's fee was properly assessed as in a contested suit and not as in a case where there is a confession of judgment. *SITARAMAYYA v. VENKATRAMANNA*.

[I. L. R. 11 Mad. 371]

7.—*Costs between pleader and client—Act I of 1846, s. 6—Quantum meruit*]. In a suit brought by *R* in form *pauperis* against the defendant he had engaged the services of the plaintiff as his pleader, but no express agreement for the remuneration of the plaintiff was made. The suit was numbered, and, after the evidence on either side had been gone into, the trying Court made an order dispaupering *R*. On an application by *R*, who offered to pay the Court-fees, the High Court under its extraordinary jurisdiction made an order directing the lower Court to receive the fees and to proceed with the suit. *R* paid the fees, but the suit was compromised. The plaintiff did not attend to the suit after remand. The plaintiff having sued the defendant for his fees, the Subordinate Judge was of opinion that one-fourth fee under s. 6 of Act I of 1846 should be awarded to the plaintiff. On reference to the

**PLEADER—concluded.****(3) REMUNERATION—concluded.**

High Court : *Held*, that the plaintiff was entitled to a *quantum meruit*, which was to be determined with reference to all the circumstances of the case, there being no express agreement in the case *KESHAV GOVIND JOSHI v. JAMSETJI CURSETJI*.

[I. L. R. 12 Bom. 557]

**(4) PRIVILEGES OF PLEADERS.**

8.—*Pleaders' taids—Mukhtear—Legal Practitioners Act (XVIII of 1879)—Ministerial duties of pleaders, Delegation of, to their bonâ fide clerks.* A Judge has a right to control his Court premises in such way as is most convenient to the public and to persons working there, but does not act rightly in passing any general order by which he excludes as a general body from his Court any portion of the community acting in an orderly manner. The pleaders of this country are a body of men who, from the earliest times have combined in their own persons the duties performed in England by barristers and attorneys, and in acting in this second and ministerial capacity are, on their own responsibility, entitled to work through any number of clerks or *taids* properly selected and paid by them; and no Court other than a High Court as established by Charter has the right to make rules defining the ministerial duties to be performed by them as distinct from the duties of their *bonâ fide* taids or clerks, nor does the Legal Practitioners Act of 1879 control in any way the privileges which have always existed in them or restrict their powers, the Act being one passed to bring mukhtears under the control of the Court. *IN THE MATTER OF THE PETITION OF KHODA BUX KHAN.*

[I. L. R. 15 Calc 638]

**(5) PURCHASE BY PLEADER AT SALE IN EXECUTION OF DECREE.**

9.—*Civil Procedure Code 1882, s. 292—Pleaders not officers of the Court within the meaning of that section* Pleaders of parties to a suit are not debarred by s. 292 of the Code of Civil Procedure from purchasing property sold in execution of the decree. *ALAGIRISAMI v. RAMANATHAN.*

[I. L. R. 10 Mad. 111]

**PLEADERSHIP EXAMINATION.**

*See* BOARD OF EXAMINERS.

[I. L. R. 9 All. 611]

**PLEADINGS**

*See* DECREE—FORM OF DECREE—MORTGAGE.

[I. L. R. 9 All. 125]

**POLICE ACT (V OF 1861.)**

1.—s. 29.—*Power to make rules under Act V of 1861—District Superintendent of Police, Power of—A rule or regulation and a lawful order distinguished.* There is no express power given by

**POLICE ACT (V OF 1861)—concluded.**

Act V of 1861 to any officer save the Inspector-General of Police to make rules, therefore the violation of a general rule alleged to have been made by a District Superintendent of Police to the effect that constables are to be within the lines at a particular time or a roll-call is not punishable under s. 29 of the Act. *Semble*—The violation of a special order made by a District Superintendent of Police requiring the presence of an officer or of certain officers within the Police lines and issued expressly to him or each of them would come within s. 29 of the Act as being not "a rule or regulation," but a "lawful order" made by a competent authority and relating to the duties of the officer or officers. *IN THE MATTER OF THE PETITION OF ABDUL HOSSEIN. QUEEN-EMPRESS v. ABDUL HOSSEIN.*

[I. L. R. 15 Calc. 194]

2.—s. 29 and s. 8.—*Police-officer—Suspension—Breach of order.* A police-constable was suspended and ordered to remain in the lines during suspension. Despite the order he absented himself therefrom without leave. He was convicted under s. 29 of Act V of 1861 : *Held*, s. 29 of Act V of 1861 contemplates that the person to be charged with an offence under it must have been, at the time of his doing the act in respect of which the charge is preferred, a police constable within the meaning of that Act. When a police-officer is suspended, he ceases to be a police-officer; the conviction was therefore wrong. *Queen v. Dinonath Gangooly.* 8 B L R. Ap. 58, followed *QUEEN-EMPRESS v. DURGA.*

[I. L. R. 10 All. 459]

**POLICE DIARIES.**

*See* EVIDENCE—CRIMINAL CASES—STATEMENTS TO POLICE-OFFICERS.

[I. L. R. 16 Calc 610, 612 note]

**POLICE INQUIRY**

*See* DETENTION OF ACCUSED BY POLICE.

[I. L. R. 11 Mad. 98]

—*Criminal Procedure Code, 1882, ss. 155, 202, and 203—Magistrate's power to direct a local investigation by the police.* S 155 of the Code of Criminal Procedure (Act X of 1882) deals only with the powers of police-officers. It confers no power or authority on Magistrates to direct a local investigation by the police, or call for a police report. *IN RE JANKIDAS GURU SITARAM.*

[I. L. R. 12 Bom. 161]

**POLICE-OFFICER, OBSTRUCTION TO.**

*See* WRONGFUL RESTRAINT.

[I. L. R. 12 Bom. 377]

**POLICY.**

*See* INSURANCE—MARINE INSURANCE.

[I. L. R. 16 Calc. 564]

## POSSESSION.

Col

1. Evidence of title .. 789  
 2. Adverse possession . 789

See MAMLATDAR'S COURTS ACT, s. 4.

[I. L. R. 12 Bom. 419]

See REGISTRATION ACT 1877, s. 50

[I. L. R. 12 Bom. 569]

## —, Evidence of

See EVIDENCE—CIVIL CASES—MAPS.

[I. L. R. 15 Calc. 353]

## (1) EVIDENCE OF TITLE.

1—*Onus of proof—Person out of possession.*]

Possession is evidence of title, and is primarily exclusive. It is for him who impugns this exclusive title to show that the possession arose in some way which has preserved his own right. In every case the person who has been out of possession for more than twelve years must make out some *prima-facie* title, and some agreement or acknowledgment of that title, such that possession is deprived of its ordinary effect though being held on a joint right, or a subordinate right. *RAMCHANDRA NARAYAN v. NARAYAN MAHADEV.*

[I. L. R. 11 Bom. 216]

See *TATYA v. ANAJI.*

[I. L. R. 11 Bom. 220 note]

and *VITHOBA v. NARAYAN.*

[I. L. R. 11 Bom. 221 note]

## (2) ADVERSE POSSESSION

2.—*Limitation—Mortgagee—Purchase by mortgagee of share in mortgaged property* ] A mortgagee of an entire undivided estate does not, by a subsequent purchase of a certain share therein from one not in actual possession at the time of conveyance, thereby change his character from a mortgagee to that of an owner, but his possession continues as a mortgagee. *B* held an entire undivided estate under a mortgage (usufructuary) from *C* since 1273 (1866), and as such mortgagee in 1282 (1875) *B* purchased a share therein from *D*, who had not been in actual possession since the date of the mortgage. On the 20th January 1885, *B* brought a suit to recover possession of his purchased share. *Held* that the subsequent purchase did not change the character of *B* from that of a mortgagee to that of an owner, and that his suit was barred by 12 years' limitation. *NUNDO LAL ADDY v. JODU NATH HALDAR*

[I. L. R. 14 Calc. 674]

2—*Denial by mortgagee in possession of mortgagor's right to redeem.* ] Denial by a mortgagee in possession of the mortgagor's right to redeem is not sufficient to convert such possession into adverse possession. *MUSSAD v. THE COLLECTOR OF MALABAR.*

[I. L. R. 10 Mad 189]

## POSSESSION—continued.

## (2) ADVERSE POSSESSION—continued.

4—*Joint family—Possession by one member of family—Neglect by plaintiff to take possession of his share notwithstanding request that he would do so—Limitation* ] The plaintiff and the defendant were brothers and members of an undivided family. The plaintiff was in Government service, and had been for a long time absent from his native place on duty, the family property remaining under the management of the defendant. In 1863 the defendant wrote to the plaintiff, requesting him to return and manage his share of the property, or to employ some one to manage it for him. Nothing, however, was done by the plaintiff in the matter, and the defendant continued in possession. In 1882 the plaintiff sued the defendant for partition. The defendant pleaded that the suit was barred, contending that he had been in adverse possession from the date of the letter. The Court of First Instance awarded the plaintiff's claim. The defendant appealed, and the lower Appellate Court reversed the lower Court's decree holding that the suit was barred. On appeal by the plaintiff to the High Court. *Held* that the suit was not barred. The above-mentioned letter of the defendant showed that, up to the date at which it was written, the defendant had not been in possession of the property "as his own property to the exclusion of the plaintiff," and the mere circumstance that, subsequently to the date of the letter, the plaintiff had not participated in the profits, would not, in the absence of other evidence, justify the inference that the plaintiff was then excluded. *DINKAR SADASHIV v. BHIKAJI SADASHIV.*

[I. L. R. 11 Bom. 365]

5—*Limitation—Co-sharer—Possession of one co-sharer when adverse—Mortgage—Mortgage by three co-sharers—Redemption by one of several mortgagors—Right of the other mortgagors to sue for redemption—Period of limitation for such suit* ] In 1847 the property in dispute was mortgaged by three co-sharers, *D*, *A*, and *R*. In 1859 *R* alone redeemed the property, and mortgaged it again to a third person. In 1882 the heirs of *D* and *A* brought a suit to redeem the whole of the property, or their portions of it. The defence to the suit was that it was barred by limitation being brought more than twelve years after *R* had redeemed the property, and *R*'s possession subsequently to such redemption having been adverse to the plaintiffs and their predecessors in title. *Held* that the suit was not barred by limitation. When *R* redeemed the property, he held it, as regards his co-sharers' interests in it, as a lienor, and, as such, his possession was not adverse to them. It did not contradict, but rather implied and preserved their ultimate proprietary right. In the case of a co-sharer holding after redemption, limitation is computed only from the date when the possession becomes adverse by the assertion of an exclusive title and submission to the right thus set up, in analogy to the provision

## POSSESSION—continued.

## (2) ADVERSE POSSESSION—continued.

which has an excluded sharer generally after the lapse of twelve years from the time when he becomes aware of his exclusion. As long as possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession be referred to that right, rather than to a right which contradicts the ownership. **RAMCHANDRA YASHVANT SIRPOTDAR v. SADASHIV ABAJI SIRPOTDAR.**

[I. L. R. 11 Bom. 422]

6.—*Mortgage—Suit for redemption or recovery of property on payment of a charge—Possession after redemption by one of several mortgagors—Adverse possession—Limitation.* The plaintiff sought to recover his father's share in two portions of family property, one of which had been mortgaged by the plaintiff's father and the father of the defendant No. 1 jointly, the other had been mortgaged by the plaintiff's father jointly with the father of defendant No. 1 and the husband of defendant No. 2. The first was redeemed by the father of defendant No. 1 alone in 1868; the second was redeemed by the defendant No. 1 more than twelve years before the suit. The parties were Mahomedans, and the plaintiff had a brother and three sisters, only one of whom (defendant No. 2), was the party to the suit. Defendant No. 1 contended that the suit was defective for want of parties, and that it was time-barred. *Held*, that the plaintiff's brothers and sisters ought to have been joined as co-plaintiffs, the defendant No. 1's possession after redemption not being adverse to them. If it was adverse at all, it was adverse to the whole of the plaintiff's branch of the family, so as to bar the right of the group altogether. But that was no reason why the co-owners should not be admitted as co-plaintiffs, and the suit go on upon its merits. **BHAUDIN v. ISMAIL.**

[I. L. R. 11 Bom. 425]

7.—*Manager of a Hindu temple—Shevaks or servants of an idol—Rights of manager and servants inter se.* The plaintiff was the hereditary manager of the temple of Shri Ranchord Raiji at Dakor. The defendants were the *shevaks* or ministers of the deity. The plaintiff sued to oust the defendants from a certain piece of land attached to the temple alleging that the defendants had erected shops on the land and appropriated the rents to their own use, although it had been already decided in a suit between the parties that the land was always to be kept open and unoccupied for the use of the temple. The *shevaks* contended that they had been in exclusive and uninterrupted possession of the land in dispute for more than twelve years, and that by reason of such user they had acquired a *quasi* proprietary title at least as against the manager of the temple. They therefore pleaded that the suit was barred by limitation. *Held*, that the defendants had not by occupation and user

## POSSESSION—concluded.

## (2) ADVERSE POSSESSION—concluded.

acquired any title as against the plaintiff who was the manager of the temple estate. They had come into occupation originally as servants and representatives of the deity, and during their occupation they could not by a wish change the nature of their possession. Both they and the plaintiff held the land for the same deity and their rights could not be adverse to each other so as to give rise to a title by prescription. The only question then was as to which of them was the proper representative of the deity for the particular purpose of this suit, and that question had already been decided in a former suit in favour of the plaintiff. **MULJI BHULABHAI v. MANOHAR GANESH.**

[I. L. R. 12 Bom. 322]

## POSSESSION, ORDER OF CRIMINAL COURT AS TO.

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## (1) CASES WHICH MAGISTRATE MAY DECIDE AS TO POSSESSION

1.—*Criminal Procedure Code (Act X of 1882), s. 145—Dispute as to right to collect rents—Tangible immovable property.* A dispute as to the right to collect rents is a dispute concerning tangible immovable property within the meaning of s. 145 of the Criminal Procedure Code. **Harakh Narain Singh v. Luchmi Bai Roy**, 5 O. L. R. 287, and **Sutherland v. Crowdy**, 18 W. R. Cr. 11; 9 B. L. R. 229, referred to; **Pramatha Bhusana Deb Roy v. Doorga Churn Bhattacharya**, 1 L. R. 11 Calc. 413, followed. Where a dispute arose as to the right to collect the rents of certain land the ownership of which was claimed by both A and B, and the tenants who had been paying rent to A refused to pay rent to A and attorned to B. *Held* that the conduct of the tenants in attorning to B was not an assertion of possession adverse to A such as to put an end to the relation of landlord and tenant between them and A and to A's right to collect the rents. Such attornment therefore did not deprive A of his right to have recourse to s. 145 in case of a likelihood of a breach of the peace, so as to have his possession of the right to collect the rents maintained pending proceedings in a civil suit. **SARBANANDA BASU MOZUMDAR v. PRAN SANKAR ROY CHOWDHURI.**

[I. L. R. 15 Calc. 527]

2.—*Criminal Procedure Code, s. 145—Dispute as to right to collect rents* A dispute between two persons as to the right to collect rent from the tenants of an estate is cognizable under s. 145 of the Code of Criminal Procedure. **RAMASAMI v. DANAKOTI AMMAL.**

[I. L. R. 12 Mad. 88]



# POSSESSION, ORDER OF CRIMINAL COURT AS TO—continued

## (1) CASES WHICH MAGISTRATE MAY DECIDE AS TO POSSESSION—continued.

3.—*Criminal Procedure Code, 1882, s. 145—Dispute as right to collect rents—Tangible immovable property.* A dispute as to the right to collect rents is a dispute concerning tangible immovable property within the meaning of s. 145 of the Criminal Procedure Code, and the operation of that section cannot be limited by any rule which would depend upon the area of the property in dispute. Where, in such a dispute which related to two pergunnahs comprising more than three hundred distinct villages, it was admitted by the petitioner that the opposite party had been in possession by receipt of rent from the tenants up to a period some three months anterior to the institution of the proceeding, but she alleged that she had succeeded in inducing the tenants to attorn to her by payment of rent to the officers appointed by her since such period; and where the Deputy Commissioner, after recording a certain amount of evidence, refused to examine any more witnesses on the ground that the enquiry would extend to an inordinate length and be extremely expensive and passed an order under the section. *Held*, that even though it might be established that the Deputy Commissioner's action in excluding evidence was illegal, it did not follow, having regard to the circumstances of the case, that the High Court would be justified in exercising its revisional powers: *Held*, further, that a payment of rent for a short time to the petitioner, even if proved, would not amount to dispossession of the opposite party. *Sarbananda Basu Mozumdar v. Pran Sanhar Roy Chowdhuri*, I L R 15 Calc. 527, followed. *ABHAYESSARI DEBI v. SHIDHESARI DEBI*.

[I. L. R. 16 Calc. 513]

## (2) DECISION OF MAGISTRATE AS TO POSSESSION.

4.—*Criminal Procedure Code (Act X of 1882), s. 145—Possession—Title—Symbolical possession.* A Magistrate, trying a case under s. 145 of the Criminal Procedure Code, in determining the question of possession, took into consideration the question of title: *Held*, that he had a right to discuss the question of title, if in his opinion it was material upon the question of possession, and that the mere fact that he had considered and discussed the question of title, would not invalidate his decision on the point of possession, provided that there was evidence before him as to who was in possession. *Semble*—In the absence of any other evidence of possession, a Magistrate would be justified in finding possession to be with a person to whom symbolical possession has been shown to have been given in execution of a decree, although possibly slight evidence would be sufficient to rebut such evidence of possession. *RAJA BABU v. MUDDUN MOHUN LALL*.

[I. L. R. 14 Calc. 169]

# POSSESSION, ORDER OF CRIMINAL COURT AS TO—continued.

## (2) DECISION OF MAGISTRATE AS TO POSSESSION—continued.

5.—*Criminal Procedure Code (Act X of 1882), s. 145—Order passed under s. 146 on proceedings taken under s. 145, Criminal Procedure Code—Power of Court on revision.* Where a Magistrate has passed an order under s. 145 of the Criminal Procedure Code, whereas the proper order in the case should have been one under s. 146, the High Court on revision will make the order which the lower Court ought to have made. *Raja Babu v. Muddun Mohun Lall*, I. L. R. 14 Calc. 169, explained. *REID v. RICHARDSON*.

[I. L. R. 14 Calc. 361]

6.—*Criminal Procedure Code (Act X of 1882), s. 145—Joint hearing of the case of several claimants—Number of plots, Dispute as to—Practice.* A Magistrate, proceeding under s. 145 of the Criminal Procedure Code, in a case in which one party (thirty-nine in number) claimed to be the tenants of 708 bighas of land belonging to one T II, and the members of the other party (seventeen in number) claimed to hold the same land in separate parcels as their *maurasi jote*, tried the question of possession as between the two parties in one case, notwithstanding the protest of the *maurasi* claimants to this mode of procedure, and decided that possession was with the party of thirty-nine, directing that they as a body should remain in possession until ousted by the order of a Civil Court. *Held*, that the course pursued by the magistrate at the hearing was prejudicial to the case of the *maurasi* claimants; and that the form of his order was open to the objection that it would render it necessary for the party out of possession to make all the persons declared to be in possession defendants in any civil suits brought to recover possession of the land. *Azim Mollah v. Satoo Poramanick*, 10 C L R 523, distinguished. *KUTUHUL SINGH v. UMA SINGH*.

[I. L. R. 15 Calc. 31]

7.—*Criminal Procedure Code (Act X of 1882), s. 145—Possession, Inquiry into—Time at which Magistrate has to determine who was in possession—Undisturbed possession immediately before dispute.* In an enquiry under s. 145 of the Criminal Procedure Code, where the property in dispute was forest land, the right to possession of which was exercised by cutting and removing timber from time to time, the magistrate found that the men of the first party had been driven away by those of the second, and had been unable to enter the forest and remove the timber alleged to have been cut by them; that this happened before the time of the initial proceedings, and continued to the date of the hearing; and that the men of the second party had been able to bring out of the forest the timber which had been cut. Upon these findings he came to the conclusion that the possession of the second party had been

**POSSESSION, ORDER OF CRIMINAL COURT AS TO—*continued.***

**(2) DECISION OF MAGISTRATE AS TO POSSESSION—*concluded.***

established, and made an order under the section in their favour. *Held*, that having regard to the nature of the property in dispute, these facts could not constitute legal possession of the second party at the time the proceedings were instituted. *Held*, further, that in like cases, having regard to the nature of the property in dispute, and the mode in which possession may be exercised over it, in order to find which party was in possession when the proceedings were instituted, it is necessary to inquire which party was in undisturbed possession of the land in dispute by felling timber and removing the same without objection on the occasion immediately preceding the one on which the dispute arose, and whichever party be found to have been in possession on that occasion should be presumed to have possession at the time when the proceedings were commenced. **JAGAT KISHORE ACHARJYA CHOWDHURI v. KHAJAH ASHANULLAH KHAN BAHADUR.**

[I. L. R. 16 Calc. 281]

**(3) DISPUTES AS TO RIGHT OF WAY, WATER, &c.**

8.—*Criminal Procedure Code* 1882, s. 147—*Reasonable likelihood of a breach of the peace—Police report*.] The lessee of certain grass land in a village disputed the right of the villagers to graze their cattle on his land during the rainy season. On 26th August 1886, he prosecuted twenty-one villagers before the Second Class Magistrate for having unlawfully brought their cattle on his land, and committed mischief on the 5th September 1886, and pending this prosecution, the villagers assembled on the land in question, and there was a riot. The offenders were convicted and punished. On appeal, the Sub-divisional Magistrate on the 11th October 1886, upheld the conviction. On the same day, finding from the police report that there existed a dispute between the lessee and the villagers as to the right of the latter to graze cattle on the grass land, and that the dispute was likely to lead to a breach of the peace, the Sub-divisional Magistrate thought it necessary to hold an inquiry into the matter, under s. 147 of the Criminal Procedure Code (Act X of 1882). He, however, postponed the inquiry until the decision of the Second Class Magistrate in the mischief case. In that case the Magistrate found that the villagers had no right to graze cattle on the land in question, and that the lessee was in exclusive possession of it. He, therefore, held that the villagers had unlawfully entered upon the land; but as the damage done was inappreciable, he acquitted the accused on the 19th October 1886. The Sub-divisional Magistrate being of opinion that after this decision a breach of the peace was probable, held the enquiry under s. 147 of the Criminal Procedure Code. He found that the villagers had the right of grazing cattle on the land in ques-

**POSSESSION, ORDER OF CRIMINAL COURT AS TO—*concluded.***

**(3) DISPUTES AS TO RIGHT OF WAY, WATER, &c.—*concluded.***

tion during the autumn, and that they had exercised this right in the last preceding season. He, therefore, made an order allowing the right of grazing to the villagers. On application by the lessee to the High Court under s. 435 of the Criminal Procedure Code *Held*, that the order was illegal. Though the police report afforded some justification for entering upon an inquiry under s. 147, still after the rights of the parties had been judicially pronounced upon by the Second Class Magistrate in the sense that the villagers had no right of grazing cattle on the land in question, there was no reasonable ground for apprehending any further violence, and, therefore, no necessity for holding the inquiry under s. 147. **IN RE BALKRISHNA AMRIT PRADHAN**

[I. L. R. 11 Bom. 584]

9.—*Criminal Procedure Code*, s. 147—*Dispute concerning right to officiate in a mosque.*] Where a dispute likely to cause a breach of the peace is shewn to exist concerning the right to perform a religious ceremony in a mosque, the Magistrate may exercise the powers conferred by s. 147 of the Code of Criminal Procedure. **MUHAMMAD MUSALIAR v. KUNJI CHEK MUSALIAR.**

[I. L. R. 11 Mad. 323]

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[I. L. R. 16 Calc. 776]

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[I. L. R. 13 Bom 424]

*See* INSOLVENT ACT, s. 36.

[I. L. R. 11 Bom. 61]

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[I. L. R. 12 Bom 408]

**(1) CIVIL CASES.****(a) COMMISSIONER FOR TAKING ACCOUNTS**

1.—*Commissioner's report—Application to vary Time for—Extension of time—High Court Rules, Cap. VI, Rule 6* ] A party desiring to move to vary a report made by the Commissioner must not only file his exceptions to such report, but must also make his motion to vary it, within twenty days after the filing of the report; or, if the Judge or the Court have allowed him further time for such application, then within the further time so allowed. *NARROTTAM VIZBHOOKANDAS v. HARICHAND RAMCHAND.*

[I. L. R. 13 Bom 368]

**PRACTICE—continued.****(1) CIVIL CASES—continued.****(b) COUNSEL.**

2.—*Hearing Counsel—Hearing of preliminary issue* ] Two Counsel for the same party may be heard in argument of a preliminary issue. *FAT-MABAI v AISHABAI,*

[I. L. R. 12 Bom. 454]

**(c) FUND IN COURT.**

3.—*Costs—Attorney's lien—Lien—Attaching creditor—Fund in Court attached.* ] A sum of money had been paid into Court as admittedly due to the plaintiff in a certain suit, the plaintiff not having satisfied in full his attorney's taxed bill of costs, the attorney applied for payment out of the fund in Court; previously to this application the fund had been attached by a third party. *Held* that the attorney was entitled to enforce his lien as against the attaching creditor for all costs incurred up to the date of attachment, that the attaching creditor was then entitled to be satisfied before the attorney could claim payment out of the balance in Court of any sum remaining due to him on account of his costs. *SUPRAMANYAN SETTY v HURRY FROO MUG.*

[I. L. R. 14 Calc. 374]

**(d) INSPECTION AND PRODUCTION OF DOCUMENTS.**

4.—*Discovery—Civil Procedure Code 1882, ss 131, 134, and 136* ] If a notice under s. 131 of the Civil Procedure Code be not answered as provided by s. 132, the party seeking the inspection of documents may apply for an order under s. 133, and his application must be supported by an affidavit. The Court has no jurisdiction to pass an order under s. 136, unless the provisions of s. 134 are strictly complied with. *DHAPI v. RAM PERSHAD.*

[I. L. R. 14 Calc. 768]

**(e) INTERROGATORIES.**

5.—*Refusal to answer—Particulars of damage—Civil Procedure Code (Act XIV of 1882), ss. 125, 127.* ] The plaintiff alleged that the defendant Bank improperly and without notice, and in violation of an agreement, sold some Government promissory notes, which had been deposited as security for certain loans, and claimed a specified sum as damages or in the alternative a decree for an account. The defendant Bank denied the alleged agreement, and asserted that the notes had been sold after due notice and on failure of the plaintiff to comply with the terms on which the loans were made. Interrogatories were administered for the examination of the plaintiff, and amongst them one in the following terms:—“State how your estimate of damages to the amount of Rs 1,30,000 mentioned in the eighth paragraph of the plaint is arrived at?” Upon the plaintiff declining to answer that interrogatory the defendant Bank applied on notice for an order under s. 127 of the Code of Civil Procedure requiring

## PRACTICE—continued.

## (1) CIVIL CASES—continued.

## (e) INTERROGATORIES—concluded.

him to answer it fully: *Held*, that the plaintiff was not bound to answer it. If, on the one hand, it was intended to elicit the principle on which the damages were estimated by the plaintiff, the defendant was not entitled to discovery on that point. If, on the other hand, it was sought to elicit an account of the transactions between the parties, it was unnecessary, as the transactions were within the knowledge of the defendant Bank; and if it were not, then the enquiry was premature, as the question whether there had been any wrongful act committed and whether the plaintiff was entitled to any damages should be first determined. *NECKRAM DOBAY v. BANK OF BENGAL.*

[I. L. R. 14 Calc. 703]

## (f) LEAVE TO SUE OR DEFEND.

6.—*Application to take plaint off the file after leave given—Summons to rescind leave given.* Where leave to bring a suit has been given to a plaintiff under s. 12 of the Letters Patent, and a defendant objects and asserts that the Court has no jurisdiction, he is not bound to wait until the case comes on for hearing, but may take out a Judge's summons calling on the plaintiff to show cause why the leave given should not be rescinded and the plaint taken off the file. *Ismail Hadjee Habbib v. Mahomed Hadjee Jossab*, 13 B. L. R. 91, referred to. *KESWJI DAMODAR JAIRAM v. LUCKMIDAS LADHA*

[I. L. R. 13 Bom. 404]

## (g) LETTERS OF ADMINISTRATION.

7.—*Power of attorney—Evidence Act (I of 1872), s. 85—Letters of administration. Application for.* On an application for letters of administration to the estate of a deceased, who was domiciled in Scotland, and to whose estate one P had been appointed executor *dativo quâ Father*, the application being made by one K, under a power of attorney granted by K, such power not having been executed and authenticated in the manner provided by s. 85 of the Evidence Act *Held* that the application must be refused. *IN THE GOODS OF PRIMROSE*

[I. L. R. 16 Calc. 776]

## (h) NEXT FRIEND.

8.—*Minor defendant, Application by next friend of, for transfer of when no guardian ad litem has been appointed—Civil Procedure Code (Act XIV of 1882), ss 410, 441, 443, 449* A suit was instituted in a Mofussil Court against two defendants, one of them being a minor. Before a guardian *ad litem* had been appointed for the minor defendant, an application was made to the High Court, to transfer the case from the Mofussil Court to the High Court in its ordinary original civil jurisdiction by the minor defendant through a

## PRACTICE—continued

## (1) CIVIL CASES—continued

## (h) NEXT FRIEND—concluded.

next friend. It was contended that the application was informal, and could not be granted, and that no such application could be made on behalf of the infant defendant until a guardian *ad litem* had been appointed, and then it should be made by him. *Held*, that the objection should not prevail, and that this application could be made through the next friend. *JOTENDRONAUTH MITTER v. RAJ KRISTO MITTER.*

[I. L. R. 16 Cal. 771]

## (i) OBJECTIONS.

9.—*Objection taken at hearing that application made to Court was not the application of which notice had been given to opposite party—Preliminary point* In a motion made by the defendants for rectification of a decree for specific performance, Counsel for the plaintiffs contended that the defendants were not entitled to ask for a rectification of the decree, inasmuch as their notice of motion did not intimate that the point would be raised: *Held*, that such an objection ought to be taken at once as a preliminary point. As it was not made until the argument of Counsel for the defendants was concluded, it should be taken that the form of the motion as made to the Court was acquiesced in. The objection was then too late. *KARIM MAHOMED v. RAJOOMA.*

[I. L. R. 12 Bom. 174]

## (j) PLEADER, APPEARANCE OF

10.—*Second appeal—Vakeel, Right of, to be heard without certified grounds of appeal or without any order admitting the appeal—Rules and Orders of Court (Appellate Side), 86 and 162.* A vakeel will not be heard on behalf of an appellant on second appeal, when neither duly certified ground or grounds of appeal have been filed, nor the appeal been admitted by order of Court under Rules 86 and 162 of Court. *Kishen Chunder Roy v. Hurish Chunder Bose*, 3 W. R. 216, followed. *QIYULLAH v. BACHU LAL KHOTTA.*

[I. L. R. 15 Calc. 706]

## (k) REMAND.

11.—*Remand on point raised as issue in lower Court.* A case ought not, as a rule, to be remanded upon a point which has been framed as an issue by the Court below and brought to the attention of the parties, and where they have failed at the trial to give any evidence upon it. *RAM PRASAD v. ABDUL KARIM.*

[I. L. R. 9 All 513]

## (l) SECURITY FOR COSTS.

12.—*Civil Procedure Code, s. 549.—Security for costs—Dismissal of appeal—Practice* The last paragraph of s. 549 of the Civil Procedure Code

**PRACTICE** *concluded*(1) CIVIL CASES—*concluded*(b) SECURITY FOR COSTS—*concluded*

seems to contemplate that, on failure to furnish security within the time fixed, an order for rejecting the appeal should be obtained from the Court that gave the order to furnish security. Upon the application of the respondent in a second appeal pending before the High Court, an order was passed requiring the appellant to furnish security for the costs of the appeal, and to lodge such security at any time before the hearing. This order purported to be made under s. 549 of the Civil Procedure Code, but neither the application nor the order stated the amount of the security required. At the hearing of the appeal, no security having been lodged, the respondent objected that, with reference to the terms of s. 549, the Court had no option but to dismiss the appeal: *Held* that the proper course was to have applied to the Judge, who passed the order for security, at any time before the case came on for hearing, for the rejection of the appeal, and that it was too late at the hearing to ask the Court to reject the appeal. **THAKUR DAS v. KISHORI LAL.**

[I. L. R. 9 All. 164]

## (2) CRIMINAL CASES.

*See* CRIMINAL PROCEDURE CODE 1882, s. 437.

[I. L. R. 9 All. 52]

*See* BAIL.

[I. L. R. 15 Calc. 455]

*See* RIGHT OF REPLY.

[I. L. R. 14 Calc. 245]

[I. L. R. 11 Mad. 339]

**PRE-EMPTION—**

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*See* EXECUTION OF DECREE—EXECUTION OF DECREE AFTER APPEAL OR REVIEW.

[I. L. R. 11 All. 346]

*See* CASES UNDER ONUS PROBANDI—PRE-EMPTION.

*See* RES JUDICATA—MATTERS IN ISSUE.

[I. L. R. 10 All. 123]

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*See* CUSTOM.

[I. L. R. 10 All. 585]

*See* EVIDENCE—CIVIL CASES—DECREES, JUDGMENTS AND PROCEEDINGS IN FORMER SUITS—DECREES AND PROCEEDINGS NOT INTER PARTES

[I. L. R. 10 All. 585]

W., D.

**PRE-EMPTION—continued**

## (1) RIGHT OF PRE-EMPTION.

1—*Wajib-ul-urz—Co-sharers—Effect of perfect partition—Purchase of equity of redemption by mortgagee in possession—Acquiescence—Equitable estoppel.*] The *wajib-ul-urz* of three villages which originally formed a single *mehal* gave a right of pre-emption to co-sharers in case of transfers of shares to strangers. Afterwards the shares in these villages were made the subject of a perfect partition and divided into separate *mehals*. Subsequently, by two deeds of sale executed on the 13th January 1884, and registered on the 17th January 1884, some of the original co-sharers sold to strangers their shares in all three villages. At the time of the sale the shares in two of the villages were in possession of the vendees under a possessory mortgage, the amount due upon which was set off against the purchase-money. The share in the third village was, at the time of the sale, in possession of another of the original co-sharers under a possessory mortgage. On the 17th January 1885, this last-mentioned co-sharer brought a suit against the vendors and the vendees to enforce his right of pre-emption under the *wajib-ul-urz* in respect of the shares sold in the three villages: *Held* that, notwithstanding the partition of the village into separate *mehals*, the existing *wajib-ul-urz* at the time of partition must be presumed to subsist and govern these separate *mehals* until it was shown that a new one had been made. *Gokal Singh v. Mannu Lal*, I. L. R. 7 All. 772, referred to. *Held* also, that the Court below was wrong in holding that the plaintiff, by reason of his having omitted in a suit previously brought against him for redemption of his mortgage, and dismissed for want of jurisdiction, to set up in defence any right of pre-emption or to express any desire to purchase, was equitably estopped by acquiescence in the sale from asserting his pre-emptive right. **SIAM SUNDAR v. AMANANT BEGAM**

[I. L. R. 9 All. 234]

2—*Co-sharers—Recorded co-sharers—Benami purchase of shares—Sale by co-sharer—Claim for pre-emption resisted by person claiming to be co-sharer by virtue of benami transaction—Equitable estoppel.*] A secret purchase *benami* of shares in a village does not constitute the purchaser a co-sharer for the purposes of pre-emption either under the Mahomedan law or under the provisions of a *wajib-ul-urz* so as enable him upon the strength of the interest so acquired to defeat an otherwise unquestionable pre-emptive right preferred by a duly recorded shareholder who had no notice direct or constructive of his title, and asserted immediately upon his purchase of a share, for the first time, in his true character. *Ramcoomar Koonoo v. Macqueen*, L. R. I. A. Sup Vol 19, referred to. **BENI SHANKAR SHELHAT v. MAHPAL BAHADUR SINGH.**

[I. L. R. 9 All. 480]

3.—*Wajib-ul-urz—Custom—Mahomedan Law—Immediate and confirmatory demands.*] The *wajib-*

## PRE-EMPTION—continued.

## (1) RIGHT OF PRE-EMPTION—continued.

*wajib-ul-urz* of a village gave a right of pre-emption "according to the usage of the country." In a suit for pre-emption, there was no evidence to show what, in fact, was the usage prevailing in the district in regard to pre-emption. There was no evidence that the plaintiff had satisfied the requirements of the Mahomedan law as to immediate and confirmatory demands, or that there was any custom which absolved him from compliance with those requirements, or that he was at any time willing to pay the actual contract price. *Held* that in the absence of evidence of any special custom different from or not co-extensive with the Mahomedan law of pre-emption, that law must be applied to the case and that, under the circumstances above stated, the suit failed and must be dismissed. *Fakir Rawot v. Emambakhsh*, B. L. R. Sup. Vol 35. *Choudhry Brij Lal v. Goor Sahai*, Agra F. B. 128, and *Jar Kuar v. Hira Lal*, 7 N.W. 1, referred to. *RAM PRASAD v. ABDUL KARIM*.

[I. L. R. 9 All. 513]

4.—*Wajib-ul-urz—Co-sharers*—"Ek jaddi." The *wajib-ul-urz* of a village gave a right of pre-emption, in cases of sale, to "brothers," and provided that, on refusal by a "brother," there should be a right of pre-emption in favour of co-sharers in the *thoke* who were related to the vendor by descent from a common ancestor ("hissadaran ek jaddi thoke"). It was also provided that in the event of any dispute arising as to price, it should be settled by arbitration, and that "if the co-sharers do not take at the amount fixed by the arbitrators," the co-sharer desiring to sell might make the transfer to a stranger: *Held* that co-sharers who were not of common descent from the vendor were entitled to pre-emption after own brothers and co-sharers *ek jaddi*, and to have preference over strangers. *Guneshee Lal v. Zaraut Ali*, 2 N. W. 343, followed. *SABIR ALI v. YAD RAM*.

[I. L. R. 9 All. 660]

5.—*Partition of village into separate mehals* [Cases where, after the division of a village area into separate *mehals* for which no new *wajib-ul-urz* is drawn up, the old *wajib-ul-urz* for the whole area has been held to apply generally to the new *mehals*, and such division has been held not to affect covenants existing between the co-sharers under such *wajib-ul-urz*, distinguished from cases where a new *wajib-ul-urz* has after the division been drawn up for each *mahal*. *Gokal Singh v. Mannu Lal*, I. L. R. 7 All. 772, and *Jar Ram v. Mahabir Rai*, I. L. R. 7 All. 720, referred to. *KUAR DAT PARSAD SINGH v. NAHAR SINGH*

[I. L. R. 11 All. 257]

6.—*Wajib-ul-urz—Pre-emptor out of possession of his share—His own share lost by him pending appeal.* The plaintiff instituted this suit to enforce her right of pre-emption in respect of a

## PRE-EMPTION—continued.

## (1) RIGHT OF PRE-EMPTION—continued.

share in a village of which she alleged she was a co-sharer with the vendors. The defendants to the suit were the vendors, the vendees, and others who were rival claimants for pre-emption in the share sold. The rival pre-emptors alone defended the action on the ground, among others, that plaintiff was not in possession of her own share in the village out of which she alleged that her right to claim pre-emption arose. The Court of First Instance dismissed her suit. On appeal the District Judge in effect dismissed her claim as against the defendants who were the rival pre-emptors, but gave the plaintiff a right to obtain the share if the other pre-emptors did not avail themselves of the decree which they had obtained in their action. On the 12th of January 1887, plaintiff's second appeal was admitted, and on the 20th January plaintiff's share in the village out of which her claim to pre-emption in respect of the share sold arose, was sold in execution of a decree in another suit. Respondent contended that, as since the appeal the share out of which plaintiff alleged that her right arose was sold, she could not get any decree now in her favor: *Held* that this Court as a Court of Appeal have only got to see what was the decree which the Court of First Instance should have passed, and if the Court of First Instance had wrongly dismissed the claim, the plaintiff cannot be prejudiced by her share having been subsequently sold in execution in another suit; such a sale could not have affected her right to maintain the decree, if she had obtained a decree in her favour in the Court of First Instance either on review or on appeal, nor could it have been made the ground of appeal. Further, plaintiff being out of possession of her share at the time she instituted the suit for pre-emption was immaterial, the Court should have ascertained whether the plaintiff was at the date of suit entitled in law to the share out of which her right of pre-emption was alleged to have arisen. *Held*, by MAHMOOD, J., that the passage from Hamilton's Hedaya by Grady, p. 562, means that in the pre-emptive tenement the pre-emptor should have a vested ownership and not a mere expectancy of inheritance or a reversionary or any kind of contingent right, or any interest falling short of full ownership. *SAKINA BIBI v. AMIRAN*.

[I. L. R. 11 All. 472]

7.—*Mortgage by conditional sale—Foreclosure—Regulation XVII of 1806—Suit by mortgagee for possession—Compromise and decree thereon—Mortgagee accepting part of the property in suit—Suit for pre-emption—Pre-emptor not asserting or proving validity of foreclosure proceedings—Pre-emptor's title referred to date of compromise and decree—Purchase money.* The mortgagee under a deed of conditional sale executed in 1878 took foreclosure proceedings under Reg. XVII of 1806, and, the year of grace having expired, a foreclosure proceeding was recorded

## PRE-EMPTION—continued.

## (3) RIGHT OF PRE-EMPTION—continued.

on the 18th September 1882, declaring the mortgage to have been foreclosed. In August 1885, the mortgagee instituted a suit for possession of the mortgaged property. On the 19th September 1885, the suit was compromised, the mortgagee accepting a part of the mortgaged property, and relinquishing the remainder. A decree was passed in the terms of the compromise. Subsequently, a suit for pre-emption was brought against the mortgagor and mortgagee to enforce pre-emption in respect of the alienation. The plaintiff claimed to pre-empt the whole of the property to which the deed of 1878 related, including the portion relinquished by the conditional vendee under the compromise and decree of the 19th September 1885. *Held* that, although upon the expiration of the year of grace, the ownership of mortgaged property vested in a conditional vendee even though he might not have obtained a decree establishing or declaring his right, and the right of pre-emption accrued on the date when the conditional sale thus became absolute, yet foreclosure proceedings under the Regulation, being of a purely ministerial character, were not conclusive or even *prima facie* evidence in a subsequent litigation against the conditional vendor that a valid foreclosure had been duly effected, that strict observance of the requirements of the Regulation were conditions precedent to the right of foreclosure; and that in the present case, as the plaintiff had not asserted or attempted to prove that all those requirements had been fulfilled so as to result in an actual foreclosure and consequent accrual of pre-emption at the end of the year of grace, no foreclosure was shown to have taken place prior to the compromise of the 19th September 1885, and the plaintiff's right of pre-emption accrued on and must be referred to that date, and consequently extended only to the property to which the compromise related, and the price payable by the plaintiff was the amount specified in the compromise. *Bhadu Mahomed v. Radha Churn Bolia*, 4 B. L. R. A. C. 219; *Sheodeen v. Sookit*, S. D. A. N. W. 1864, p. 624; and *Tinwakhul Rai v. Lachman Rai*, I. L. R. 6 All. 342, distinguished; *Norender Narain Singh v. Dwarka Lal Mundur*, L. R. 5 I. A. 18; *Madho Prashad v. Gajadhar*, L. R. 11 I. A. 186; *Sitla Bakhsh v. Lalta Prasad*, I. L. R. 8 All. 388, and *Jagat Singh v. Ram Bakhsh*, Weekly Notes, All. 1887, p. 233, referred to. *AJAIB NATH v. MATHURA PRASAD*.

[I. L. R. 11 All. 164]

## (2) CONSTRUCTION OF WAJIB-UL-URZ

8.—*Co-sharers* — “*Eh jaddi*.”] The *wajib-ul-urz* of a village gave a right of pre-emption, in cases of sale, to “brothers,” and provided that, on refusal by a “brother,” there should be a right of pre-emption in favour of co-sharers in the *thoke* who were related to the vendor by descent from a common ancestor (“*hissadaran*

## PRE-EMPTION—continued.

## (2) CONSTRUCTION OF WAJIB-UL-URZ—concluded.

*ed jaddi thoke*”) It was also provided that in the event of any dispute arising as to price, it should be settled by arbitration, and that “if the co-sharers do not take at the amount fixed by the arbitrators,” the co-sharer desiring to sell might make the transfer to a stranger: *Held* that co-sharers who were not of common descent from the vendor were entitled to pre-emption after own brothers and co-sharers *eh jaddi* and to have preference over strangers. *Guneshee Lal v. Zarat Ali*, 2 N. W. 343, followed. *SABIR ALI v. YAD RAM*.

[I. L. R. 9 All. 660]

9.—“*Pattidars*” — “*Chakdars*.”] *Held* that the terms of a *wajib-ul-urz* conferring a right of pre-emption upon “*pattidars*” did not apply to a *chakdar* holding a share in the same *chak* as the vendor. *BALWANT SINGH v. SUBHAN ALI*

[I. L. R. 10 All. 107]

10.—“*Karibi*,” meaning of] The word “*kari-bi*” used by itself in the pre-emptive clause of a *wajib-ul-urz* to indicate shareholders “near” to the vendor, is ambiguous and inadequate to express the intentions of the shareholders. The pre-emptive clause in the *wajib-ul-urz* of the village gave a right of pre-emption, in cases of sale by shareholders, first to “*bhai hakiki*” (own brothers), next to “*karibi*” (near), and next to co-sharers in the same *thoke* as the vendor. *Held* that although the word “*karibi*” must be read in connection with the preceding word “*bhai*,” the words “*bhai karibi*” could not reasonably be confined to cousins, but must be construed as meaning “*bhai buand*” or “*bhai lag*” so as to include all near relatives, both male and female: *Held*, also, that a vendor's father's brother's widow holding a share in the village absolutely and as heir of her deceased husband, was entitled to pre-emption in preference to the vendees, who were only sharers in the same *thoke* as the vendor. *KHUMAN SINGH v. HARDAI*.

[I. L. R. 11 All. 41]

## (3) PURCHASE-MONEY.

11.—*Concealment by vendor and vendee of actual price—Evidence—Market value.*] In suits for pre-emption, where the Court has come to the conclusion that the price alleged in the deed of sale is not the true contract price, and where it cannot ascertain the true price by reason either that the vendor and vendee refuse to disclose the same by their own evidence, or their evidence cannot be believed, the Court should ascertain, if possible, what was the market price of the property in dispute at the time of the sale, and accept that market price as the probable price agreed upon between the parties. It is for the plaintiff either to show what was the actual



## PRE-EMPTION—continued.

## (3) PURCHASE-MONEY—continued

contract price, or to give substantial evidence on which the Court can act, showing what was the market value at the time of the sale. *AGAR SINGH v. RAGHURAJ SINGH*.

[I. L. R. 9 All. 471]

12.—*Conditional decree—Appeal—Costs—Civil Procedure Code, ss. 214, 583.* A Court of First Instance decreed a claim for pre-emption conditionally, on the pre-emptor paying into Court Rs. 125 within a specified period, and also awarded the pre-emptor Rs. 39-9-0 as his costs in the suit. Within the specified period the pre-emptor paid into Court the Rs. 125, and subsequently executed his decree for costs, by drawing out therefrom the Rs. 39-9-0. After this the decree was modified on appeal, the Appellate Court raising the Rs. 125 payable as the condition of pre-emption to Rs. 200, and reversing the first Court's order as to costs. Within the period specified in the Appellate Court's decree the pre-emptor paid into Court the further sum of Rs. 75. Subsequently the vendee, defendant, applied to the Court under s. 583 of the Code of Civil Procedure to have the property in suit restored to him, contending that the pre-emptor had failed to pay the full Rs. 200 within the prescribed period: *Held* by STRAIGHT J. affirming the judgment of MAHMOOD, J., that this contention must fail; that the payment of Rs. 125 due under the first Court's decree could not be said to have been reduced by the pre-emptor subsequently executing against the amount so paid, the order of that Court in his favour for costs, and that the subsequent payment of Rs. 75 within the period prescribed by the Appellate Court satisfied the requirements of that Court's decree, subject to the judgment debtor's right to recover the costs realized in execution of the first Court's decree: *Held* by TYRELL, J., *contra*, that although the pre-emptor had once made a payment, which for a few days was a compliance with the first Court's decree, such compliance became immaterial when that decree was modified on appeal, and as he had never had in any Court a credit for Rs. 200, as required by the Appellate Court's decree, which alone was the decree in the cause, he had failed to fulfil the condition essential to pre-emption, and therefore the defendant's application should be allowed. *BALMUKAND v. PANCHAM*.

[I. L. R. 10 All. 400]

13.—*Wajib-ul-urz—Clause fixing price in case of sale to a co-sharer—Agreement running with the land—Pre-emptor entitled to take property on payment of price fixed in wajib-ul-urz.* The pre-emptive clause in the *wajib-ul-urz* of a village contained a provision that the right of pre-emption could be enforced on payment of such sum as would represent the "*himat-i-murav-tajih*," that is, according to current rates. A suit for pre-emption was brought against the

## PRE-EMPTION—concluded.

## (3) PURCHASE-MONEY—concluded.

vendor and vendee of a certain fractional share in the village, and the plaintiff claiming the benefit of the above provision disputed the price entered in the sale-deed as the proper price for the share according to current rates: *Held*, following *Karim Baksh Khan v. Phula Bibi*, I L. R. 8 All. 102, that a co-sharer was entitled to purchase the share sold at a price to be ascertained according to the rule in that behalf contained in the *wajib-ul-urz*, and the condition in the *wajib-ul-urz* regarding the price to be paid for the share sold was binding on the land and therefore binding on the stranger vendee. *UPMANI KUAR v. RAM DUN*.

[I. L. R. 10 All. 621]

## (4) LOSS OR WAIVER OF RIGHT.

14.—*Acquiescence in mortgage by conditional-sale—Relinquishment* Acquiescence in a mortgage by conditional-sale does not involve relinquishment of the right of pre-emption upon the conditional-sale eventually becoming absolute. *AJAIB NATH v. MUTHURA PRASAD*.

[I. L. R. 11 All. 164]

## PRESCRIPTION.

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See FISHERY, RIGHT OF.

[I. L. R. 12 Mad. 43]

## (1) EASEMENTS.

## (a) HOUSES AND OTHER BUILDINGS.

1.—*Wall—Adjoining building—Side wall* A built a house in the rear of B's house. There was a passage between the houses. Over the passage A built a room connecting the two houses. This room corresponded with B's first floor, and had an open terrace on the top of it. The structure by which B connected the two houses was quite independent of B's house. It was supported throughout by wooden pillars adjoining B's wall, which the cross beams did not penetrate or touch. But the structure was built so close to B's wall, that the latter served as a side wall to the room. This state of things had existed for upwards of twenty years: *Held*, that A did not acquire any easement over B's wall by merely building on his own ground close to B's house, even though B had built no side wall to his own house, but trusted to B's keeping up his wall to shelter his (B's) house on that side. *GERDHAN DALPATRAM v. CHOTALAL HARGOVAN*.

[I. L. R. 13 Bom. 79]

## PRESCRIPTION—continued.

## (1) EASEMENTS—continued.

## (b) PRIVACY.

2.—*Customary easement—Right to have windows closed—Custom*] Case in which it was found that the plaintiff was by local custom entitled to an easement of privacy, and in which the Court granted a mandatory order compelling the defendant to permanently close the door or window complained of. *LACHMAN PRASAD v. JAMNA PRASAD*.

[I. L. R. 10 All. 162]

3.—*Custom—Right of suit.*] A customary right of privacy, under certain conditions, exists in India and in the North-Western Provinces, and is not unreasonable, but merely an application of the maxims *sic utere tuo ut alienum non laedas* and *aedificare in tuo proprio solo non licet quod alteri noceat*. A substantial interference with such a right, where it exists, if without the consent or acquiescence of the owner of the dominant tenement, affords such owner a good cause of action. Each case in which such a right is in dispute, must be decided upon its own facts, the primary question in all cases being, whether the privacy in fact and substantially exists, and has been and in fact enjoyed. If this is answered in the negative, no further question arises. If in the affirmative, the next question is whether the privacy has been substantially interfered with by acts done by the defendant, without the consent or acquiescence of the person seeking relief against such acts. The Indian law relating to the right of privacy reviewed. *GOKAL PRASAD v. RADHO*.

[I. L. R. 10 All. 358]

## (c) LIGHT AND AIR.

4.—*South breeze—Limitation Acts; Act IX of 1871, s. 27; Act XV of 1877, s. 26—English Prescription Act, 2 & 3 Will. IV, c. 71—Limitation Act, Effect of, on the pre-existing law as to nature and extent of the right to light or air*] The Indian Limitation Act, unlike the English Prescription Act, places light and air, on the same footing; and the object of the Prescription Act and of the provisions of the Indian Limitation Act is not to enlarge the extent and operation of the easement, but to provide another and more convenient way of acquiring such easement—a mode independent of legal fiction and capable of easy proof in a Court of law; these Acts do not, therefore, alter in any way the pre-existing law as to the nature and extent of the right. The only amount of light for a dwelling-house which can be claimed by prescription or by length of time (whether prior or subsequently to the Limitation Act of 1871) without an actual grant is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house. Rule laid down in *Bagram v. Khettarnath Karformah*, 3 B. L. R. O. C. 41, followed. The right of air is co extensive with the right to

## PRESCRIPTION—continued.

## (1) EASEMENTS—continued.

## (c) LIGHT AND AIR—concluded.

light To give a right of action, either prior or subsequently to the Limitation Act of 1871, in a case (where there is no express contract on the subject) for an interference with the access of air to dwelling-houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house; in other words, to render the house unfit for the ordinary purposes of habitation or business. There is no such right as a right to the uninterrupted flow of south breeze as such. The "45-degree rule" is not a positive rule of law, but is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obscuration is not definite or satisfactory. *DELHI AND LONDON BANK v. HEM LALL DUTT*.

[I. L. R. 14 Calc. 839]

5.—*Injunction—Damages—Specific Relief Act I of 1877, s. 54, cl. c—Limitation Act XV of 1877, s. 26—Mandatory injunction.*] The plaintiff complained that the defendants intended to build so as to obstruct the passage of light and air through an ancient window in his house, and render a room therein unfit for use, and prayed for a perpetual injunction restraining the defendant from so building. It was proved that the wall intended to be built would so shut out the light and air as to render the room completely dark and unfit for use. The Subordinate Judge granted the injunction as prayed. The defendants appealed to the Joint Judge, who amended the lower Court's decree by ordering the removal of the injunction and directing, in its stead, a new window to be opened in the plaintiff's house to the east of the window in question. On appeal by the plaintiff to the High Court: *Held*, reversing the decree of the lower Appellate Court, that the plaintiffs had an absolute and indefeasible right to the easement he had acquired, and the only possible question was whether injunction or damages was the appropriate remedy under the circumstances of the particular case. *Held* also that, as the evidence established that, after defendant's wall was built, plaintiff's room would not remain substantially as useful to him as before, the plaintiff was entitled to an injunction. *Holland v. Worley*, L. R. 26 Ch. D. 578, distinguished. The High Court also directed a mandatory injunction to issue to the defendants to remove the wall they had raised after the lower Appellate Court had passed the decree in their favour and pending the plaintiff's appeal to the High Court. *KADARBHAI v. RAHIMBHAI*.

[I. L. R. 13 Bom. 674]

## (d) RIGHT TO WATER.

6.—*Easement Act (V of 1882), ss. 6, 7, 17—Natural streams—Surface water—Rights of riparian owners.*] The owners of a tank fed by natural streams which depended for their supply on natural rainfall and surface water, sued for an

**PRESCRIPTION—concluded.****(1) EASEMENTS—concluded.****(d) RIGHT TO WATER—concluded.**

injunction to restrain superior riparian owners from damming the streams or interfering with the supply of water, over which the plaintiffs claimed a right of easement. The issue as to the ownership of the land on which the streams rose was undecided: *Held*, (1) The Easement Act only declared the existing law as to easements over water; (2) An easement can therefore be acquired in regard to the water of the rainfall. But surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise, is not a subject of easement by prescription, though it may be the subject of an express grant or contract; (3) It is the natural right of every owner of land to collect or dispose of all water on the surface which does not pass in a defined channel; (4) Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle for irrigating their land, and for purposes of manufacture, subject to the conditions (i) that the use is reasonable, (ii) that it is required for their purposes as owners of the land, and (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by inferior riparian owners in the exercise either of their natural right or their right of easement if any; (5) It was therefore necessary to ascertain where the streams rose, and the course, source and length of their tributaries. *PERUMAL & RAMASAMI*.

[I. L. R. 11 Mad. 16]

**PRESUMPTION, REBUTTAL OF.***See* SUCCESSION ACT, s. 128.

[I. L. R. 15 Cal. 83]

**PREVIOUS CONVICTION.***See* EVIDENCE—CRIMINAL CASES—PREVIOUS CONVICTIONS.

[I. L. R. 14 Cal. 721]

**PRIMOGENITURE***See* HINDU LAW—ENDOWMENT—SUCCESSION IN MANAGEMENT.

[L. R. 16 I. A. 137]

[I. L. R. 17 Cal. 3]

*See* MAHOMEDAN LAW—ENDOWMENT.

[I. L. R. 13 Bom. 555]

**PRINCIPAL AND AGENT.**

Col.

1. Liability of principal ... 812

*See* ACCOUNT, SUIT FOR.

[I. L. R. 14 Cal. 147]

*See* CONTRACT—CONSTRUCTION OF CONTRACTS

[I. L. R. 13 Bom. 470]

**PRINCIPAL AND AGENT—concluded.***See* COSTS—SPECIAL CASES—ACCOUNT, SUIT FOR.

[I. L. R. 14 Cal. 147]

*See* HUSBAND AND WIFE.

[I. L. R. 9 All. 147]

*See* LIEN.

[I. L. R. 13 Bom. 314]

*See* LIMITATION ACT 1877, ART. 89

[I. L. R. 14 Cal. 147]

**(1) LIABILITY OF PRINCIPAL.**

1—*Right of person dealing with agent personally liable—Suit and judgment recovered against agent—Subsequent suit against agent barred—Act IX of 1872 (Contract Act), s. 233.* The obligee under a hypothecation-bond brought a suit thereon against one who, upon the face of the instrument, contracted as obligor, but whom, when the suit was instituted, the plaintiff knew to have acted as agent in the transaction for a third person. Having obtained a decree, he satisfied it in part by attachment of a sum of money, and next caused the hypothecated property to be sold, and purchased it himself. Upon attempting to obtain possession, he was successfully resisted by the principal debtor under the hypothecation-bond, on the ground that the latter was the real owner of the property, and that the decree-holder had derived no title thereto from his judgment-debtor. He then sued the principal debtor to recover the balance remaining due upon the bond, after giving credit for the amount recovered by attachment in the suit against the agent: *Held* that the plaintiff, having elected to hold the agent responsible upon the contract, and having obtained judgment and decree against him and written up full satisfaction of the decree, could not afterwards maintain a suit against the principal in respect of the same subject-matter. *Priestly v. Ferme*, 3 H. and C., 977. 34 L. J. Ex. 172, referred to. *BIR BHADDHAR SEWAK PANDE v. SARJU PRASAD*

[I. L. R. 9 All. 681]

**PRINCIPAL AND SURETY—**

Col.

1. Liability of surety	...	812
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**(1) LIABILITY OF SURETY.**

1—*Sale of mortgaged property in execution of money-decree obtained by first mortgagee—Effect on second mortgagee's rights—Purchase by one of several joint mortgagees of mortgaged property—Limitation—Suit for sale of mortgaged property.* In January 1866 B obtained a simple money-decree only in a suit for enforcement of lien created by a bond executed by the wife of Z, and, at a sale in execution of such decree, a 10-biswas share hypothecated in the bond was sold and

**PRINCIPAL AND SURETY—continued.****(1) LIABILITY OF SURETY—concluded.**

purchased by *Z* in November 1872. On the 3rd May 1872, two bonds were executed in favour of *B* and *H* jointly, the first by *Z* and *I* jointly, hypothecating 6½ out of the above-mentioned 10 biswas, and the second by *S*, in which the obligor promised to pay the obligees the amount of the bond given by *Z* and *I* in the event of such amount not being paid by them and mortgaged certain property as security for such payment by him. In December 1872, *Z* gave another bond to *B*, hypothecating the same 10 biswas, and in execution of a decree obtained by *B* upon this bond the 10 biswas were sold and purchased by *B* himself in 1877, and in 1883 were sold by him to *D*. Subsequently, *B* and *H* brought a suit against *Z* and *I*, the joint obligors under the bond of the 3rd May 1872, the heirs of their surety *S* a purchaser from those heirs of the property mortgaged in the security-bond, and *D*, in which they claimed to recover the money due on the bond by sale of the property mortgaged therein, and also by the sale of the property mortgaged in *S*'s security-bond. Held that inasmuch as the bond executed by *S* was only a guarantee for the personal obligation created by the joint bond of *Z* and *S*, and a cause of action could only accrue as against him in respect of the personal default of the joint obligors to pay the bond-money, and such default occurred beyond the period of limitation within which a suit to enforce the personal obligation to pay the money could have been maintained, it followed that, had there been a claim in the plaint to obtain a decree personally against the joint obligors, the plea of limitation by which such a claim could have been defeated would have been equally efficacious as regards the heirs of *S*; but no such claim had been made, and the obligation of surety under his bond of the 3rd May 1872 being confined to the personal default of *S* his heirs had been wrongly imported into the present litigation, which alone sought to enforce the hypothecation of the joint bond against the hypothecated property. *BEUP SINGH v. ZAIN-UL ABDIN*.

[I. L. R. 9 All. 205]

**(2) DISCHARGE OF SURETY.**

2.—*Contract Act*, ss. 134, 137.—*Omission by creditor to sue principal debtor within period of limitation—Discharge of surety.* The omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under s. 134 of the *Contract Act* (IX of 1872), even though the non-suing within such period arose from the creditor's forbearance. S. 137 of the *Contract Act* does not limit the effect of s. 134. Its object is to explain and prevent misconception as the meaning of s. 135. It applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise a right which is still in existence. *Hajurimal v. Krishnarao*, I. L. R. 5 Bom. 647; and *Kristo Kishori Chowdhuran v. Radha Ramun Munshi*, I. L. R.

**PRINCIPAL AND SURETY—concluded.****(2) DISCHARGE OF SURETY—concluded.**

13 Calc 330, dissented from. *Hazari v. Channu Lal*, I. L. R. 8 All. 259, referred to. *RADHA v. KINLOOK*

[I. L. R. 11 All. 310]

**PRIVACY.**

See CUSTOM.

[I. L. R. 10 All. 358]

See PRESCRIPTION — EASEMENTS—PRIVACY.

**PRIVATE DEFENCE, RIGHT OF.**

See WRONGFUL RESTRAINT.

[I. L. R. 12 Bom. 377]

1.—*Penal Code*, ss. 99 and 186.—*Voluntarily obstructing a public servant in discharge of his duties—Mamlatdar's decree—Execution by a surveyor under Collector's orders—Public function.* In a suit filed in a Mamlatdar's Court under Bombay Act III of 1876, the plaintiff obtained a decree against the accused for possession of a certain piece of land. When the Mamlatdar proceeded to execute the decree, he found that there was no land corresponding to the boundaries set forth in the plaint, and that the parties were joint owners and in joint occupation of the land in dispute. Finding himself unable to execute the decree, the Mamlatdar referred the matter to the Collector for advice. The Collector, on looking into the papers of the case, ordered a surveyor to execute the decree by dividing the land in dispute and putting the decree-holder in possession of his share. The surveyor, in attempting to execute the decree, was obstructed by the accused, who was thereupon tried and convicted of the offence of voluntarily obstructing a public servant in the discharge of his public functions, under s. 186 of the *Penal Code* (Act XLV of 1860). Held that the Collector's order was so entirely *ultra vires* as to leave no room for the operation of either the first or the second clause of s. 99 of the *Penal Code*, as to right of private defence. *QUEEN-EMPRESS v. TULSI RAM*.

[I. L. R. 13 Bom. 168]

2.—*Rioting—Unlawful Assembly—Right of private defence of property—Penal Code* (Act XLV of 1860): ss. 97, 103, 104, 105, and 107.] A party of persons, consisting of some five peadas and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of *M* for the purpose of either repairing or erecting a bund across it to cause the water to flow down a channel on the lands of their master *T*. The river at the time was almost dry, and the party did not go armed ready to fight or use force, and they did not during the subsequent occurrence use force. Having arrived at the spot about 10 A.M. they proceeded to work at

PRIVATE DEFENCE, RIGHT OF—  
*concluded.*

the *bund* until the afternoon. At about 4 P.M. a body of men, consisting of about 1,200 in all, many of them armed with *lathies* and headed by the prisoners, who were servants of *M*, which had been seen collecting together during the day, proceeded to the spot, and about 25 or 30 of them attacked *T*'s men some five of whom were more or less severely wounded with the *lathies*. The occurrence resulted in the conviction of some of *M*'s servants for rioting under s. 147 of the Penal Code. *M*'s people wholly denied any right on the part of *T* to construct or repair the *bund*, and had previously denied the existence of such right, and refused permission to *T* to exercise it. It was contended that the assembly of *M*'s people was not an "unlawful assembly;" that the interference by *T*'s people with the channel of the river justified them in coming to stop the work, and the show and use of force in compelling them to do so. *Held*, that the prisoners had been rightly convicted. *Held*, further, that as no right of private defence of property is conferred by the Penal Code, except as against the perpetrators of offences under the Penal Code, and that as, upon the facts of the case as found, no offence had been committed by *T*'s people, their acts amounting merely to a civil trespass; and as there was no pressing or immediate necessity of a kind, showing that there was no time to have recourse to the protection of the public authorities, no question as to the right of private defence arose in the case. *GANOURI LAL DAS v. QUEEN-EMPRESS.*

[I. L. R. 16 Calc. 206]

## PRIVILEGED COMMUNICATION.

—*Defamation—Petition to Revenue officer—Presumptions as to malice*.] Certain raiyats in a zemindari village addressed a petition to the tehsildar praying that the village Munsif might be retained in office notwithstanding the zemindar's application for his removal. The petition imputed criminal acts to the zemindar, who now sued the petitioners for damages on the ground that the petition contained a false and malicious libel. It was found that in fact the communication was made *bonâ fide*, and that there was some ground for some of the imputations. *Held*, the petition was a privileged communication and the alleged libel was not actionable. The question when malice may be presumed, discussed. *VENKATA NARASIMHA v. KOTTYA.*

[I L R. 12 Mad. 374]

## PRIVY COUNCIL, PRACTICE OF. Col.

1 Admission to practice ...	816
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PRIVY COUNCIL, PRACTICE OF—  
*continued*

## (1) ADMISSION TO PRACTICE

1—*Rules of 31st of March 1871—Vakil of High Court.*] The words of ss. 2 and 3 of the Rules of 31st March 1871 are such that the classes of persons to be admitted to practice in the Privy Council must be either Solicitors or others practising in London, or Solicitors admitted by the High Courts in India or in the colonies respectively, and have not left an undefined class admissible at the discretion of the Judicial Committee IN THE MATTER OF THE PETITION OF TWIDALE.

[I. L. R. 16 Calc. 636]

[L. R. 16 I. A. 163]

## (2) DEATH OF PARTY ON RECORD.

2—*Practice relating to substitution of parties on revivor—Representative character to be ascertained by lower Court.*] On the death of a party on the record of an appeal pending before Her Majesty in Council, proof must be given in the Court from which the appeal has been preferred, of the representative character of the person or persons by or against whom revivor is sought. There ought to be some finding of the Court below, which also should give its own opinion as to who are the parties proper to be substituted upon the record. A certificate or statement on which their Lordships can act should be made by the Court below. *HAIDAR ALI v. TUSSADUK RASUL EX-PARTE HAIDAR ALI.*

[I L R. 16 Calc. 184]

[L. R. 15 I. A. 209]

(3) STAY OF PROCEEDINGS IN INDIA  
PENDING APPEAL.

3.—*Security for performance of order to be made by Her Majesty in Council—Civil Procedure Code 1882, s. 608—Refusal of order staying execution where decree was not yet appealed to the Privy Council, but leave to appeal from interlocutory orders in execution granted—Intimation to Court below*] A party to a suit in an Appellate Court, who had obtained leave to appeal from its decree to Her Majesty in Council, petitioned for the order of the latter staying execution of interlocutory orders made in execution of such decree, and directing payment by the petitioner to the opposite party of large sums without security taken for their repayment in the event of the decree being reversed. This accompanied a petition for special leave to appeal against those orders. The latter was granted, but it not being competent to the Judicial Committee to make any order as to the stay of execution, an intimation was made by it to the Court below that it appeared to be the reasonable course that the opposite party should not, pending the appeal, be put into possession of the large sums in dispute. That intimation being made, the petitioner might apply to the Court below for the due security of all money paid into the Treasury in obedience to the decree. *Sidhee*

PRIVY COUNCIL, PRACTICE OF—  
*continued.*

## (3) STAY OF PROCEEDINGS IN INDIA

PENDING APPEAL—*concluded.*

*Nazir Ali Khan v. Ojoodhyaram Khan*, 10 Moore's I. A. 322, and *Zerattool Batool v Hosseine Begum*, 10 Moore's I. A. 196, referred to *INDER KUMARI v. JAIPAL KUMARI*.

[I. L. R. 14 Calc 290]

[L. R. 14 I. A. 1]

## (4) QUESTIONS OF FACT.

4.—*Second Appeal—Code of Civil Procedure (Act XIV of 1882), ss. 584, 585—Jurisdiction to hear a second appeal, on what matters—Secondary evidence, Question of* ] Under ss 584 and 585 of the Code of Civil Procedure, 1882, a second appeal is confined to matters of law, usage having the force of law, or substantial defect in procedure. On an appeal to the Judicial Commissioner from a decree given on first appeal by an Appellate Court and maintaining a finding of fact by the original Court, the only questions were (1), whether secondary evidence had been properly admitted on a case that had arisen for its admission, and (2), whether the evidence offered constituted secondary evidence of the matter in dispute, which was the making of a document. *Held*, that (no special leave to appeal from the judgment of the Commissioner, the first Appellate Court, having been applied for) the facts were not open to decision on this appeal; this Committee could only do what the Judicial Commissioner on second appeal, under the above sections, could have done; and that, as the case stood, they were bound by the findings of facts of the first Appellate Court. *LUCHMAN SINGH v. PUNA*.

[I. L. R. 16 Calc. 753]

[L. R. 16 I. A. 125]

5.—*Question in issue—Parties—Admission—Execution of deed.* ] The plaintiff claimed to have inherited estate in the possession of the defendant, who was also related to the last owner, but who set up, independently of other title, a deed of gift from the latter in his favour. It was decided in the Appellate Court that even if this deed had been executed it was inoperative, and on this point the decision of the first Court was maintained. An issue having been fixed as to the execution, and the plaintiff also showing that the execution was disputed, their Lordships declined to treat the execution as not having been in contest. *ANAND KUAR v. TANSUKH*.

[I. L. R. 11 All. 396]

## (5) CONCURRENT JUDGMENTS ON FACTS.

6.—*Custom, Evidence as to—Wajib-ul-araz—Concurrent findings of Courts below.* ] A custom of inheritance was alleged to prevail in an Oudh clan that, if the branch of a family became extinct, the other branches of it should take the estate amongst them in equal shares without

PRIVY COUNCIL, PRACTICE OF—  
*continued.*

## (5) CONCURRENT JUDGMENTS ON

FACTS—*concluded.*

regard to their degrees in kinship to the deceased. This custom was found not proved by the original and Appellate Courts upon evidence of instances of succession in kindred families and of rights recorded in certain *wajib-ul-araz*. If there had been any principle of evidence not properly applied, or documentary evidence had been referred to on which it could be shown that the Courts below had been led into error, the case might have been re-examined on this appeal, but in the absence of such ground this could not be done. *THAKUR HARIHAR BAKSH v. THAKUR UMAN PARSHAD*.

[I. L. R. 14 Calc 296]

[L. R. 14 I. A. 7]

7.—*Agreement for division of family property in equal shares* ] Two Courts in concurrence found that there had been an agreement between two parties, interested in a family fund, that it should be divided into equal fourth parts among the four branches of the family, but that an unequal division, made under a decree had resulted from unfair dealing. To contest upon this appeal, those findings of fact, nothing was stated to make it appear to the Committee that, if they went through the whole of the evidence, they would differ from the Courts below on anything but questions of pure fact. Accordingly, their Lordships were of opinion that the case fell within the rule which makes appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the Courts below. *KRISHNAN v. SRIDEVI. PUTHIA KOVILAKATH KRISHNAN RAJA AVERGAL v. PUTHIA KOVILAKANTH SRIDEVI*.

[I. L. R. 12 Mad, 512]

## (6) RE-HEARING.

8.—*Infancy of party at the time of the hearing of appeal—"Res noviter"—Ground for re-hearing.* ] There may be exceptional circumstances which will warrant the Judicial Committee in allowing, even after an order of Her Majesty in Council has issued upon their report, a re-hearing at the instance of one of the parties. But this is an indulgence with a view mainly to doing justice when by some accident, without any blame, the party has not been heard, and an order has been made, inadvertently, as if he had been heard. In one of two appeals in suits relating to the same estate, judgment was given by the Judicial Committee after a hearing on the merits. In the other, judgment was given to the same effect as in the first, it being conceded between the parties that the questions in both suits were the same. After both judgments had been reported to Her Majesty, and confirmed by her orders in Council, a petition for a re-hearing was presented: *Held*, that, even assuming that a case of *res noviter* had been

PRIVY COUNCIL, PRACTICE OF—  
*concluded.*(6) RE-HEARING—*concluded.*

made out (which was not, however, the fact), the orders were final and the petition must be rejected. *IN RE APPA RAO. VENKATA NARASIMHA APPA ROW v. COURT OF WARDS VENKATA RAMALAKSHMI GARU v. GOLAPPA APPA ROW.*

[I L. R. 10 Mad. 73]

[L. R. 13 I A. 155]

## (7) COSTS.

9.—*Evidence—Costs—Co-sharers*] One of two co-sharers by ancestral title in the under-proprietary right in certain villages, obtained, in 1870, decrees against the talukdar for sub-settlement, and getting possession had his name entered in the *khevat*. The other co-sharer remained entitled to claim that this possession was held partly for him. The present suit was brought upon two agreements, purporting to have been made in 1870, between the two co-sharers, while proceedings to obtain the above decrees were pending, to the effect that, whereas both had claims against the talukdar, one only was to sue him, the other paying half of the costs and being entitled to receive half of what might be decreed. The Judicial Committee, upon the evidence concluded that the Appellate Court, attributing too much to certain omissions and acts on the plaintiff's part which were more or less explained, had erred in reversing the decree of the first Court, which maintained the agreements, depriving the plaintiff of his costs in that Court only. *MUHAMMAD YUSUF v. MUHAMMAD HUSAIN.*

[I L. R. 16 Calc. 62]

## PROBATE.

Col.

1. Jurisdiction of District Courts	...	819
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## (1) JURISDICTION OF DISTRICT COURTS.

1.—*Probate Act (V of 1881)—Will of Hindu made before Hindu Wills Act XXI of 1870—Succession Act, s. 187—Application for letters of administration.* Since the passing of Act V of 1881 the District Courts have jurisdiction to entertain applications for the grant of probate or letters of administration in respect of wills of Hindus made before the 1st September 1870, that is to say, wills of Hindus to which the Hindu Wills Act XXI of 1870, did not apply. *KRISHNA KINKUR ROY v. RAI MOHUN ROY.*

[I. L. R. 14 Calc. 37]

(2) OPPOSITION TO AND REVOCATION  
OF GRANT.

2.—*Probate, Nature and effect of—Act V of 1881, ss. 16 and 50.* S, a Parsi, died, leaving

PROBATE—*continued.*(2) OPPOSITION TO AND REVOCATION  
OF GRANT—*concluded.*

a will, whereby he directed that after his death his estate should be managed by his widow J and after her death by his sister-in-law H and after H's death by the appellant, his adopted son H N. On J's death the testator's brother D applied for letters of administration, and issued a citation to the appellant H N. H entered a caveat. No further proceedings were taken, and the matter remained pending. On H's death, D applied for a fresh citation to the appellant H N, but the District Judge held it to be unnecessary, and declined to issue it. Letters of administration were then granted to D. The appellant H N subsequently applied for probate of the testator's will. The respondents filed caveats, alleging that the will was void, on the ground of certain bequests contained in it, and on this ground the District Judge refused probate of the will: *Held* that the District Judge was wrong in refusing probate of the will on the ground that the bequests contained in it were illegal and void. Probate is only conclusive as to the appointment of executors and the validity and contents of the will; and in an application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition. *HORMUSJI NAVROJI v. BAI DHANBAIJI.*

[I. L. R. 12 Bom, 164]

## (3) EFFECT OF PROBATE.

3.—*Succession Act, s. 187—Power of Executors or Administrators*] *Semble*—Section 187 of the Succession Act not being made applicable to wills of Hindus made before 1st September 1870, that is to wills of Hindus to which the Hindu Wills Act did not apply, it is not obligatory on executors or legatees under them to take out probate or letters of administration in order to establish their rights in a Court of Justice. *KRISHNA KINKUR ROY v. RAI MOHUN ROY.*

[I. L. R. 14 Calc. 37]

4.—*Executor, Power of, before Hindu Wills Act—Evidence Act (I of 1872), s. 41—Probate Act (V of 1881), ss. 2, 149.* S. 41 of the Evidence Act is applicable to probates granted prior to the passing of the Hindu Wills Act. *GRISH CHUNDER ROY v. BROUGHTON.*

[I. L. R. 14 Calc. 861]

5.—*Appointment of Executors—Validity and contents of Will.* Probate is only conclusive as to the appointment of executors and the validity and contents of the will. *HORMUSJI NAVROJI v. BAI DHANBAIJI.*

[I. L. R. 12 Bom, 164]



**PROBATE—concluded.****(3) EFFECT OF PROBATE—concluded.**

6—*Will—Hindu Wills Act (XXI of 1870)—Succession Act (X of 1865, s. 179—Probate and Administration Act (V of 1881), s. 4—Hindu will made outside Bombay relating to property situate partly within and partly outside Bombay—Probate of such will—Effect of—Representation of the estate—Partus to suit* ] One *L* died at Surat in 1873, possessed of ancestral property situate partly in Bombay and partly in Surat District. He left a widow, *B* and a minor son, *M*. At his death he made a will bequeathing his property to his son, and appointing certain executors to manage the property during the son's minority. The son died in 1877, leaving a minor widow, *M G*. In 1879 one of the executors obtained probate of *L*'s will from the High Court. In 1884 a suit was filed, on behalf of the minor *M G*, against her mother-in-law, *B* to recover possession of the property covered by the will of *L*. One of the defences to this suit was that the property in dispute had vested in the executor, who had obtained probate of the will, and that as the defendant held the estate under the executor, the suit was not maintainable without impleading the executor: *Held* that the executor was not a necessary party to the suit. S. 179 of the Indian Succession Act (X of 1865) as incorporated into the Hindu Wills Act (XXI of 1870) did not apply so far as it related to property outside Bombay. The property in dispute was situate in the Surat District. It was joint ancestral property. On the father's death it vested in the son by survivorship, and on the son's death it vested in the son's widow, the plaintiff, in the present suit. Under the provisions, therefore, of the Probate and Administration Act (V of 1881), s. 4, (if that Act can be held to operate at all in the Mofussil before a notification is issued under s. 2), the estate could not vest in the executor, as it had passed by survivorship to another person long before the Act came into operation. *BAI HARKOR v. MANEKLAL RASIK DAS.*

[I. L. R. 12 Bom. 621]

**PROBATE ACT (V OF 1881).**

—, s. 2.

See PROBATE—EFFECT OF PROBATE.

[I. L. R. 14 Calc. 861]

—, s. 4.

See PROBATE—EFFECT OF PROBATE.

[I. L. R. 12 Bom. 621]

—, s. 16 and s. 50.

See PROBATE—OPPOSITION TO AND REVOCATION OF GRANT.

[I. L. R. 12 Bom. 164]

—, s. 131.

See SUCCESSION ACT, s. 96.

[I. L. R. 16 Calc. 549]

**PROBATE ACT (V OF 1881)—concluded.**

—, s. 149.

See PROBATE—EFFECT ON PROBATE

[I. L. R. 14 Calc. 861]

**PRODUCTION OF DOCUMENTS.**

*Procedure Code, s. 174—Production of document—Court's jurisdiction to punish a witness for refusing to produce a document—Procedure—Indian Penal Code (Act XLV of 1860), s. 175—Criminal Procedure Code (Act X of 1882), s. 480* ] A witness was summoned to produce a document in Court in connection with a certain suit. He attended the Court, but did not produce the document, stating on oath that it was not in his possession. But this statement was disbelieved, and the Court fined him Rs. 75. under s. 174 of the Code of Civil Procedure (Act XIV of 1882): *Held* that the fine was illegally levied. The jurisdiction of the Court to punish under s. 174 of the Civil Procedure Code exists only in the case of a witness, who, not having attended on summons, has been arrested and brought before the Court. The case of a witness who having a document will not produce it is provided for by s. 175 of the Penal Code (Act XLV of 1860) and s. 480 of the Code of Criminal Procedure (Act X of 1882). *IN RE PREMCHAND DOWLATRAM,*

[I. L. R. 12 Bom. 63]

**PROMISSORY NOTE.**

Col.

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|---|-----|-----|-----|
| 1. Assignment of and suits on promissory note | ... | ... | ... |
|   |     |     | 822 |

See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—UNSTAMPED OR UNREGISTERED DOCUMENTS,

[I. L. R. 10 Mad. 94]

[I. L. R. 9 All. 351]

[I. L. R. 12 Bom. 443]

See STAMP ACT, 1879, s. 34.

[I. L. R. 12 Bom. 443]

[I. L. R. 13 Bom. 449]

**(1) ASSIGNMENT OF AND SUITS ON PROMISSORY NOTE.**

1—*Negotiable Instruments Act 1881, ss. 8-9—Suit to recover money due on a promissory note by assignee of rights of payee not being endorsee* ] *K* executed a promissory note on demand for Rs. 6000 in favour of *S* in 1882. In 1884 *S*, by an agreement in writing assigned all her property including the promissory note, to *M*, but did not endorse over the promissory note, to *M*. *M* assigned his rights in the promissory note to a bank in payment of a debt. In a suit by *M* and the bank against *K* and *S* to recover the principal and interest due on the note: *Held* that the plaintiffs could not maintain the suit. *PATTAT AMBADI MARAR v. KRISHNAN.*

[I. L. R. 11 Mad. 290]

**PROMISSORY NOTE—concluded.****(1) ASSIGNMENT OF AND SUITS ON PROMISSORY NOTE—concluded.**

2—Document proposing to borrow on certain conditions—Stamp Act 1879—Proposal—Contract Act IX of 1872, s. 4] A letter containing a request to borrow a certain sum of money, promising that the same should be repaid with interest on a certain day, is not liable to stamp-duty. It is not a promissory note, but a mere proposal under s. 4 of the Indian Contract Act IX of 1872. *DHONDBHAT NARHARBHAT v. ATMARAM MORESHVAR*

[I. L. R. 13 Bom 669]

**PUBLIC DEMANDS RECOVERY ACT (BENGAL ACT VII OF 1880)**

—, ss 2, 8 10, 19—Bengal Act VII of 1868, s. 2—Sale for arrears of Road Cess—Suit to set aside Sale—Ground for setting aside Sale under certificate—Act XI of 1859, s. 33—Civil Procedure Code, ss 290, 311, 312.] Neither the provisions of s. 33 of Act XI of 1859, nor those of s. 2, Bengal Act VII of 1868, affect the jurisdiction of the Civil Court to entertain a suit to set aside a sale under a certificate on any of the following grounds, namely, that no arrears were due at all, that no notice was served in accordance with the provisions of Bengal Act VII of 1880, or that the provisions of s. 290 of the Civil Procedure Code were infringed. The words “in respect of sales in execution of decrees” in s. 19 of Bengal Act VII of 1880, do not include any proceedings instituted after the sale for setting it aside. Ss. 311 and 312 therefore of the Civil Procedure Code do not apply to sales under a certificate. The infringement of the provisions of s. 290 of the Civil Procedure Code is not a mere irregularity, but vitiates the sale. *Bakshi Nand Kishore v. Malak Chand*, I. L. R. 7 All. 289. The provision in s. 8 of Bengal Act VII of 1880, as to the certificate becoming absolute and acquiring the force and effect of a final decree, does not come into operation unless the notice required by s. 10 is actually served. The only remedy of a judgment-debtor where property has been sold in execution of a certificate issued under Bengal Act VII of 1880 and who has sustained substantial injury by reason of a material irregularity in publishing or conducting the sale, is by way of an appeal under s. 2 of Bengal Act VII of 1868. The effect of s. 2 of Bengal Act VII of 1880 is that Act XI of 1859, and Bengal Act VII of 1868, and Bengal Act VII of 1880, are to be considered as if the provisions contained in them were contained in one Act so far as such construction is consistent with the tenor of the last mentioned Act. By the force therefore of s. 2 of the Act of 1880, the provisions of s. 2 of the Act of 1868 became applicable to a sale under an execution issued upon a certificate made under the Act of 1880. Bengal Act VII of 1880 is an Act for the recovery of all kinds of public demands, and therefore applies to cases of road or other public cases. *SADHUSARAN SINGH v. PANCHDEO LAL*

[I. L. R. 14 Calc. 1]

**PUBLIC DEMANDS RECOVERY ACT (BENGAL ACT VII OF 1880)—concluded.**

—, s. 19—Certificate Procedure—Civil Procedure Code (Act XIV of 1882), ss. 311, 312] A suit will lie in a Civil Court to set aside a sale held under Bengal Act VII of 1880, where the sale proclamation is issued against the whole sixteen annas of the estate, but a sale held only of a portion thereof. The effect of s. 19 of that Act is, that it relates to the practice and procedure in respect of sales, that is, to the practice and procedure of executing Courts in the carrying out of sales. *RAM LOGAN OJHA v. BHAWANI OJHA*.

[I. L. R. 14 Calc. 9]

**PUBLIC HEALTH, OFFENCE AFFECTING.**

Penal Code, s. 269.—Communicating syphilis by the act of sexual intercourse—Cheating] A prostitute, who, while suffering from syphilis, communicates the disease to a person who has sexual intercourse with her, is not liable to punishment under s. 269 of the Indian Penal Code (Act XLV of 1860) “for a negligent act and one likely to spread infection of any disease dangerous to life.” *QUEEN-EMPRESS v. RAKHMA*.

[I. L. R. 11 Bom. 59]

**PUBLIC OFFICE.**

See OFFICIAL TRUSTEE

[I. L. R. 12 Mad. 250]

**PUBLIC POLICY.**

See BENGAL EXCISE ACT (VII OF 1878).

[I. L. R. 16 Calc. 436]

See CASES UNDER CONTRACT ACT, s. 23—  
ILLEGAL CONTRACTS—AGAINST  
PUBLIC POLICY.

**PUBLIC SERVANT, OBSTRUCTION TO.**

See WRONGFUL RESTRAINT.

[I. L. R. 12 Bom. 377]

**PURCHASE-MONEY.**

See CASES UNDER PRE-EMPTION—PUR-  
CHASE-MONEY.

—, Refund of, Application for.

See LIMITATION ACT 1877, ART. 178.

[I. L. R. 11 All. 372]

—, Suit to recover.

See LIMITATION ACT 1877, ART. 62.

[I. L. R. 15 Calc. 51]

See SMALL CAUSE COURT, MOFUSSIL—  
JURISDICTION—PURCHASE-MONEY.

[I. L. R. 11 Mad. 269]

See CASES UNDER SALE IN EXECUTION  
OF DECREE—SETTING ASIDE SALE  
—RIGHTS OF PURCHASER—RECO-  
VERY OF PURCHASE-MONEY.

**PURCHASER FROM HINDU WIDOW.**

See DEBTOR AND CREDITOR

[I. L. R. 11 Bom. 666]

**QUARRYING**

See CONTRACT—CONSTRUCTION OF CONTRACTS.

[I. L. R. 13 Bom. 630]

**RATIFICATION**

See ESTOPPEL—ESTOPPEL BY DEEDS AND OTHER DOCUMENTS.

[I. L. R. 10 Mad. 272]

See GUARDIAN—RATIFICATION.

[I. L. R. 10 Mad. 272]

See SPECIFIC PERFORMANCE—SPECIFIC PERFORMANCE ALLOWED.

[I. L. R. 16 I. A. 221]

[I. L. R. 17 Calc. 223]

**RECEIPT**

See REGISTRATION ACT 1877, s. 17.

[I. L. R. 9 All. 108]

## ——for money

See STAMP ACT 1879, SCH. I, ART. 52

[I. L. R. 12 Bom. 103]

See STAMP ACT 1879, SCH. II, ART. 15.

[I. L. R. 10 Mad. 64]

## ——Given by Secretary of Club to Member for Club Bill.

See STAMP ACT 1879, SCH. II, ART. 15.

[I. L. R. 10 Mad. 85]

**RECEIPTS FOR RENT.**

See BENGAL TENANCY ACT, s. 88.

[I. L. R. 16 Cal. 155]

**RECEIVER.**

See INSOLVENCY—INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE.

[I. L. R. 15 Cal. 762]

1.—*Power of receiver—Suit to eject tenant claiming permanent tenure without leave of Court—Civil Procedure Code, 1882, s. 503.* *D* was appointed receiver in a partition suit pending in the High Court by an order which, amongst other things, gave him power to let and set the immoveable property, or any part thereof as he should think fit, and to take and use all such lawful and equitable means and remedies for recovering, realising and obtaining payment of the rents, issues and profits of the said immoveable property, and of the outstanding debts and claims by action, suit, or otherwise as should be expedient. *D*, without special leave of the Court, served a notice to quit

**RECEIVER—concluded.**

on certain tenants of the estate, who claimed to hold a permanent lease, and afterwards instituted a suit to eject them, also without special leave of the Court: *Held*, that the order appointing him did not give him power to serve such notice or to institute such suit without the special leave of the Court, and that as he was appointed under the provisions of s. 503 of the Code of Civil Procedure and not vested with the general powers referred to in that section but only with the power referred to in the order appointing him, and as a receiver is not otherwise authorized to institute such suits without special leave of the Court, the suit must be dismissed. *DROBOMOYI GUPTA v. DAVIS.*

[I. L. R. 14 Calc. 323]

2.—*Civil Procedure Code 1882, ss. 267, 268, and 503—Execution—Practice—Garnishee—Attachment by a judgment-creditor of a debt due to judgment-debtor by a third party—Order upon third party to pay, where debt admitted—Procedure where existence of debt not admitted.* When a debt alleged to be due by a third party to a judgment-debtor has been attached by the judgment-creditor, the Court may, under s. 268 of the Civil Procedure Code (Act XIV of 1882), make an order upon the garnishee for the payment of such debt to the judgment-creditor in case the former admits it to be due to the judgment-debtor. Where, however, the garnishee denies the debt, there is no other course open to the judgment-creditor than to have it sold, or to have a receiver appointed under s. 503 of the Civil Procedure Code. *TOOLSIA GOOLAL v. ANTONE.*

[I. L. R. 11 Bom. 448]

3.—*Civil Procedure Code, 1882, s. 503—Discretion.* The appointment of receiver is a matter resting in the discretion of the Court. The powers of appointing a receiver conferred by s. 503 of the Code of Civil Procedure must be exercised with a sound discretion, upon a view of the whole circumstances of the case, not merely the circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which is asserted and has to be established. The Court will not interfere by appointing a receiver where a right is asserted to property in the possession of a defendant claiming to hold it under a legal title, unless a strong case is made out. *Owen v. Homan*, 4 H. L. C. 997, 1032, and *Clayton v. Attorney-General*, Cooper's Cases, Vol. I, p. 97, referred to. *SIDHESWARI DABI v. ABHOYESWARI DABI.*

[I. L. R. 15 Calc. 818]

**RECOGNIZANCE TO KEEP PEACE** Col.

- |   |  |     |     |     |
|---|--|-----|-----|-----|
| 1 | Magistrate with powers of Appellate Court  | ... | ... | 827 |
| 2 | Likelihood of breach of peace and evidence | ... | ... | 827 |

See CRIMINAL PROCEEDINGS.

[I. L. R. 9 All. 452]

# RECOGNIZANCE TO KEEP PEACE-- concluded.

## (1) MAGISTRATE WITH POWERS OF APPELLATE COURT.

1.—*Magistrate of the District Criminal Procedure Code (Act X of 1882), ss. 106, 423* ] The Magistrate of a District, when acting as an Appellate Court, is not competent to make an order under s. 106 of the Criminal Procedure Code (Act X of 1882) requiring the appellant to furnish security for keeping the peace. IN THE MATTER OF THE PETITION OF ASLU. *ASLU v. QUEEN-EMPRESS.*

[I. L. R. 16 Calc. 779]

## (2) LIKELIHOOD OF BREACH OF PEACE AND EVIDENCE

2.—*Criminal Procedure Code, ss. 107, 112, 117, 118.*—*Nature of order to show cause—Onus probandi—Nature and quantum of evidence necessary before passing order for Security.* ] An order passed by a Magistrate under ss. 107 and 112 of the Criminal Procedure Code, requiring any person to "show cause" why he should not be ordered to furnish security for keeping the peace, is not in the nature of a rule nisi implying that the burden of proving innocence is upon such person. The onus of proof lies upon the prosecution to establish circumstances justifying the action of the Magistrate in calling upon persons to furnish security. *Dunne v. Hem Chandra Chowdhry*, 4 B. L. R. F. B. 46, and *Queen v. Niranjan Singh*, 3 N. W. 431, referred to. In proceedings instituted under s. 107 of the Criminal Procedure Code against more persons than one, it is essential for the prosecution to establish what each individual implicated has done to furnish a basis for the apprehension that he will commit a breach of the peace. In holding such an inquiry it is improper to treat what is evidence against one of such persons as evidence against all, without discriminating between the cases of the various persons implicated. *Queen-Empress v. Nathu* (I. L. R. 6 All. 214), referred to. Although in an inquiry under s. 117 the nature or quantum of evidence need not be so conclusive as is necessary in trials for offences, the Magistrate should not proceed purely upon an apprehension of a breach of the peace, but is bound to see that substantial grounds for such an apprehension are established by proof of facts against each person implicated which would lead to the conclusion that an order for furnishing security is necessary. What the nature of the facts should be depends upon the circumstance of each case, but where the nature of the Magistrate's information requires it, overt acts must be proved before an order under s. 118 can be made, and such an order cannot be passed against any person simply on the ground that another is likely to commit a breach of the peace. *Queen v. Abdool Hing*, 20 W. R. Cr. 57; *Goshan Luchman Pershad Pooree v. Pohoop Narain Pooree*, 24 W. R. Cr. 30; *Rajah Run Bahadoor v. Ramee Tillessuree Koer*, 27 W. R. Cr. 79, and *In the matter of Kashi Chunder Doss*, 10 B. L. R. 441; 19 W. R. Cr. 47, referred to. *QUEEN-EMPRESS v. ABDUL KADIR*

[I. L. R. 9 All. 452]

# RECORD OF RIGHTS, PUBLICATION OF

*See* SONTHAL PERGUNNAHS SETTLEMENT REGULATION (III OF 1872), ss. 24, 25.

[I. L. R. 15 Calc. 785]

## REDEMPTION, RIGHT OF.

*See* LIMITATION ACT 1877, ART 134

[I. L. R. 12 Bom. 352]

*See* CASES UNDER MORTGAGE—REDEMPTION.

*See* RES JUDICATA—ESTOPPEL BY JUDGMENT.

[I. L. R. 12 Bom. 352]

*See* TRANSFER OF PROPERTY ACT, s. 60.

[I. L. R. 11 Mad. 403]

## REDEMPTION, SUIT FOR.

*See* LIMITATION ACT 1877, ART. 144—ADVERSE POSSESSION.

[I. L. R. 11 Bom. 422, 425]

*See* MAMLATDARS' COURTS ACT, s. 4.

[I. L. R. 11 Bom. 599]

*See* ONUS PROBANDI—LIMITATION AND ADVERSE POSSESSION.

[I. L. R. 11 All. 438]

*See* PARTIES—PARTIES TO SUITS—MORTGAGES, SUITS CONCERNING

[I. L. R. 11 Bom. 425]

*See* PLAINT—FORM AND CONTENTS OF PLAINT—SPECIAL CASES.

[I. L. R. 11 All. 438]

*See* POSSESSION—ADVERSE POSSESSION.

[I. L. R. 11 Bom. 422, 425]

*See* RES JUDICATA—MATTERS IN ISSUE.

[I. L. R. 13 Bom. 567]

*See* VACUATION OF SUIT—SUITS

[I. L. R. 11 Bom. 591]

[I. L. R. 13 Bom. 489]

## REFERENCE TO HIGH COURT—CIVIL CASES.

*See* APPEAL—EXECUTION OF DECREE—QUESTION IN EXECUTION

[I. L. R. 11 Bom. 57]

*See* CIVIL PROCEDURE CODE, 1882, s. 214

—QUESTIONS IN EXECUTION OF DECREE.

[I. L. R. 11 Bom. 57]

*See* DISTRICT JUDGE.

[I. L. R. 11 Mad. 38]

REFERENCE TO HIGH COURT—CIVIL CASES—*concluded*.

1.—*Civil Procedure Code*, 1882, s. 617—*Stay of execution—Amount of security required on granting stay of execution, question as to* ] The defendant in a redemption suit, against whom a decree had been passed, appealed to the High Court, which on his application granted the usual stay of execution pending the appeal, upon security being given by him. The Subordinate Judge, feeling doubt as to whether the actual value of the property, or the value stated in the plaint should be regarded in fixing the security, referred the case to the High Court, under s. 617 of the *Civil Procedure Code* (Act XIV) of 1882: *Held*, even assuming that section to apply to a proceeding of this kind under s. 647, that no reference would lie under s. 617 of the *Civil Procedure Code*. The question as to the amount of the security was a question relating to execution as contemplated by s. 244 of the Code, and, therefore, an order determining that question would be appealable under s. 2 of the Code. *ISHWARGAR v CHUDASAMA MANABHAI*.

[I. L. R. 12 Bom. 30]

2.—*Civil Procedure Code*, 1882, s. 617—*Pleader—Professional conduct*.] S. 617 of the Code of Civil Procedure (Act XIV of 1882) does not authorize a reference, except on a point arising in a litigation between parties in a suit, on appeal, or in a matter wherein the Court is called on to adjudicate, that is, to pronounce on the opposite pretensions of contending parties. A pleader was fined Rs. 25 by a Second Class Subordinate Judge for refusing to act on behalf of his client after receipt of retaining fee. On appeal, the District Judge referred the matter to the High Court, under s. 617 of the Code of Civil Procedure (Act XIV of 1882). *Held*, that the inquiry into the pleader's professional conduct was of a disciplinary, and not litigious, character. The fact that an appeal lay from the Subordinate Judge to the District Judge did not make it litigious. In such an inquiry no reference could properly be made under s. 617 of Act XIV of 1882. *YESHVANT NARAYAN ADARKAR v. DESOUZA*.

[I. L. R. 12 Bom. 78]

3.—*Civil Procedure Code*, s. 646B—*Reference by District Judge of proceedings in Small Cause Court attacked for want of jurisdiction* ] Before a District Court can make a reference under s. 646B of the *Civil Procedure Code*, it must be of opinion that the Subordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it, and that therefore the matter is one in which the interference of the High Court should be sought. The word "shall" in s. 646B, cl. (1), is not mandatory, but directory. *MADAN GOPAL v. BHAGWAN DAS*.

[I. L. R. 11 All. 304]

## REFERENCE TO HIGH COURT—CRIMINAL CASES.

1.—*Practice—Criminal Procedure Code*, s. 438—*Reference by District Magistrate of proceeding of Sessions Judge*.] A District Magistrate who considers that there has been a miscarriage of justice in the Court of Session, should not report the case to the High Court for orders under s. 438 of the *Criminal Procedure Code*, but should communicate with the Public Prosecutor as to the case in which he thinks such miscarriage has occurred, and invite his assistance to move the Court with regard to it. *QUEEN-EMPRESS v. SHERE SINGH*.

[I. L. R. 9 All. 362]

2.—*Criminal Procedure Code*, s. 307—*Powers of High Court under s. 307—Criminal Procedure Code*, ss. 418, 423, (d).] No trial can be, legally speaking, concluded until judgment and sentence are passed, and the trial of a case referred by a Sessions Judge to the High Court under s. 307 of the *Criminal Procedure Code* remains open for the High Court to conclude and complete, either by maintaining the verdict of the jury and causing judgment of acquittal to be recorded, or by setting aside the verdict of acquittal, and causing conviction and sentence to be entered against the accused. The provisions of s. 307 of the *Criminal Procedure Code* are not in any way cut down by ss. 418 and 423; and the High Court has power, under s. 307, to interfere with the verdict of the jury where the verdict is perverse or obtuse, and the ends of justice require that such perverse finding should be set right. The power of the High Court is not limited to interference on questions of law, *i.e.*, misdirection by the Judge, or misapprehension by the jury of the Judge's directions on points of law. *QUEEN-EMPRESS v. MCCARTHY*.

[I. L. R. 9 All. 420]

3.—*Criminal Procedure Code*, s. 438—*Reference by Magistrate of orders passed by Sessions Judge*.] A Magistrate is not justified in referring under s. 438 of the *Criminal Procedure Code* orders passed by the Sessions Judge on appeal, except in very special cases. *Queen-Empress v. Shere Singh*, I. L. R. 9 All. 362, referred to. *QUEEN-EMPRESS v. ZOR SINGH*.

[I. L. R. 10 All. 146]

## REFORMATORY SCHOOLS ACT (V OF 1876).

—, ss. 2, 7.

*See* MAGISTRATE, JURISDICTION OF—  
POWERS OF MAGISTRATES.

[I. L. R. 12 Mad. 92]

## REGISTRAR OF HIGH COURT, AUTHORITY OF.

—*Power to execute conveyance and enter into covenants on behalf of infants and persons refusing to execute—Defects of title known to purchaser*

# REGISTRAR OF HIGH COURT, AUTHORITY OF—continued.

at time of sale—Covenants for title and quiet enjoyment—*Parda-nashin*, when not bound by conveyance executed by her containing covenants for title and quiet enjoyment—*Civil Procedure Code (Act XIV of 1882)*, ss. 261, 262—*Rules of Court (Belchambers' Rules and Orders)*, Nos. 341 and 436] The Registrar of the High Court has authority, when so directed by an order of Court, to execute a conveyance on behalf of a party refusing to do so, so as to pass his estate, if any, but has no authority to bind him by entering into any covenants on his behalf. The power of the Registrar to execute such a conveyance rests upon statutory authority. General covenants for title and quiet enjoyment extend to the case of a defect known to the purchaser at the time of the sale, unless the intention of the parties that they should not do so is clearly expressed in the covenants themselves. "Conveyance," as used in Rule 436 (*Belchambers' Rules and Orders*) means such an instrument as may be necessary to transfer the estate, if he has any, belonging to the person on behalf of whom the Registrar executes the transfer to the purchaser. Circumstances under which a *parda-nashin* lady will be relieved from liability under covenants contained in a conveyance executed by her. *D* an heir of one *X*, a deceased Hindu lady, sold and conveyed to *M*, in March 1878 a moiety in certain premises belonging to the estate of *X*. Subsequently a decree was made for partition of the estate left by *X* in a suit to which *D*, *A*, *R*, *G*, and *S* were parties, and an order was made in that suit directing the premises, of which *D* had so sold a moiety, to be sold by the Registrar, and the parties were directed to join in the conveyance, the Registrar being directed to approve and execute the same on behalf of *G* who was an infant. At the sale the plaintiff purchased the premises, and thereafter *D* refused to execute the conveyance, which included the usual covenants for title and quiet enjoyment. A summons was thereupon taken out against him, and an order was made directing the Registrar to execute the conveyance on his behalf. The conveyance was then executed in September 1885 by *A*, *S*, and *R*, and by the Registrar on behalf of *D* and the minor *G*. In a suit instituted by *M*, under the conveyance of 1878, the Court held that he was entitled to possession, as against the plaintiffs, of the moiety of the premises covered by his conveyance. The plaintiff, therefore, brought a suit against *D*, *A*, *R*, *G* and *S* to recover damages for breach of the covenants for title and quiet enjoyment. It was not found that *R* had any good independent advice in the matter, or that she clearly understood the nature of the contract she was entering into, and the liabilities she was taking upon herself: *Held*, that although the Registrar had authority to execute the conveyance on behalf of *D* and *G*, he had no authority to enter into the covenants on their behalf, and that the suit should be dismissed as against them: *Held*, also, that having regard to the position of *R*,

# REGISTRAR OF HIGH COURT, AUTHORITY OF—concluded.

the suit should also be dismissed as against her. *RAM CHUNDER DUTT v. DWARKA NATH BYSACK*.

[I. L. R. 16 Calc. 330]

# REGISTRAR, SALE BY.

See VENDOR AND PURCHASER—MISCELLANEOUS CASES

[I. L. R. 14 Calc. 518]

# REGISTRATION.

See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—UNSTAMPED OR UNREGISTERED DOCUMENTS.

[I. L. R. 11 All. 13]

See OUDH ESTATES ACT (I OF 1869), s. 13

[I. L. R. 16 Calc. 468, 556]

# REGISTRATION ACT (III OF 1877).

1.—s. 17 and s. 49—*Registration Act, 1871, s. 17—Decrees—Instrument—Admissibility in evidence.*] A decree by which immoveable property was charged did not need registration under s. 17 of the Registration Act 1871 in order to make it admissible in evidence under s. 49. Such decrees are now expressly excluded by s. 17 Registration Act 1877. *PURMANUDAS JIWANDAS v. VALLABDAS WALLJI*.

[I. L. R. 11 Bom. 506]

2.—s. 17 and s. 49—*Mortgage bond—Indorsement of part payment—Receipt*] The strictest construction should be placed on the prohibitory and penal sections of the Registration Act, which impose serious disqualifications for non-observance of registration. An instrument to come within s. 17 (b) of the Registration Act (III of 1877) must in itself purport or operate to create, declare, assign, limit or extinguish some right, title, or interest of the value of Rs. 100 or upwards in immoveable property. To come within s. 17 (c), it must be on the face of it an acknowledgment of the receipt of payment of some consideration on account of the creation, declaration, assignment, limitation, or extinguishment of such a right, title or interest. In a suit by a mortgagee for the sale of immoveable property mortgaged in certain simple mortgage-bonds for amounts severally exceeding Rs. 100, the defendant pleaded that he had made certain payments in respect of the bonds, and in support of his plea relied on indorsements of payment upon them, one of which was as follows:—"Paid on the 21st December Rs. 300." The other indorsements were in similar terms; *Held* by the Full Bench (*STRAIGHT, J.*, doubting) that the indorsements, even if assumed to be receipts, did not fall within s. 17 (b) of the Registration Act, inasmuch as a receipt, unless so framed and worded as to purport expressly to limit or extinguish an interest in immoveable property

# REGISTRATION ACT III OF 1877, s. 17

—continued.

(which the indorsements did not), could not come within the section, and what ordinarily operated to limit or extinguish a mortgagee's interest in the mortgaged property was not the paper receipt, but the actual part payment of the mortgage-debt. *Held* also that the indorsements did not fall within s. 17 (c) of the Act inasmuch as taken by themselves they were merely memoranda made by the mortgagee, and could not be treated as acknowledgments, nor, even if assumed to be such, did they show, upon their face, that they were acknowledgments of the receipt or payment of any consideration for the limitation or extinguishment of any interest of the mortgagee in the mortgaged property. *Held* therefore that the indorsements did not require to be registered in order to make them admissible in evidence of the payments to which they related. *Mahadaji v. Vyankaji Gorind*, I. L. R. 1 Bom. 197; *Basawa v. Kalkapa*, I. L. R. 2 Bom. 489; *Kaki v. Khotu* I. L. R. 4 Bom. 590; *Waman Ram Chundra v. Dhondiba Kishnaji*, I. L. R. 4 Bom. 126; *Futeh Chund Sahoo*, v. *Leelumber Singh Doss*, 14 Moore's I. A. 129; and *Imdad Husain v. Tasaddak Husain*, I. L. R. 6 All. 335, distinguished. *Dulip Singh v. Durga Prasad*, I. L. R. 1 All. 442, referred to. *JIWAN ALI BEG v. BASA MAL*.

[I L R. 9 All. 108]

3.—s. 17 and s. 49.—*Hypothecation of Crops* —“*Moveable Property*”—*Act I of 1868, s. 2 (6)*—*Transfer of Property Act IV of 1882, s. 54.* *Held* that an assignment by indorsement of a registered bond hypothecating certain crops was a transaction relating to moveable property, and registration of such indorsement was not required. S. 17 of the Registration Act (III of 1877), or s. 54 of the Transfer of Property Act (IV of 1882). *KALKA PRASAD v. CHANDAN SINGH*.

[I L R. 10 All. 20]

4.—ss. 17 and 49.—*Agreement to give kabuliati*—*Instrument giving right to obtain another document.* *Held* that an *ikrar* to the effect that the tenants will sign and have registered *kabuliats* at rents expressed in the *ikrar* is not a document inadmissible in evidence for want of registration under s. 17, cl. (b) as operating to create or declare an interest. It comes under cl. (h) by creating a right to obtain another document which, when executed, will create or declare an interest. *PARTAB CHUNDER GHOSE v. MOHENDRA PURKAIT*.

[L. R. 16 I. A. 233  
[I L R. 17 Calc. 291]

—, s. 18.

See VENDOR AND PURCHASER—COMPLETION OF TRANSFER.

[I. L. R. 16 Calc. 622]

—, ss. 23, 24.

See s. 34.

[I. L. R. 15 Calc. 538  
[I. L. R. 16 Calc. 189]

W., D.

# REGISTRATION ACT III OF 1877—

continued.

—, s. 28.—*Transfer of decree—Civil Procedure Code, ss. 232, 241—Appeal—Act III of 1877, s. 28.* The words of s. 28 of the registration Act (III of 1877), “some portion of the property” should not be read as meaning some substantial portion. *Sheo Dayal Mal v. Hari Ram*, I. L. R. 7 All. 590 dissented from. The holders of a decree for the sale of mortgaged property transferred the same to *M* by instruments which were registered at a place where a small portion only of the property was situate. Subsequently *M* transferred the decree to other persons, and the co-transferees applied, under s. 232 of the Civil Procedure Code, to have their names substituted for those of the original decree-holders. The judgment-debtor opposed the application on the grounds that *M*'s name had not been substituted for the names of the original decree-holders, who had transferred to him, and that the transfers by *M* were inoperative, as the instruments of transfer had not been registered at the place where the substantial portion of the mortgaged property was situate in accordance with s. 28 of the Registration Act (III of 1877). The application was allowed by the Courts below: *Held* that the objection in reference to s. 28 of the Registration Act could only properly be raised between the transferor and the transferee, and not by the judgment-debtor, and moreover had no force. *GULZARI LAL v. DAYA RAM*.

[I L R. 9 All. 46]

—, s. 28 and ss. 64, 65, and 66.—*Place of registration of documents.* The requirements of s. 28 of Act VIII of 1871 are fulfilled by the registration of a document relating to immoveable property in the office of the sub-registrar within whose sub-district any portion of the property is situate. The words “some portion of the property” are not to be read as meaning some substantial portion of the property. All matters of publicity which it is the object of a register to afford are provided for in this respect, by the carrying out of the provisions of ss. 64, 65, and 66. *HARI RAM v. SHEODAYAL MAL*.

[I L R. 11 All. 136]

[L. R. 16 I. A. 12]

Reversing the decision of the High Court in *SHEODAYAL MAL v. HARI RAM*.

[I. L. R. 7 All. 590]

—, s. 34.

See COURT.

[I. L. R. 11 Mad. 3]

See SANCTION TO PROSECUTION—WHERE SANCTION IS NECESSARY.

[I. L. R. 11 Mad. 3]



# REGISTRATION ACT III OF 1877— continued.

1.—s. 34 and ss. 23, 24, 76, 77.—*Limitation for registration or order of refusal of a document admitted for registration by Registrar—Denial of execution—Refusal to attend—Limitation for suit under s. 77 of the Registration Act.* No period is prescribed by Act III of 1877, within which a document which has been admitted for registration, may be registered, or within which the order of refusal by the Registrar to register the document must be made. There is nothing in ss. 76 and 77 to compel the Registrar in cases where there has been no express denial of execution, but where the executant refuses to attend at his office, to make his order of refusal within the time limited for admission of execution by ss. 23 and 24. Limitation in respect of a suit under s. 77 begins to run from the date of such order. *Mukhun Lall Panday v. Koondun Lall*, 15 B. L. R. 228, L. R. 2 I. A. 210: 24 W. R. 75, and *Shama Charan Dass v. Joyenoolah*, I. L. R. 11 Calc. 750, relied on. In the matter of *Buttobehary Banerjee*, 11 B. L. R. 20, dissented from. LUCKHI NARAIN KHETTRY v. SATCOURIE PYNE.

[I. L. R. 16 Calc 189

Affirming on appeal the decision in SATCOURIE PYNE v. LUCKHI NARAIN KHETTRY.

[I. L. R. 15 Calc 538

—s. 35 and ss. 74 and 77.—*Denial of execution, what is—Non-appearance—Specific Relief Act I of 1877, s. 45.* A, by an indenture of mortgage, dated 15th March 1887, mortgaged certain property to S to secure the repayment of Rs. 18,500 within two months. The deed was duly lodged for registration; but A, (the mortgagor), neglected to appear at the registration office to admit execution. A summons was accordingly issued against him under s. 36 of the Registration Act III of 1877, to enforce his attendance, and was duly served upon him as required by s. 39. He, however, did not obey the summons, and neglected to attend the Sub-Registrar's office on the day appointed. He subsequently went away to Arabia without admitting execution, and was not expected to return to Bombay. S (the mortgagee), then applied to the Sub-Registrar to treat A's neglect to attend and admit execution as equivalent to a denial of execution and to "refuse to register" the deed under the provisions of s. 35 (last clause), in order that an application might be made to the Registrar, under s. 73, for the purpose of establishing the right of S (the mortgagee), to have the deed registered. The Sub-Registrar, however, considered that he could not treat A's non-appearance as a denial of execution. On application to the High Court under s. 45 of the Specific Relief Act I of 1877: Held following *Radhakishan Rowra Dakna v. Choornilal*, I. L. R. 5 Calc. 445, that the non-appearance of A, in pursuance of the summons was equivalent to a denial of execution within the meaning of s. 35 of the Registration Act; and that, under the

# REGISTRATION ACT III OF 1877, s. 35— continued.

provisions of that section, the Sub-Registrar was bound to "refuse to register" the deed. The Court accordingly made an order directing the Registrar to proceed under s. 74 to make the inquiry therein directed. IN RE ABDUL AZIZ

[I. L. R. 11 Bom. 691

—, s. 41.

See COURT.

[I. L. R. 10 Mad. 154

See SANCTION TO PROSECUTION—WHERE SANCTION IS NECESSARY.

[I. L. R. 10 Mad. 154

1.—s. 49 and s. 17.—*Registration Act 1871, s. 17—Decree—Instrument—Admissibility in evidence.* Where a decree contained a charge on immoveable property: Held that it was admissible in evidence under s. 49 of Act VIII of 1871 without registration under s. 17. S. 17 of the Registration Act 1871 expressly excludes such decrees. PURMANANDASJIWANDAS v. VALLABDAS WALLJI.

[I. L. R. 11 Bom. 506

2.—s. 49 and s. 17 (e)—*Unregistered agreement by mortgagor to sell to mortgagee—Subsequent assignment of equity of redemption to third person for value, but with notice of agreement.* In a suit for redemption filed by an assignee for value of the equity of redemption against a mortgagee in possession, it was found that the mortgagor had agreed with the defendant to sell the mortgage premises to him, that part of the purchase-money had been acknowledged as paid, and that the balance had been tendered in pursuance of the agreement. It was further found that the plaintiff had taken his assignment with notice of the above agreement and tender. The agreement was in writing, but not registered. Held, that though the agreement was not admissible in evidence as creating an interest in land, still it might be used for the purpose of obtaining specific performance, and the plaintiff having purchased the equity of redemption with notice as above was not entitled to redeem. ADARKALAM v. THEFTHAN.

[I. L. R. 12 Mad. 505

3.—s. 49 and s. 60.—*Certificate of registration—Distinction between act of registering officer and conduct of parties—Certificate not invalidated and document not made inadmissible by erroneous procedure in presenting or admitting execution.* The word "registered" as used in s. 49 of the Registration Act (III of 1877) refers to the act of registration by the registering officer, and not to matters of procedure or conduct of the parties seeking registration, which are governed by special provisions of the Act. S. 49, read with s. 60 only means that a document, to be admissible in evidence for the purposes of the former section, must be registered, i.e., the officer must, under

REGISTRATION ACT III OF 1877, s. 49,  
—continued.

s. 60, have put upon it the certificate required by that provision. If he has done so, the document bearing such certificate becomes admissible in evidence: if he has not, or there has been no registration of the document, then such document is inadmissible. Where the document bears such a certificate, it is registered within the meaning of s. 60, and becomes under the second paragraph thereof admissible in evidence, and the operation of the second paragraph is not interfered with by s. 49. Where, therefore, the lower Appellate Court rejected as inadmissible in evidence under s. 49, a deed-of-gift of immovable property upon which was endorsed a certificate under s. 60, on the ground that the person presenting it for registration and admitting execution was not qualified to do so under ss. 32 and 35, and the registration was consequently void and the document not registered under s. 17 (a): *Held* that the Court was wrong in so doing, and ought to have looked at and dealt with the document. *Har Sahar v. Chummi Kuar*, I. L. R. 4 All. 14; *Iktal Begam v. Shum Sundar*, I. L. R. 4 All. 384; *Bishunath Naik v. Kelliani Bai*, Weekly Notes, All. 1882, p. 175; *Husaini Begam v. Mulo*, Weekly Notes, All. 1882, p. 183; *Sheo Shunkar Sahay v. Hirday Narain Sahu*, I. L. R. 6 Cal. 25; *Muhammad Ehsaz v. Brj Lal*, L. R. 4 I. A. 166; *Jah Mukhun Lal Panday v. Jah Koondan Lal*, L. R. 2 I. A. 210; *Majid Hosain v. Fazl-un-nissa*, L. R. 16 I. A. 19, referred to. *HARDEI v. RAM LAL*.

[I. L. R. 11 All. 319]

1.—s. 50—*Priority—Possession of mortgagor as tenant to mortgagee, Effect of—Notice.* By an unregistered deed of sale, dated the 1st June 1881, the first defendant sold to the plaintiff for Rs 90 certain land which had been previously mortgaged with possession by him to the plaintiff. The first defendant had remained in possession subsequently to the mortgage as the tenant of the plaintiff under a lease which was not registered. On the 16th April 1883, the first defendant sold the property to defendant No. 2, who registered his deed, took actual possession of the land, and got it transferred to his name in the revenue books. The plaintiff now sued to recover possession from defendant No. 2, who contended (*inter alia*) that his deed being registered was preferable to the plaintiff's prior, but unregistered, deed of sale. The Court of First Instance awarded the plaintiff's claim. The defendants appealed to the District Judge, who reversed the lower Court's decree. On appeal by the plaintiff to the High Court: *Held*, confirming the decree of the lower Appellate Court, that defendant No. 2 having registered his deed of the 16th April 1883 was entitled, under s. 50 of Act III of 1877, in priority to the plaintiff, whose deeds were not registered, although earlier in date. It was contended for the plaintiff that the possession of the defendant No. 1 as tenant to the plaintiff subsequently to the mortgage and sale of the land to the plaintiff was the possession of the plaintiff, and that such

REGISTRATION ACT III OF 1877, s. 50—  
continued.

possession operated as constructive notice of the plaintiff's title to defendant No. 2: *Held*, that the possession by defendant No. 1 as mortgagor was not notice to defendant No. 2 of the plaintiff's title. Defendant No. 1 being the vendor of the land to defendant No. 2, the latter could have no reason to suppose that he was in possession otherwise than as owner. *MOHESHWAR BALKRISHNA v. DATTU*.

[I. L. R. 12 Bom. 569]

2.—s. 50—*Operation of section—Priority—Meaning of the words "duly registered" in the section—Registration Act, Act VIII of 1871, s. 50—Contest between instruments executed before Act III of 1877, which are not both optionally registrable—Vendor and purchaser—Purchaser omitting to take possession—Fraud—Estoppel* S. 50 of the Registration Act (III of 1877) has no retrospective effect. The words "duly registered" under that section mean duly registered under that Act, and not under any prior Act. The section has no application to cases where the contest is between an unregistered instrument whenever executed and a registered instrument executed before the Act came into force. It applies only to cases where the registered instrument is subsequent to the Act. A sold certain land to B by a sale-deed, dated 15th July 1871. The deed was optionally registrable, and was not registered. A continued in possession after the date of the sale. B sold the same land to the plaintiff by a deed of sale, dated 1st February 1872. The deed was registered, its registration being compulsory. It was unaccompanied with possession. In 1882 B obtained possession of the land from A's sons and sold it to the defendant by a sale-deed, dated 14th October 1882. This deed was registered and accompanied with possession. In 1883 the plaintiff sued for possession of the land in dispute, relying on his registered deed of sale of 1st February 1872. The defendant relied on his vendor's sale-deed of the 15th July 1871: *Held*, that under Act VIII of 1871, which governed the present case, there could be no competition between the sale-deeds of 1871 and 1872, the registration of the one being optional, whilst that of the other was compulsory. The registration of the plaintiff's deed, therefore, did not give it priority over the earlier deed under which the defendant claimed. *Held*, also, that the defendant's vendor by merely omitting to take possession of the land on his purchase was not guilty of any positive fraud or of any concealment or negligence so gross as to amount to fraud that would entitle the plaintiff to relief against him. *SHIVRAM v. SAYA*.

[I. L. R. 13 Bom. 229]

—, s. 60.

See s. 49.

[I. L. R. 11 All. 319]

REGISTRATION ACT III OF 1877—*contd.*

—, s. 60.—*Certificate of registration—Document registered by officer having no jurisdiction—Admissibility of evidence.* The Court can go behind a certificate of registration, and where it finds that a document was registered by an officer who had no jurisdiction to register it, will refuse to receive it in evidence on the ground that it is not duly registered. *Ram Coomar Sen v Khodu Nevaz*, 7 C L. R. 223, distinguished. *BENI MADHAB MITTER v KHATIR MONDUL*.

[I. L. R. 14 Calc. 449]

—, ss. 64, 66.

See s. 28.

[I. L. R. 11 All. 136]

—, s. 77.

See s. 35.

[I. L. R. 11 Bom. 691]

1.—s. 77.—*Suit to compel registration of document not compulsorily registrable* Under the Registration Act of 1877, a suit lies by a purchaser to compel registration of his *kobala* in a case in which the value of the property conveyed is under Rs. 100, and in which, therefore, the registration of the deed is not compulsory. *TOPA BIBI v. ASHANULLAH SARDAR*.

[I. L. R. 16 Calc. 509]

2.—s. 77 and ss. 23, 24, 76—*Limitation for registration or order of refusal of a document admitted for registration by Registrar—Denial of execution—Refusal to attend—Limitation for suit under s. 77 of the Registration Act.* No period is prescribed by Act III of 1877, within which a document which has been admitted for registration may be registered, or within which the order of refusal by the Registrar to register the document must be made. There is nothing in ss. 76 and 77 to compel the Registrar in cases where there has been no express denial of execution, but where the executant refuses to attend at his office, to make his order of refusal within the time limited for admission of execution by ss. 23 and 24. Limitation in respect of a suit under s. 77 begins to run from the date of such order. *Mukhun Lall Panday v. Koondun Lall*, 15 B. L. R. 228; L. R. 2 I A. 210; 24 W. R. 75, and *Shama Charun Das v. Joyenoolah*, I. L. R. 11 Calc. 750, relied on. In the matter of *Buttobehary Banerjee*, 11 B. L. R. 20, dissented from. *LUCKHI NARAIN KHETTRY v. SATCOURIE PYNE*.

[I. L. R. 16 Calc. 189]

Affirming on appeal, *SATCOURIE PYNE v. LUCKHI NARAIN KHETTRY*.

[I. L. R. 15 Calc. 538]

—, ss. 82, 83.

See SANCTION TO PROSECUTION—WHERE SANCTION IS NECESSARY.

[I. L. R. 11 Mad. 500]

## REGULATIONS MADE UNDER STATUTE 33 VICT c 3.

—1872—III

See SONTHAL PERGUNNAHS SETTLEMENT REGULATION.

[I. L. R. 15 Calc. 765]

—1886—I.

See ASSAM LAND AND REVENUE REGULATION.

[I. L. R. 15 Calc. 227]

## RE-HEARING.

See SMALL CAUSE COURT, PRESIDENCY TOWNS—PRACTICE AND PROCEDURE—RE-HEARING.

[I. L. R. 12 Bom. 408, 579]

## RELEASE, DEED OF.

See STAMP ACT 1879, s. 39.

[I. L. R. 11 Mad. 40]

## RELIEF.

—*Form of decree not indicated in the plaint, but indicated in the issues—Civil Procedure Code 1882, ss. 146, 147.* In a suit by the head of an adhinam for declarations that a math was subject to his control, that he was entitled to appoint a manager, that the present head of the math was not duly appointed and his nomination by his predecessor was invalid, and for delivery of possession of the moveable and immoveable properties of the math to a nominee of the plaintiff, it was admitted that the defendant had succeeded to the management of the math under the will of his predecessor, and that he was not a disciple of the adhinam and it was found (1) that on the evidence as to the usage in the establishment in question, the head of the math is entitled to appoint his successor, but his election is limited to members of the adhinam; and the head of the adhinam is entitled to enforce this rule though he is bound to invest a disciple properly nominated by the head of the math; (2) that the defendant not being a disciple of the adhinam, his appointment was invalid and the head of the adhinam was entitled to see that a competent member of the adhinam was appointed in his stead. Held that the plaintiff was entitled to declarations based on the two last-mentioned findings since they were comprised in the issues framed under s. 146 and 147 of the Code of Civil Procedure, although the appropriate form in which the decree should be passed was not indicated with precision in the plaint itself. *GIYANA SAMBANDHA PANDARA SANNADHI v KANDASAMI TAMBIRAN*.

[I. L. R. 10 Mad. 375]

## RELIGION, OFFENCES RELATING TO.

1.—*Penal Code, ss. 295, 297—Defiling a place of worship—Trespass on a place of sepulture.* A Hindu, had sexual intercourse with a woman within an enclosure surrounding the tomb of a Mahomedan fakir. He was convicted under

# RELIGION. OFFENCES RELATING TO—*concluded.*

s. 295 of the Penal Code. *Held*, that in the absence of proof that the place was used for worship or otherwise held sacred, the conviction was bad, and that it should be altered to a conviction under s. 297 of the said Code. *IN RE RATNA MUDALI.*

[I L R. 10 Mad 126]

2.—*Penal Code, s. 295—“Object” held sacred by any class of persons—Killing cows in a public place*] The word “object” in s. 295 of the Penal Code does not include animate objects. *QUEEN-EMPRESS v. IMAM ALI.*

[I. L. R. 10 All 150]

# RELIGIOUS COMMUNITY.

—*Jews—Beni-Israelite community in Bombay—Dismissal of officers of the community by resolutions passed at a meeting—Such officers to be given opportunity of defending themselves—Domestic tribunal—Jurisdiction of Court*] The plaintiffs and the defendants were members of the Beni-Israelite community worshipping at a certain synagogue in Bombay. The administration of the synagogue and of the funds was vested in a *mukadam* or head-man, and four managers, a treasurer, and a crier. The *mukadam* succeeded to the office by family right according to the custom of the community, but in matters of management he was bound to keep within his powers, which were co-ordinate with those of his colleagues. The first defendant was the *mukadam*, the second defendant was the *haan* or headle, and the third defendant was the *samost* or crier. The first defendant had succeeded to the office of *mukadam* as the nearest lineal descendant of the founder of the synagogue. The second defendant was appointed by the community, and it did not appear on what terms he held office. The third defendant was merely a paid official of subordinate character. Disputes arose in the community, which became divided into two parties, to one of which the three defendants belonged. At a meeting of the community held on the 20th October 1884, which was attended by a majority of the community, resolutions were passed, dismissing all three defendants from office; and their dismissal was formally communicated to them by a letter, dated the 30th October. It did not appear that they had been given any notice that the question of their dismissal was to be discussed at the meeting. They had received only the ordinary notice that a meeting was to be held. The defendants refused to recognize the authority of the resolutions passed at the meeting of the 28th October, and the plaintiffs, accordingly, filed this suit, praying for a declaration that the defendants did not occupy any official position in the synagogue, and for the recovery of certain property in their hands. *Held*, that the first defendant had not been duly dismissed. He held the office of *mukadam*, not merely at the will of the community, but as long as he duly performed the duties of his office. He could not be dismissed without an

# RELIGIOUS COMMUNITY—*concluded.*

opportunity of making his defence and explaining his conduct, and he had been given no notice that his conduct and his dismissal were to be discussed at the meeting of the 28th October. *Held*, also, that the second defendant had not been duly dismissed. No evidence was given as to the exact terms on which he held office; but he was entitled to notice, and to an opportunity of defending himself before dismissal. *Held*, as to the third defendant, that he had been duly dismissed. He was merely a subordinate officer, and the managers had the power of dismissing him. All the managers, save the first and second defendants, concurred in dismissing him, and in doing so they were within their right. Where a domestic tribunal has been appointed for the regulation of the affairs of a community, the Court has no jurisdiction to interfere with its decisions if it acts within the scope of its authority and in a manner consonant with the ordinary principles of justice. *ADVOCATE-GENERAL OF BOMBAY v. HAIM DEVAKER.*

[I L R. 11 Bom. 185]

# RELIGIOUS INSTITUTIONS.

*See HINDU LAW—ENDOWMENT—SUCCESSION AND MANAGEMENT.*

[I. L. R. 10 Mad. 375]

*See LIMITATION ACT* 1877, ART. 144—*ADVERSE POSSESSION.*

[I L R. 10 Mad. 375]

*See RIGHT OF SUIT—CHARITIES.\**

[I. L. R. 10 Mad. 375]

# RELINQUISHMENT OF, OR OMISSION TO SUE FOR, PORTION OF CLAIM.

1.—*Suit not brought for whole claim—Civil Procedure Code 1882, s. 43.*] On the 5th September 1874 *R*, a Hindu, and his son borrowed Rs. 5,000 from *V* and mortgaged to him certain lands items 1, 2, and 3. On the 7th September 1874 *V* borrowed Rs. 5,000 from *R N* and mortgaged his rights in items 1 and 2 and land of his own to *R N*. In 1877 *R N* bought at a sale in execution of a decree against *R* the share of *R* in the said items 1 and 2 subject to the mortgage created by *R* on 5th September 1874, and to another mortgage created by *R* dated 11th January 1875. In 1880 *R N* sued *V* and the sons of *R* for arrears of interest due under his mortgage-bond, but their suit was withdrawn with liberty to bring a fresh suit for the principal and interest due on the bond. In 1885 *R N* sued *V* and the sons of *R* to recover principal and interest due under his mortgage-bond. *Held*, that the claim of *R N* was not barred by s. 43 of the Civil Procedure Code. *VENKATA SHETTI v. RANGA NAYAK.*

[I L R. 10 Mad. 160]

2.—*Civil Procedure Code, s. 43—Declaration of title to continue to enjoy separate possession of land—Suit for partition.*] The plaintiffs having

**RELINQUISHMENT OF, OR OMISSION  
TO SUE FOR, PORTION OF CLAIM—  
*continued.***

obtained a declaration of title to continue to enjoy separate possession of certain lands sued the former defendants again for partition of the same lands: *Held*, that the suit was unnecessary and should be dismissed. *Per cur*—The claim and the remedy mentioned in s. 43 of the Code of Civil Procedure have reference to the cause of action litigated in the previous suit. *ANGI v. THATHA.*

[I. L. R. 10 Mad. 347]

3.—*Mortgage for securing payment of rent—Decree of Revenue Court for arrears of rent—Suit for sale of mortgage property—Civil Procedure Code, s. 43.* In 1874 the plaintiff leased certain immoveable property to the defendant, and the latter executed a deed, by which he covenanted to pay the annual rent and fulfil other conditions of the lease, and gave security in Rs. 3,000 by mortgage of landed property. In 1874 the plaintiff obtained decrees in the Revenue Court for arrears of rent, and the decrees were partially satisfied and then became barred by limitation. In 1884 the plaintiff brought a suit to recover the balance due by enforcement of the mortgage security against the purchasers of the mortgaged property. *Held* that the plaintiff had two separate rights of action, one on the contract to pay rent, and the other on the mortgage security; that he could only enforce the first by a suit in the Revenue Court for arrears of rent, and the second by suit in the Civil Court; and consequently there could be no bar to the latter suit by reason of the suit instituted in the Revenue Court, with reference to s. 43 of the Civil Procedure Code. *CHUNNI LAL v. BANASPAT SINGH.*

[I. L. R. 9 All. 23]

4.—*Suit for enhancement of rent—Dismissal of enhancement suit—Rent suit at old rate for year for which rent had been sought at enhanced rate* The dismissal of a suit for rent at an enhanced rate is no bar to a subsequent suit for rent at the rate originally fixed. *Kannook Chunder Mookerjee v. Guru Dass Biswas*, I. L. R. 9 Calc. 919; 12 C. L. R. 599, overruled. *SUDDURUDDIN AHMED v. BANI MADHUB ROY CHOWDHRY.*

[I. L. R. 15 Calc. 145]

5.—*Civil Procedure Code, s. 43—Suit to change maintenance on land after suit for maintenance.* The plaintiff having obtained a decree against the defendants for the payment to her of a monthly sum for her maintenance, subsequently sued to have it constituted a charge on certain land: *Held*, that the claim in both suits arose out of the same cause of action, and therefore the plaintiff was precluded by s. 43 of the Code of Civil Procedure from asserting in the second suit the claim which she might have asserted in the first. *RANGAMMA v. VOHALAYYA.*

[I. L. R. 11 Mad. 127]

**RELINQUISHMENT OF, OR OMISSION  
TO SUE FOR, PORTION OF CLAIM—  
*continued.***

6.—*Civil Procedure Code, 1882, ss. 13 and 43—Act XII of 1879, s. 6—Act VIII of 1859, s. 7—Inclusion of whole claim in suit* The present suit was preceded by others in which the plaintiff sought to establish a right in the same part of the talukdairi estate that he now claimed to redeem from mortgage. The first suit in which he with another claimed as under-proprietors was dismissed in 1866 on the ground that they had not shown themselves to have held such right under the talukdars within the period since 1841. Proceedings not to be regarded as judicial, subsequently taken under Circular 4 of 1867, resulted in a finding that the dismissal was right upon the merits, the property having been transferred to the talukdar by a conditional-sale which had become absolute. Another suit was then brought to recover the talukdairi right, under the terms of Circular 106 of 1869, it being alleged that arrears of revenue paid by the talukdar had been paid on the plaintiff's account. That suit was also dismissed: *Held*, that the present suit to redeem the same property under a mortgage was not barred. The claim to redeem did not arise out of the former cause of action within the meaning of the sections of Act VIII of 1859 relating to the inclusion of the whole claim in a suit. The plaintiff not then being aware of his right when he sued before, it could not be regarded as a "portion of his claim," and he was not precluded, by having omitted it, from bringing it forward. *AMANAT BIBI v. IMDAD HUSAIN.*

[I. L. R. 15 Calc. 800]

[L. R. 15 I. A. 106]

7.—*Civil Procedure Code, s. 43—Claim for mesne profits received prior to date of former suit for land.* Where a suit to recover land was brought and no claim was made for mesne profits received prior to date of plaint: *Held*, that s. 43 of the Code of Civil Procedure was a bar to a subsequent suit for such mesne profits. *VENKOBA v. SUBBANNA.*

[I. L. R. 11 Mad. 151]

8.—*Civil Procedure Code, 1882, s. 43—Suit for land and mesne profits after dismissal of suit for mesne profits of same land.* A leased certain land to B. The lease expired in 1877 B continued to hold over and refused to accept a fresh lease from A. A sued B in 1882 for mesne profits for three years, but did not claim possession of the land. The suit was dismissed on a preliminary point. A then sued B to recover possession of the land and mesne profits. It was argued that A's claim to the land was barred by s. 43 of the Code of Civil Procedure, because he omitted to claim the land in the former suit for mesne profits: *Held* that the suit was not barred. *TIRUPATI v. NARASIMHA.*

[I. L. R. 11 Mad. 120]

**RELINQUISHMENT OF, OR OMISSION TO SUE FOR, PORTION OF CLAIM—continued.**

9.—*Joint owners—Mortgage of joint property by two co-owners—Subsequent mortgage of part of same property to same mortgagee by one co-owner—Suit by mortgagee on second mortgage and sale in execution—Purchase by mortgagee—Effect of such purchase on first mortgage—Subsequent suit by mortgagee on first mortgage.* By a mortgage-deed, dated the 24th January 1878, *S* and *V* two of three brothers constituting an undivided family, jointly mortgaged to the plaintiff *B* a part of the family property. On the 28th July 1878, *S* alone further mortgaged to the plaintiff for a fresh advance a portion of the property already mortgaged. Subsequently the three brothers effected a partition among themselves of all the undivided property, and the property jointly mortgaged by *S* and *V* fell, along with other property, to the share of *V* and the third brother *N*. In 1881 the plaintiff *B* sued *S* on the second of the above mortgages, *viz.*, that of the 28th July 1878. He obtained a decree, and at a sale held in execution of that decree himself purchased the property comprised in that mortgage. In the meantime on the 27th January 1882, and on the 6th December 1883, *V* and *N* respectively mortgaged with possession to the defendant *M* portions of the land comprised in the first mortgage of the 24th January 1878. In 1883 the plaintiff filed the present suit upon his first mortgage of 24th January 1878, claiming to recover Rs. 316-14-0 from *S* and *V* personally. He also prayed that the defendant *M*, who had been in possession of the property in dispute, should be prevented from obstructing him in selling the property. *S* and *V* did not appear. The third defendant *M* alone appeared and contended (*inter alia*) that the plaintiff, having sued upon his second mortgage without including the earlier one, was now barred from suing on the latter by ss. 13 and 43 of the Civil Procedure Code (XIV of 1882). He also contended that the plaintiff, having purchased part of the lands comprised in the mortgage now sued upon in execution of the decree obtained by him upon his second mortgage, could not now seek to burden the remaining lands included in the mortgage with the whole of the mortgage-debt, but that a proportionate part of that debt must be satisfied: *Held* that the plaintiff's suit was not barred by his previous suit on the second mortgage under the provisions of ss. 13 and 43 of the Civil Procedure Code. **MORO RAGHUNATH v. BALAJI TRIMBAK.**

[I. L. R. 13 Bom. 45]

10.—*Civil Procedure Code, 1882, s. 43—First suit to redeem—Second suit to eject—Causes of action not identical.* *A* filed a suit against *B*, to redeem the land in dispute, alleging that it had been mortgaged to *B*, and that the mortgage-debt had been more than paid off. He therefore prayed for an account and restoration of the land on payment of the sum that might be found due. The Court found that the alleged mortgage was not proved, and dismissed the suit. Thereupon *A* filed

**RELINQUISHMENT OF, OR OMISSION TO SUE FOR, PORTION OF CLAIM—concluded.**

a suit in ejectment against *B*. *Held*, that the ejectment suit was not barred under s. 43 of the Code of Civil Procedure (Act XIV of 1882). Failure in a redemption suit does not bar a subsequent suit in ejectment, the causes of action in the two suits being essentially different. *Shrudhas Vinayak v. Narayan*, 11 Bom. 221, followed. **NARO BALVANT v. RAMCHANDRA TUKDEV.**

[I. L. R. 3 Bom. 326]

11.—*Civil Procedure Code (Act XIV of 1882), ss. 13, 43—Cause of action—Damages* In September 1886 the plaintiff sued in a Munsif's Court certain defendants for possession of one biggah of land, and for damages for the cutting and carrying of certain paddy from such land on the 23rd December 1885. This suit was dismissed on the ground that no dispossession had taken place, the plaintiff being referred to a Small Cause Court for his damages. No appeal was made against this decision. In March 1887 the plaintiff sued these defendants in the Munsif's Court for possession of 5 biggahs 6 cottahs of land and for mesne profits, and obtained a decree for possession of 3 biggahs 6 cottahs of land with mesne profits; possession of the one biggah, the subject of the suit of 1886, being included in the three biggahs 6 cottahs decreed. He subsequently sued the same defendants in a Small Cause Court for damages for the paddy cut and carried on the 23rd December 1885. *Held*, that such suit was not barred by either s. 13 or s. 43 of the Civil Procedure Code. **MAHABEER SING v. RAMBHAIJAN SHA.**

[I. L. R. 16 Calc. 545]

12.—*Civil Procedure Code, s. 43—Maintenance—Suit to declare maintenance fixed by a decree, a charge on land* A Hindu woman having obtained a decree for maintenance against her husband, now alleged that he had alienated part of his property with a view to defeat her claim for maintenance, and sued him for a declaration that certain land which he had not alienated was liable for her maintenance: *Held*, that no cause of action was shown, but if there were one it was barred by s. 43 of the Civil Procedure Code. **SAMINATHA v. RANGATHAMMAL**

[I. L. R. 12 Mad. 285]

**REMAND.**

*Col.*

1. Power of remand ...	... 847
2. Ground for remand ...	... 847
3. Procedure on remand...	... 848
1. Cases of appeal after remand	... 849

*See APPELLATE COURT—INTERFERENCE WITH AND POWER TO VARY ORDER OF LOWER COURT.*

[I. L. R. 11 All. 35]

*See CIVIL PROCEDURE CODE, s. 544.*

[I. L. R. 11 All. 35]

**REMAND—continued.****(1) POWER OF REMAND.**

1.—*Powers of Courts of first and second appeal—Civil Procedure Code 1882, ss 574, 578.*] Observations by MAHMOOD, J., upon the distinction between the duties of the Courts of first appeal and those of the Courts of second appeal in connection with the provisions of ss. 574 and 578 of the Civil Procedure Code, and with the remand of cases for trial *de novo*. *Ram Narain v. Bhanwadin*, I. L. R. 9 All. 29 note, and *Sheamber Singh v. Lallu Singh*, I. L. R. 5 All. 14, referred to. *SOHAWAN v. BABU NAND*.

[I. L. R. 9 All. 28]

2.—*Civil Procedure Code, ss. 562, 564—“Suit.”*] S. 562 of the Civil Procedure Code authorizes a remand only where the entire suit, and not merely a portion of it, has been disposed of by the Court below upon a preliminary point. *BANWARI LAL v. SAMMAN LAL*.

[I. L. R. 11 All. 488]

**(2) GROUND FOR REMAND.**

3.—*Remand on point raised on issue in lower Court.*] A case ought not, as a rule, to be remanded upon a point which has been framed as an issue by the Court below, and brought to the attention of the parties, and where they have failed at the trial to give any evidence upon it. *RAM PROSAD v. ABDUL KARIM*.

[I. L. R. 9 All. 513]

4.—*Civil Procedure Code, ss. 562, 563, 564, 566—Trial on one of several issues—Reversal on that issue on appeal.*] In a suit for possession of property by right of inheritance, the Court framed six issues, four of which it tried and decided. With reference to its finding upon the principal of these issues, which related to the plaintiff's legitimacy, the Court dismissed the suit, observing that, in the view which it took of the case, the determination of the remaining issues was unnecessary. Some of the defendants had filed a statement of defence upon which no issues were framed, and no evidence taken, apparently in consequence of the attention of the Court being directed almost exclusively to the main issue as to the plaintiff's legitimacy. There was no formal order excluding evidence on any point. On appeal, the High Court reversed the first Court's finding on the issue with reference to which the suit had been dismissed below. *Held* by EDGE, C. J., and MAHMOOD, J. (*STRAIGHT, J.*, dissenting) that s. 562 of the Civil Procedure Code applied not only to cases where the first Court had expressly excluded evidence, but also to cases where the parties were or might have been misled by the Act of the Court as to the issues or the evidence necessary, and where, in consequence of the Court erroneously considering one issue only, the parties did not tender or bring forward their evidence; and that, as in the present case evidence had been excluded in this broad sense,

**REMAND—continued.****(2) GROUND FOR REMAND—concluded.**

s. 562 (the operation of which in such cases should be rather explained than limited) was applicable, and the case should be remanded for trial of the remaining issues. *Held* by *STRAIGHT, J.*, *contra*, that, with reference to ss. 562, 563, and 564, the case could not be remanded under s. 562, because it had not been disposed of upon a preliminary point, so as to exclude evidence of fact, and the Court should therefore proceed to dispose of it upon the evidence on the record, if any; and that an issue should be remitted to the lower Court under s. 566. *MUHAMMAD ALLAHADAD KHAN v. MUHAMMAD ISMAIL KHAN*.

[I. L. R. 10 All. 289]

5.—*N.-W. P. Rent Act XII of 1881, s. 208—Jurisdiction, Suit dismissed on ground of want of.*] An Assistant Collector dismissed a suit without considering the merits, on the ground that it was not cognizable by a Revenue Court. On appeal, the District Judge held that it was unnecessary to determine the question of jurisdiction as he had power in any event, under s. 208 of the N.-W. P. Rent Act, to remand the suit to the Assistant Collector, and he remanded it accordingly. *Held* that the Judge had rightly construed s. 208 of the Rent Act, and that the remand was proper. *Ahmad-ul-din Khan v. Maghs Rai*, I. L. R. 5 All. 488, distinguished. *GIRWAR SINGH v. SITA RAM*.

[I. L. R. 10 All. 31]

**(3) PROCEDURE ON REMAND**

6.—*Civil Procedure Code, 1882, s. 562—Order of remand—Issues undecided—Procedure.*] A Subordinate Judge decided a suit on the grounds (1) that it was *res judicata*; (2) that it was barred by limitation. On appeal, the Assistant Judge upheld the decree on the first-mentioned ground without deciding the point of limitation. On second appeal, the High Court reversed the Assistant Judge's decision, holding that the suit was not *res judicata*, and remanded the case to be tried on the merits. On receipt of the order of the High Court, the Assistant Judge reversed the decree of the Subordinate Judge without giving any decision on the point of limitation, and remanded the case to the Subordinate Judge to be tried on the merits. From this order the defendant appealed to the High Court. *Held* that the order of remand by the Assistant Judge was unauthorized under s. 562 of the Civil Procedure Code (Act XIV of 1882). When the High Court remanded the case to be tried on the merits, the whole case was left open to the Assistant Judge, and before he could reverse the Subordinate Judge's decree he was bound, under s. 562 of the Code, to determine whether the decision of the Subordinate Judge on the question of limitation was right or not. *RAISINGJI v. BALVANT-RAO*.

[I. L. R. 11 Bom. 663]



**REMAND—concluded.****(4) CASES OF APPEAL AFTER REMAND.**

7.—*Power of Appellate Court to deal with whole appeal after return of findings—Civil Procedure Code, ss. 561, 566.* In a second appeal by the defendant, in which the plaintiff filed objections to the decree under s. 561 of the Civil Procedure Code, the High Court, without giving judgment on the appeal, stated (giving reasons) the opinion that the appellant would be entitled to succeed, and at the same time remitted an issue under s. 566 of the Code with reference to the plaintiff's objections. At that time the appeal was apparently not argued out, and the true meaning of the facts as found was obviously not present to the mind of the Court. *Held*, that upon the return of the findings on remand the Court could not treat the appeal as already decided and the objections the sole matter for consideration, but must consider both appeal and objections and decide the whole case. *Held*, however, that where Judges have heard arguments on some of the issues and have expressed their views thereon and have remitted another issue or issues under s. 566, they are not bound, on the return of findings, to hear the case *de novo*, but may confine counsel to argument upon the findings. *LACHMAN PRASAD v. JAMNA PRASAD*.

[I. L. R. 10 All 162]

**RE-MARRIAGE, EFFECT OF**

*See CASES UNDER HINDU LAW—WIDOW—DISQUALIFICATIONS—RE-MARRIAGE.*

**RENT, ASSESSMENT OF, FOR TAXING PURPOSES**

*See MADRAS MUNICIPAL ACT, s. 123.*

[I. L. R. 10 Mad. 38]

**RENT, NON-PAYMENT OF.**

*See RIGHT OF OCCUPANCY—LOSS OR FORFEITURE OF RIGHT.*

[I. L. R. 14 Calc. 751]

**RENT, SUIT FOR ARREARS OF.**

*See ASSAM LAND AND REVENUE REGULATION.*

[I. L. R. 15 Calc. 227]

*See LIMITATION ACT 1877, ART. 116.*

[I. L. R. 15 Calc. 221]

**REPRESENTATIVE OF DECEASED PERSON.**

1.—*Representation of estate by mother—Decree against mother when adopted son in existence, null.* Plaintiff obtained a decree on a bond executed by S against the mother of S, whom he believed to be the heiress of S. In attempting to execute this decree against the estate of S, plaintiff was obstructed by the defendant who

**REPRESENTATIVE OF DECEASED PERSON—concluded.**

was the adopted son of S. Plaintiff sued the defendant for a declaration that he was entitled to execute his decree against the estate of S in the hands of the defendant: *Held*, that the suit must fail, inasmuch as the estate of S was not properly represented in the former suit. *Sotish Chunder Lahiry v. Nil Comul Lahiry*, (I. L. R. 11 Calc. 45), distinguished. *SUBBANNA v. VENKATAKRISHNAN*

[I. L. R. 11 Mad. 408]

2.—*Civil Procedure Code, s. 234—Sale in execution of decree against deceased Mahomedan's estate—Representation of deceased by some only of his next-of-kin—Sale held to be valid.* V, a Mahomedan woman, died, leaving her husband and several minor children as her representatives. In execution of a money-decree obtained against V, the creditor attached certain land which belonged to V and made her husband and two of her children parties to the execution-proceedings. The land was sold and purchased by the decree-holder: *Held* in a suit brought by the children of V to set aside the sale on the ground, *inter alia*, that some of them were no parties to the proceedings in execution, and that the others, being minors at the time, had not been represented by a guardian appointed by the Court, that the sale was valid. *KUNHAMMAD v. KUTTI*.

[I. L. R. 12 Mad. 90]

3.—*Son's liability for father's debts—Decree against legal representatives of a deceased debtor—Assets* Where a suit is brought against the sons and legal representatives of a deceased Hindu for debts contracted by the latter, the Court ought to pass a decree, although the deceased debtor may have left no assets. *Bapuji v. Umedbhai*, 8 Bom. A. C. 245, followed. *LALLU BHAGVAN v. TRIBHUVAN MOTIRAM*.

[I. L. R. 13 Bom. 653]

**RE-SALE.**

*See CASES UNDER SALE IN EXECUTION OF DECREE—RE-SALES.*

**RESISTANCE OR OBSTRUCTION TO EXECUTION OF DECREE.**

*See LIMITATION ACT 1877, ART. 167.*

[I. L. R. 11 Bom. 473]

1.—*Application against a claimant resisting execution, how treated—Order under Civil Procedure Code, s. 331, Nature of.* An application in furtherance of execution of a decree for possession against a person who resists execution, claiming the property as his own, is an application within s. 331 of the Civil Procedure Code, and should be treated as a plaint. *FONINDRO DEB RAIKUT v. JUGODISHWARI DABI*.

[I. L. R. 14 Calc. 234]

# RESISTANCE OR OBSTRUCTION TO EXECUTION OF DECREE—continued.

2.—*Civil Procedure Code*, ss. 318, 335—*Suit to recover possession of property sold in execution of decree.* *S* attached certain land and a house in execution of a decree against *R. M* put in a claim, under s. 278 of the Code of Civil Procedure, alleging that he was in possession as purchaser from *R*. The claim was rejected. No suit was brought by *M* to contest this order. *S* purchased the said land and house in execution and obtained a sale certificate. In 1884 *S* sued *M* to recover possession of the land and house, alleging that in execution-proceedings in 1882 he had been put into possession of the land, but not of the house, which was found locked up by the Court amin, and that *M* prevented him from enjoying both the land and house. *M* pleaded that *S* had never been put into possession and again set up his title as purchaser from *R* and possession under such title. The Munsif found that *S* had been put into formal or constructive possession of the land, but not of the house, and decreed the claim. On appeal the District Judge held that *S* was bound to proceed according to the provisions of s. 335 of the Code of Civil Procedure to recover possession, and could not bring a separate suit. *Held* that, whether there had been legal delivery or not the suit was not barred. *SEVU v. MUTTUSAMI*

[I. L. R. 10 Mad. 53]

3.—*Civil Procedure Code*, 1882, s. 335—*Effect of order unappealed from.* An order rejecting a claim petition under s. 335 of the Civil Procedure Code, not being appealed against within one year, acquires the force of a decree. *Teluyathan v. Lakshmana*, I. L. R. 8 Mad. 506, followed. *ACHUTA v. MAMMAVU*.

[I. L. R. 10 Mad. 357]

4.—*Person dispossessed in execution of decree—His remedy by suit or application under s. 332 of the Code of Civil Procedure (Act XIV of 1882).* A person, dispossessed of his land in execution of a decree of a Civil Court against a third party, should proceed for the alleged obstruction of his possession, not by a suit in the Mamlatdar's Court, but by an application under s. 332 of the Code of Civil Procedure (Act XIV of 1882), or by a regular suit. *GULABHAI GOPALJI v. JINABHAI RATANJI*.

[I. L. R. 13 Bom. 213]

5.—*Civil Procedure Code*, ss. 234, 332, 588—*Death of Judgment-debtor between order for possession in execution of decree and delivery of possession—Appeal against appellate order reversing an order under s. 332.* A decree-holder in a District Munsif's Court obtained an order for possession of land in execution of his decree on 20th August, on which day the judgment-debtor died. Possession was delivered on 28th August. The person dispossessed presented a petition under s. 332 of the Code of Civil Procedure disputing his right to be put into possession, on the ground,

# RESISTANCE OR OBSTRUCTION TO EXECUTION OF DECREE—concluded.

*inter alia*, that the judgment-debtor was not represented on the record. On appeal against the appellate order of the District Judge, *held*, assuming that the order for possession was made prior to the death of the judgment-debtor, there was no necessity for the decree-holder to bring any other person on to the record between the date of that order and the date on which the order was executed. *Ramasami v. Bagirathi*, I. L. R. 6 Mad. 180, distinguished. *BIYYAKKA v. FAKIRA*.

[I. L. R. 12 Mad. 211]

# RES JUDICATA.

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See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE 1882, s. 622.

[I. L. R. 11 Bom. 488]

# (1) ESTOPPEL BY JUDGMENT.

1.—*Attempt to control the descent of property.* Two brothers having divided their family estate, each took a share consisting of villages which they held separately, agreeing in the instrument of partition that "the villages of the shares of both of us should in future descend only to the sons and grandsons, and so on of us both, but must not go to any others." On the death of one brother leaving a widow and daughters, the widow obtained possession of the villages which formed her husband's share, and a suit brought against her by the other brother to recover them was dismissed on the ground that the divided shares descended according to law. The widow then transferred the villages to her elder daughter, whose right to the possession, as against the brother, was declared in the present suit on the ground that, as between the widow and the brother, the question of the widow's title was *res judicata*. *VENKATADRI APPA RAU v. PEDA VENKAYAMMA*.

[I. L. R. 10 Mad. 15]

## RES JUDICATA—continued.

## (1) ESTOPPEL BY JUDGMENT—continued.

2—*Benami transactions for purpose of defrauding creditors—Deed of conveyance not in real purchaser's name—Collusive suit by nominee against real owner—Decree obtained by fraud—Subsequent suit by real owner against nominee for possession—Right of party to fraud to set fraudulent decree aside—Collusive transaction when held binding, and when set aside.* In 1874, the plaintiff P bought a house from G, but caused the conveyance to be executed by G, in the defendant C's name. This was done with the object of protecting the property against the claims of the plaintiff's creditors. The plaintiff occupied the house, ostensibly as tenant to the defendant for a nominal rent. In 1880 the defendant brought a suit against the plaintiff to recover possession of the house, and obtained an *ex-parte* decree. He applied for execution of the decree, but allowed the execution-proceedings to drop. In 1883 he made a fresh application for execution. Thereupon the plaintiff filed the present suit for a declaration of his title to the house in question, and of his right to retain possession, alleging that the defendant was a mere *benamidar*; that the sale-deed and the *ex-parte* decree were sham and collusive transactions in fraud of the plaintiff's creditors, and that the defendant was merely a trustee for him: *Held*, that the plaintiff was bound by the decree passed in 1880 in the defendant's favour, though it was a collusive decree. The plaintiff could not get the judgment set aside which the defendant had obtained against him by his own contrivance. The plaintiff alleged that the defendant held in trust for him the object of that trust being to protect the plaintiff's property in fraud of his creditors. Even if such a trust enforceable by the Courts could arise out of such a *turpis causa*, the question was whether this continued to subsist and would be enforced when the original relations of the parties had become merged in the decree obtained by the defendant against the plaintiff. The general principle is that where a defendant has suffered a judgment to pass against him, the matter is then placed beyond his control: *Held*, also, upon the general principle of *res judicata*, that the plaintiff was estopped from raising the question of fraud in the present suit, which he might and ought to have urged in the former litigation. CHENVIRAPPA BIN VIRBHADRAPPA v. PUTTAPPA BIN SHIVBASAPPA.

[I. L. R. 11 Bom. 708]

3—*Civil Procedure Code, 1882, s. 13—Matter adjudged in a former suit—Purchase pendente lite* ] A zemindar, having granted a putni lease, mortgaged the zemindari to the putnidar, who, having afterwards obtained a decree against the zemindar upon the mortgage, attached and purchased, at the sale in execution, the zemindari interest subject to the mortgage. Before that purchase, though after the attachment, another holder of a decree against the zemindar brought the right, title, and interest in the zemindari to sale in exe-

## RES JUDICATA—continued.

## (1) ESTOPPEL BY JUDGMENT—continued.

cution of his decree, and himself became the purchaser. He then, claiming to have obtained the zemindari estate, sued the putnidar for rent due under the lease. This suit was dismissed, save as to rent due for the time intervening between the two sales in execution, on the ground that the relation of zemindar to lessee had ceased on the purchase by the latter. The present suit was brought by the purchaser from the zemindar, stating his title, acquired at the prior of the two sales, and claiming to redeem the mortgage. *Held*, that the dismissal of the rent suit, which involved the title barred the present one; and the opinion was expressed that the plaintiff had been rightly adjudged in the rent-suit to be bound by the proceedings taken by the mortgagee, pending which the purchase relied upon had been made. RADHAMADHUB HOLDAR v. MONOHUR MUKERJI

[I. L. R. 15 Calc 756]

[L. R. 15 I. A. 97]

4—*Code of Civil Procedure, s. 13—Identity of cause of action with that of prior suit to which the plaintiffs in a subsequent suit had been a party—Effect of judgment, that a will had been revoked, to bar, between the parties, any claim founded solely on the will.* The widow of a talukdar, acting under his supposed will, appointed the present appellant to succeed to the taluk and other estate which had belonged to the deceased. The heir of the deceased, under the Oudh Estates' Act I of 1869, obtained the judgment of the Judicial Committee, declaring that he was entitled to the taluks as against the present appellant, whose title was under the will, which had been revoked, as the Committee found. Another suit brought by the present appellant for a decree declaring that, in virtue of his appointment by the widow under the will, he was entitled to the whole of the estate of the deceased, talukdari and non-talukdari, was dismissed by the Judicial Committee on the ground that he had no such title to the whole or any part of the estate. *Held*, that this prior judgment was conclusive to bar the present suit which, being founded entirely upon the appellant's appointment in pursuance of the will, was brought for possession of all the estate of the deceased as well as a declaration of right thereto. Although the heir was not entitled to possession of the estate of the deceased other than talukdari, inasmuch as the widow took her estate therein, nevertheless, the claim of the present appellant being only founded upon her appointment under the will, as if unrevoked, and not being a claim for property as descending to the widow upon her husband's intestacy, the prior judgment was binding in the present suit. TRILOKI NATH SINGH v. PERTAB NARAIN SINGH.

[I. L. R. 15 Calc. 808]

[L. R. 15 I. A. 113]

5.—*Civil Procedure Code, 1877, ss. 13 and 43—Act XII of 1879, s. 6.* The present suit was preceded

## RES JUDICATA—continued.

## (1) ESTOPPEL BY JUDGMENT—continued.

by others in which the plaintiff sought to establish a right in the same part of the talukdari estate that he now claimed to redeem from mortgage. The first suit, in which he with another claimed as under-proprietors, was dismissed in 1866 on the ground that they had not shown themselves to have held such right under the talukdars within the period since 1841. Proceedings not to be regarded as judicial subsequently taken under Circular 4 of 1867, resulted in a finding that the dismissal was right upon the merits, the property having been transferred to the talukdar by a conditional-sale which had become absolute. Another suit was then brought to recover the talukdari right, under the terms of Circular 106 of 1869, it being alleged that arrears of revenue paid by the talukdar had been paid on the plaintiff's account. That suit was also dismissed. *Held*, that the present suit to redeem the same property under a mortgage was not barred under s 13 of Act X of 1877, as amended by s. 6 of Act XII 1879. *AMANAT BIBI v. IMDAD HOSAIN*.

[I. L. R. 15 Cal. 800

[L. R. 15 I. A. 106]

6.—*Clause of conditional-sale in mortgage—Suit by mortgagee for declaration of title—Decree ordering delivery of property to mortgagee in default of payment of mortgage-debt by mortgagors within one month—Default of payment by mortgagors—Effect of such default—Mortgaged property taken by mortgagee in execution of such decree not as mortgagee, but absolutely—Subsequent suit for redemption* ] In 1863 B and C mortgaged certain land to one G under a mortgage-deed, which provided that, if the mortgage-debt was not paid at the stipulated time, the land should become the absolute property of G, the mortgagee. In 1871 G filed an ejectment suit against B and C and one H alleging that he had become owner of the land by operation of the above clause, and that he had subsequently let it to H, who now in collusion with the other two defendants (the mortgagors), denied his title. The ejectment suit was subsequently converted into one for a declaration of G's title as owner as against the mortgagors, B and C who claimed a right to redeem. A decree was passed in 1872 ordering B and C to pay Rs. 100 to G within one month, or in default, to deliver up to him possession of the land. The money was not paid, and V, as purchaser from G, got possession in execution of the above decree in August 1873. In September 1885, the plaintiff, as B's heir and legal representative, filed a suit against G and V to redeem the property. The Court of First Instance dismissed the suit, holding that the plaintiff's claim was *res judicata* by virtue of the decree passed in 1872, and that the right to redeem was lost. On appeal, the Court reversed this decision and passed a decree for redemption on payment of Rs. 100 by the plaintiff within six months. The defendant V then applied to the High Court

## RES JUDICATA—continued.

## (1) ESTOPPEL BY JUDGMENT—continued.

under its extraordinary jurisdiction. *Held*, that the plaintiff's claim was *res judicata*. In the suit brought by G (the mortgagee), in 1871, he had claimed the land as owner through the forfeiture clause in the mortgage-deed, and the mortgagors insisting in that suit on a right still to redeem, the decree plainly meant to give them by way of indulgence one month within which to regain the land by payment of Rs. 100 to G. It renewed the mortgage, but with a condition, which was a material part of the decree. They having failed to pay, the mortgage was extinguished. After the lapse of the month G could not have recovered the Rs. 100. Had he sought to recover that money he would have been met by the terms of the decree. He was entitled to the land, and nothing else. So, too, was V as his vendee. As, then, there was no debt that could be recovered, there was and could be, no subsisting mortgage that could be redeemed. *VISHNU CHINTAMAN v. BALAJI BIN RAGHUJI*.

[I. L. R. 12 Bom. 352]

7.—*Civil Procedure Code, s. 13—Malikana—Recurring liability—Res judicata—Different subject-matters claimed—Judgment in first suit going to root of plaintiff's title—“Final” judgment—Judgment liable to appeal or under appeal—Effect of final decree in first suit pronounced subsequent to decision in second suit of lower appellate Court, but before hearing of second appeal in second suit.* ] For the purposes of the rule of *res judicata* it is not essential that the subject-matters of the present and the former litigations should be identical. Where a recurring liability is the subject of claim, a previous judgment dismissing a suit between the same parties upon findings which do not go to the root of the title on which the claim rests, but relate merely to a particular item or instalment, cannot operate as *res judicata*. But if such previous judgment negatives the title and main obligation itself, the plaintiff cannot re-agitate the same question of the title by claiming a subsequent item or instalment. *Rajah of Pittapur v. Sri Rajah Rau Buchi Sittaya Garu* I. L. R. 12 I. A. 16, referred to. A judgment liable to appeal or under appeal is only a provisional and not a definitive or final adjudication and cannot operate as *res judicata* during the interval preceding the appeal or the interval preceding the decision of the appeal. Explanation IV of s. 13 of the Civil Procedure Code, commented on. *Kakariapudi Surijanarayana-razu v. Chellamkuri Chellama*, 5 Mad 176, and *Nivaru v. Nilvaru*, I. L. R. 6 Bom. 116, referred to. The rule of *res judicata* contained in s. 13 of the Code applies equally to appeals and miscellaneous proceedings as to original suits. Having regard to its main object, so far as it relates to the re-trial of an issue, it refers not to the date of the commencement of the litigation, but to the date when the Judge is called upon to decide the issue. Where, after the commencement of the trial of an issue, a final judgment upon the same

## RES JUDICATA—continued.

## (1) ESTOPPEL BY JUDGMENT—continued.

issue in another case is pronounced by a competent Court (the identity of parties and other conditions of s. 13 being fulfilled), such judgment operates as *res judicata* upon the decision, original or appellate of the issue in the later litigation. On the 17th August 1885, a suit was instituted for recovery of an annual *malikana* allowance for the years 1290, 1291, and 1292 Fasli. On the 5th October 1885, the Munsif dismissed the suit. On the 10th March 1886, the Subordinate Judge on appeal reversed the Munsif's decree and decreed the suit. On the 21st June 1886, the defendant appealed to the High Court, which, on the 4th July 1887, reversed the Subordinate Judge's decree, and restored that of the Munsif on the ground that the plaintiff had never received and was not entitled to *malikana*. Meanwhile, on the 8th June 1886, the plaintiff brought another suit against the defendant for recovery of *malikana* for the year 1293 Fasli, which accrued after the institution of the former suit. By judgments dated respectively the 21st August and 27th November 1886, the lower Courts decreed this suit holding that the Subordinate Judge's decree of the 10th March 1886, in the former suit, operated as *res judicata*, and was conclusive in favour of the plaintiff's title to the *malikana*. On the 17th May 1887, the defendant appealed to the High Court, and on the 16th May 1888 (the High Court having, in the interval, dismissed the former suit by its judgment of the 4th July 1887) the appeal came on for hearing: *Held* that the lower Courts were wrong in holding that the Subordinate Judge's decree of the 10th March 1886, in the former suit, which, at the date of the institution of the present suit on the 8th June 1886, was liable to appeal, and, at the dates of the decisions of those Courts in August and November 1886, was the subject of a second appeal pending in the High Court, could operate as *res judicata* in favour of the plaintiff's title to *malikana*. (1) That the High Court's judgment dismissing the former suit on the 4th July 1887, though passed after the decisions of the lower Courts in the present suit and after the institution of the second appeal in the present suit, was nevertheless binding on the High Court in deciding such second appeal, and being final, was conclusive as *res judicata* against the plaintiff's title to *malikana*. (2) That the effect of the High Court's judgment dismissing the former suit on the 4th July 1887, was not affected by the circumstance that the second suit was brought for recovery of *malikana* for a different year, inasmuch as that judgment went to the root of the plaintiff's title to *malikana*, and its scope was not limited to the particular item then claimed. BALKISHAN v. KISHAN LAL.

[I. L. R. 11 All. 148]

8.—Evidence — Estoppel — Ex-parte decree, Effect of.—Rate of rent—Rent-suit—Civil Procedure Code (Act XII of 1882). s. 13.] A mere

## RES JUDICATA—continued.

## (1) ESTOPPEL BY JUDGMENT—concluded.

statement of an alleged rate of rent in a plaint in a rent-suit in which an *ex-parte* decree had been obtained, is not a statement as to which it must be held that an issue within the meaning of s. 13 of the Code of Civil Procedure was raised between the parties, so that the defendant is concluded upon it by such decree. Neither a recital in the decree of the rate of rent alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter a *res judicata*, assuming that no such declaration was asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case. MODHUSUDUN SHAHA MUNDUL v. BRAE

[I. L. R. 16 Calc. 300]

## (2) ADJUDICATIONS.

9.—Civil Procedure Code, 1882, s. 158 (Act VIII of 1859), s. 148—Previous suit by next friend dismissed for default—Evidence of fraud of next friend—Limitation.] A sued in 1885 to recover certain estates from B, alleging claim under his adoption which took place in 1865. A suit to recover the same estates had been filed on behalf of A by his next friend and had been dismissed for default in 1872. In 1875 A, being still a minor, relinquished by deed his claim to the estates for Rs. 12,000; but now alleged that he thought he was relinquishing it only in favour of the defendant's predecessor in title who died in 1883 having been in possession of the estates since 1867. The plaintiff attained his majority in 1878: *Held* that the claim was *res judicata*, the plaintiff having failed to prove fraud on the part of his next friend and that whether the cause of action arose in 1865 or 1867, it was equally barred from 1879. *Per cur.*—The plea of *res judicata* ordinarily presupposes an adjudication on the merits; but s. 148 of the Code of Civil Procedure (Act VIII of 1859) contains a statutory direction that in case the plaintiff neglects to produce evidence and to prove his claim as he is bound to do, the Court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall have the force of a decree on the merits, notwithstanding the default on the part of the plaintiff. VENKATACHALAM v. MAHALAKSHMAMMA.

[I. L. R. 10 Mad. 272]

80.—Judgment liable to appeal—Finality of judgment.] A judgment liable to appeal or under appeal is only a provisional and not a definitive or final adjudication, and cannot operate as *res judicata* during the interval preceding the appeal or the interval preceding the decision of the appeal. Explanation IV of s. 13 of the Civil Procedure Code, commented on, *Kakarlapudi Suryanarayana Razu v. Chellamkuri Chellamma*, 5 Mad. 176, and *Nalvaru v. Nalvaru*, I. L. R. 6 Bom. 110, referred to. The

## RES JUDICATA—continued.

## (2) ADJUDICATIONS—concluded.

rule of *res judicata* contained in s. 13 of the Code applies equally to appeals and miscellaneous proceedings as to original suits. Having regard to its main object, so far as it relates to the re-trial of an issue, it refers not to the date of the commencement of the litigation, but to the date when the Judge is called upon to decide the issue. Where, after the commencement of the trial of an issue, a final judgment upon the same issue in another case is pronounced by a competent Court (the identity of parties and other conditions of s. 13 being fulfilled), such judgment operates as *res judicata* upon the decision, original or appellate, of the issue in the later litigation. *BAL-KISHAN v. KISHAN LAL*.

[ I. L. R. 11 All. 148 ]

## (3) JUDGMENTS ON TECHNICAL OBJECTIONS.

11.—*Civil Procedure Code, s. 13—Suit dismissed "as brought."* In a suit in which the plaintiffs claimed exclusive possession, and, in the alternative, joint possession of certain land, evidence was taken upon the issues raised; but the Court, without discussing the evidence, held that the alternative claims were "contradictory," and the plaintiff's claim, therefore, "uncertain," and accordingly ordered "that the plaintiffs' claim, as brought, be dismissed with costs." The plaintiffs did not appeal from this decision, but subsequently brought a suit against the same defendants, claiming joint possession of the same property. *Held* that the suit was barred by s. 13 of the Civil Procedure Code, the Court in the former suit not having reserved to the plaintiffs the right to bring a fresh action. *Ganesh v. Kalka Prasad*, I. L. R. 5 All. 595; *Muhammad Salim v. Nabian Bibi*, I. L. R. 3 All. 282, and *Watson v. The Collector of Rayshahye*, 13 Moore's I. A. 169, referred to by *TYRRELL, J.* *KUDRAT v. DINU*.

[ I. L. R. 9 All. 155 ]

12.—*Dismissal of suit for default—Difference in causes of action—Civil Procedure Code, ss. 13, 102, 103.* The dismissal of a suit in terms of s. 102, Civil Procedure Code, is not intended to operate in favor of the defendant as *res judicata*. When read with s. 103, it precludes a fresh suit in respect of the same cause of action, referring, irrespectively of the defence or the relief prayed, entirely to the grounds, or alleged *media*, on which the plaintiff asks the Court to decide in his favour. Brother's sons, as nearest agnates of a deceased proprietor, sued for a decree, declaring that a gift, before then made by the widow in favour of her daughter's son, of the estate of her late husband, would not operate against their right of succession on her death. A prior suit, before the date of the gift, brought by two of the plaintiffs for a declaratory decree, and an injunction restraining the widow from alienating the same estate, had been dismissed under the provisions of ss. 102 and

## RES JUDICATA—continued.

## (3) JUDGMENTS ON TECHNICAL OBJECTIONS.—concluded.

103 (Act X of 1877), Civil Procedure Code. *Held*, that the causes of action in the two suits were not identical, and the fresh suit was not precluded by s. 103, the gift having afforded the new ground of claim, which also had subsequently arisen. *CHAND KOUR v. PARTAB SINGH*.

[ I. L. R. 16 Calc. 98 ]

[ L. R. 15 I. A. 156 ]

13.—*Civil Procedure Code, ss. 13, 373—Dismissal of suit—Decree containing clause stating that a fresh suit might be instituted as to a part of the subject-matter—Res judicata* A suit for possession of immoveable property was wholly dismissed, on the ground that the plaintiff had not made out his title to the whole of the property claimed, though he had proved title to a one-third share of such property. The decree included an order in these terms:—"This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of Musammatt Lachminia in the fields specified in the deed of sale," upon which the suit was based. No appeal was preferred from this decree. Subsequently the plaintiff brought another suit upon the same title to recover possession of the one-third share referred to in the order just quoted; *Held* by the Full Bench that the Court in the former suit had no power to include in its decree of dismissal any such reservation or order; that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effect, that as in the former suit the plaintiff could have obtained a decree for the one-third share now claimed, and the whole of the claim in that suit was dismissed, the decree in that suit was a decision within s. 13 of the Civil Procedure Code; and the present suit was consequently barred as *res judicata*. *Kudrat v. Dinu*, I. L. R. 9 All. 155; *Ganesh Rai v. Kalka Prasad*, I. L. R. 5 All. 595; *Salig Ram Pathak v. Perbhawan Pathak*, Weekly Notes, All. 1885, 171; and *Muhammed Salim v. Nabian Bibi*, I. L. R. 3 All. 282, explained. *SUKH LAL v. BHIKHI*.

[ I. L. R. 11 All. 187 ]

14.—*Civil Procedure Code, s. 13—Previous suit dismissed as premature—Omission to give notice under Transfer of Property Act, s. 132* A suit by the assignee of a mortgage-bond against the mortgagor was dismissed on the ground that the plaintiff was not entitled to sue for want of notice to the defendant under s. 132 of the Transfer of Property Act. The plaintiff then gave express notice of the assignment to the mortgagor and sued on the bond again: *Held*, the claim was not *res judicata*, and the second suit was accordingly not precluded by s. 13 of the Code of Civil Procedure. *RAMIREDDI v. SUB-BAREDDI*.

[ I. L. R. 12 Mad. 500 ]

## RES JUDICATA—continued.

## (4) ORDERS IN EXECUTION OF DECREE.

15.—*Civil Procedure Code, 1882, s. 244—Finality of order—Competency of Court.* S S brought a suit under a mortgage-bond, making R S a subsequent incumbrancer, a defendant, and obtained a decree for a sale of the whole of the mortgaged premises. After the decree a compromise was effected between all the parties with the exception of R S by the terms of which, in consideration of the judgment-debtors (mortgagors) undertaking to do certain acts, S S promised to execute his decree against only a 3-annas 12 dams share of the mortgaged premises. The judgment-debtors (mortgagors) having failed to carry out the compromise, S S applied for a sale of the whole of the mortgaged premises, but on the petition of R S setting out the terms of the compromise to which he was no party, the Subordinate Judge, by an order of the 7th September 1885, held that under the agreement S S was entitled to sell only a 3-annas 12 dams share of the mortgaged premises, which was accordingly directed to be sold. That order was not appealed against, but subsequently in March 1886, S S made a fresh application for a sale of the remainder of the premises, R S objecting: *Held*, that the order of the 7th September was one which the Court was competent to make under s. 244 of the Code of Civil Procedure, and by reason of that order not being appealed it became final *BASUDEO NARAIN SINGH v. SEOLJOY SINGH*.

[I. L. R. 14 Calc. 640]

16.—*Decree against mortgaged property—Liability of judgment-debtor to arrest under such decree—Principles of res judicata applicable to execution-proceedings.* A decree cannot be extended in execution beyond the real meaning of its terms. A decree obtained on a mortgage directed that the judgment-debtor should pay the sum adjudged out of the property mortgaged. After executing the decree against the mortgaged property, the decree-holder made an application for execution against the person of the judgment-debtor. A notice was issued calling upon him to show cause why execution should not be further proceeded with. But the notice did not give him any intimation of the application for the arrest of his person. He did not appear, and, in his absence, an order was made for his personal arrest; but the order was not executed, as the decree-holder did not pay the process fee. Subsequently a fresh application was made for execution against the person of the judgment-debtor: *Held*, that the question as to the personal liability of the judgment-debtor to satisfy the decree was not concluded by the order made in the previous execution-proceedings for execution to issue against his person. The order would have operated as a *res judicata* if the judgment-debtor had been called upon to contest the right claimed by the decree-holder to hold him personally liable under the decree, and had then failed in his contention to the contrary, or allowed the judgment to go by default. The order was *res judicata* as to

## RES JUDICATA—continued.

## (4) ORDERS IN EXECUTION OF DECREE—concluded.

the legal possibility of further execution in terms of the decree, but not as to the special construction which the judgment-creditor sought to impose on it. *BUDAN v. RAMCHANDRA BHUNJ-GAYA*.

[I. L. R. 11 Bom. 537]

## (5) CAUSES OF ACTION.

17.—*Civil Procedure Code, s. 12—Act XVII of 1886, s. 8—Decree made in British India—Suit on judgment in a native territory—Cession of territory to British Government pending suit.* Prior to the cession of the town of Jhansi to the British Government, plaintiff had instituted a suit in the Subah's Court in the Gwalior State on a judgment of the British Court in Jhansi district. After the cession, the suit was made over for trial to the Court of the Assistant Commissioner of the Jhansi district. The suit was dismissed by the first Court as barred by s. 13 of the Code of Civil Procedure, but remanded by the lower Appellate Court for trial on the merits. *Held*, that the recital in Part II of Act XVII of 1886 shows that it was intended that suits pending in the Courts of the Gwalior State prior to the cession of the town of Jhansi to the British Government should be continued in the Courts of the Jhansi district after the cession thereof; therefore the present suit, which, if it had been originally instituted in a Court of British India, could not have been maintained, being an action on a judgment of a Court of British India, was a good and maintainable action in the Court where it was instituted, and is to be deemed to be a properly instituted suit to which in other respects the law of the Courts of British India may now be applied. *King v. Hoare*, 13 M. and W. 504; 14 L. J. Ex. 29, referred to as illustrating the distinction between an original cause of action founded upon a judgment recovered on the original cause of action. *SALONI v. HAR LAL*.

[I. L. R. 10 All. 517]

18.—*Civil Procedure Code (Act XIV of 1882), ss. 13, 43—Damages.* In September 1886 the plaintiff sued in a Munsif's Court certain defendants for possession of one biggah of land, and for damages for the cutting and carrying of certain paddy from such land on the 23rd December 1885. The suit was dismissed on the ground that no dispossession had taken place, the plaintiff being referred to a Small Cause Court for his damages. No appeal was made against this decision. In March 1887 the plaintiff sued these defendants in the Munsif's Court for possession of 5 biggahs 6 cottahs of land and for mesne profits, and obtained a decree for possession of 3 biggahs 6 cottahs of land with mesne profits; possession of the one biggah, the subject of the suit of 1886 being included in the 3 biggahs 6 cottahs decreed. He subsequently sued the same defendants in a Small Cause Court for damages for the



## RES JUDICATA—continued.

## (5) CAUSES OF ACTION—concluded.

paddy cut and carried on the 23rd December 1885. *Held*, that such suit was not barred by either s. 13 or s. 43 of the Civil Procedure Code. **MAHABEER SINGH v RAMBHAJJAN SHA.**

[I. L. R. 16 Calc. 545]

19.—*Suit for redemption—Conditional decree—Failure of mortgagor to pay in accordance with decree—Subsequent suit for redemption—Civil Procedure Code, s. 13—Foreclosure—Act IV of 1882 (Transfer of Property Act) s. 93* In a suit for redemption of a usufructuary mortgage, a decree for redemption was passed conditional upon the plaintiff paying the defendants, within a time specified, a sum which was found still due to the latter, and the decree provided that if such sum were not paid within the time specified, the suit should stand dismissed. The plaintiff failed to pay, and the suit accordingly stood dismissed. Subsequently he again sued for redemption, alleging that the mortgage-debt had now been satisfied from the usufruct: *Held*, having regard to the distinction between simple and usufructuary mortgages, that the decree in the former suit only decided that, in order to redeem and get possession of the property, the mortgagor must pay the sum then found to be due by him to the mortgagee and did not operate as *res judicata* so as to bar a second suit for redemption, when, after further enjoyment of the profits by the mortgagee, the mortgagor could say that the debt had now become satisfied from the usufruct. Having regard to s. 93 of the Transfer of Property Act (IV of 1882), in a suit brought by a usufructuary mortgagor for possession on the ground that the mortgage-debt has been satisfied from the usufruct, and in which the plaintiff is ordered to pay something because the debt has not been satisfied as alleged, the decree passed against such a mortgagor for non-payment has not the effect of foreclosing him for all time from redeeming the property. The decision in *Gulam Hossein v Alla Rukhree Bebee*, 2 N. W. 62 treated as not binding since the passing of the Transfer of Property Act. *Charita v. Purun Soohk*, 2 Agra 256, and *Anrudh Singh v. Sheo Prasad*, I. L. R. 5 All. 431, referred to. **MUHAMMAD SAMI-UD-DIN KHAN v. MANNU LAL.**

[I. L. R. 11 All. 386]

## (6) MATTERS IN ISSUE.

20.—*Question not decided—Hindu widow, Power of to bind reversioners—Chur land—Jungleburi tenure.* *R*, a Hindu widow, granted a jungleburi tenure to certain tenants in respect of a chur belonging to her husband's estate. An *amulnama* was granted to the tenants signed by a *karpardaz* of *R* in respect of the tenure. *R* died in January 1861, and was succeeded by *J* and *P*, two daughters, the last of whom died on the 31st December 1880. On her death the grandsons succeeded to the estate. On *R*'s death *J* and *P* got possession of all estate papers, and amongst them a *dowl*

## RES JUDICATA—continued.

## (6) MATTERS IN ISSUE—continued.

granted by the tenants in return for the *amulnama*. In 1865 proceedings were taken by the tenants to obtain *kabulats* on the footing of those documents, which proceedings came to an end in 1868. In 1873 *J* and *P* instituted suits against the tenants, alleging the *amulnama* and *dowl* to be forgeries, and seeking to enhance the rents payable to them, as well as to have it declared that *R*'s acts did not bind them. In these suits it was found that *J* and *P* had all long been aware of the claim made by the tenants that they held a permanent tenure, and the suits were dismissed on the ground that it was too late for *J* and *P*, after the lapse of twelve years from *R*'s death, to raise the question. In 1884 *D*, a receiver, instituted a suit in the names of the grandsons to eject the tenants on amongst other grounds that the grandsons (reversioners) were not bound by *R*'s act and that the jungleburi tenure was not binding on them; that the tenants were middlemen and had no right of occupancy; that at all events the plaintiffs were entitled to rent on the area of land then held by the defendants, as there had been large accretions to the amount covered by the *amulnama* and *dowl*. The defendant amongst other things pleaded *res judicata*, and that *R* had the power to grant the jungleburi tenure so as to bind the reversioners: *Held*, that the suit was not barred by *res judicata* as in the suits brought by *J* and *P*, the question of whether *R*'s acts bound the reversioners was never decided. **DROBOMOYI GUPTA v. DAVIS.**

[I. L. R. 14 Calc. 323]

21.—*Issue as to proprietorship of lands—Suit as to title to waste lands—Subsequent suit as to right to cultivated lands* In a suit by *A*, the *namdar* against *B*, the *khot* of a certain village it was decided that *A* was the proprietor of the forest or waste lands attached to the village: *Held*, that this decision did not operate as *res judicata* between *A* and *B*, so as to estop *B*, in a subsequent suit for setting up a proprietary title, as against *A*, to the cultivated lands in the village. **MORO ABASI v. NARAYAN DHONDBHAT PITRE.**

[I. L. R. 11 Bom. 325]

22.—*Suit in respect of different portions of joint family property—Material issue in former suit.* In 1876 the plaintiffs, alleging a partition of the family estate in 1864, sued their uncle (father of the present defendants), to recover their share of the rent of a certain piece of land which had formed part of the family estate. The plaintiffs relied in that suit upon a memorandum of agreement of partition executed in 1864. The defendant in that suit, however, contended that the family was still joint and that the plaintiff could not claim a share of any particular piece of land, but must sue for partition of the whole property. At the hearing of that suit an issue was raised as to whether partition had taken place. The Court found in the affirmative and awarded the plaintiff's

## RES JUDICATA—continued.

## (6) MATTERS IN ISSUE—continued.

claim. In the present suit the plaintiffs sued the defendants (the sons of the defendant in the former suit), to recover possession of certain property which they alleged formed part of the share awarded to them at the partition of 1864, but of which they had been dispossessed by the defendants in 1873. The defendants denied that there had been any partition of the family property. *Held*, that the question of partition was *res judicata*, and could not be raised again by the defendants. The question had been directly and substantially in issue in the former suit. No doubt the dispute in that suit was as to a different piece of land, but there was no allegation that that land was held on any different tenure to the land now in suit. The plaintiffs there as now, alleged that there had been a partition and that they had a separate share. The defendants there contended, as the defendants now contended, that there was no partition, and that the family estate was joint. The decree in that suit depended on that issue, and where the decree depends on an issue the finding on that issue is binding as *res judicata*. The status of the family having been thus tried and determined in the former suit was binding on the parties in subsequent suits. ANANTA BALACHARYA v DAMODHAR MAKUND.

[I. L. R. 13 Bom. 25]

23.—*Suit by a woman for a share of property alleging herself to be A's widow—Prayer for declaration of her marriage to A—Denial of her marriage to A by defendant—Arbitration—Award of a certain sum in satisfaction of plaintiff's claim—Decree on award—No declaration as to her marriage—Subsequent suit by her as widow—Release—Civil Procedure Code (XIV of 1882), s. 13.] The plaintiff F in this suit alleged that both she and the defendant A had been the wives of one H a Cutchi Memon Mahomedan, who died intestate in 1878, leaving them his widows and other members of his family him surviving. The plaintiff had a daughter named M. Both plaintiff and defendant had since H's death filed separate suits, in which they respectively claimed parts of his estate. In 1879 the defendant had filed a suit (No. 616 of 1879) against the executors of her father-in-law's will, to recover certain money belonging to her husband. She obtained a decree, and the suit was referred to the Commissioner to make inquiries. In 1882 the present plaintiff F and her daughter M filed a suit (No. 227 of 1882) against the present defendant A, claiming a share of the estate of her deceased husband H. In that suit she alleged that she had been lawfully married to H and ever since cohabited with him, and that her child M was his legitimate daughter; and she prayed (*inter alia*) for a declaration that she was the lawful wife, and that M was the lawful daughter of H. In the written statement filed by A in that suit, she alleged that F was not the*

W., D.

## RES JUDICATA—continued.

## (6) MATTERS IN ISSUE—continued.

lawful wife of H, but only his kept mistress, and she denied that F was entitled to a share in his property. On the 3rd May 1882, an order of reference was made by which both the above suits, viz., No. 616 of 1879 and No. 227 of 1882, "and all matters in difference therein" were by consent of all parties thereto referred to arbitration. The arbitrators were the respective attorneys of the parties. Awards were duly made, and on the 1st October 1883, decrees were passed in both suits in accordance with the said awards. By the decree and award in suit No. 227 of 1882, F was to be paid by A a sum of Rs. 55,000 in full satisfaction of all the claims of F and her daughter M upon the estate of H, the rest of the estate being declared the sole property of A. The material part of the decree was as follows: "This Court doth by consent pass judgment according to the said award \* \* \* and doth order that the said A do pay for the said F to her attorneys, Messrs Tyabji and Dayabhai, within seven days after the date of this decree, the sum of Rs. 55,000 in full settlement of all and singular the claims and claim of the said F and M, or either of them against or upon the estate of the said H whatsoever and wheresoever \* \* \* and doth declare that upon the payment of the said sum of Rs. 55,000 by the said A to the said F as aforesaid, all claims whatsoever of the said F and M or either of them upon the estate of the said H in the hands of any person whatsoever or upon the said A as heir of the said H personally or otherwise howsoever, shall be considered to have been fully satisfied by the said A and absolutely waived for ever by the said F and M; and doth further declare that the said A is entitled absolutely to all the rest of the estate and effects of the said H as her sole property as against the said F and M." The defendant A in 1882 also filed another suit (No. 198 of 1882) against her father-in-law's executors, and recovered certain ornaments which she alleged to be her *stridhan*. In October 1886, A married again; and in December 1887, F filed the present suit against her, alleging that by the law and custom of Cutchi Memons A had by reason of such second marriage forfeited all rights and interests to and in the property of her first husband H, and also to the ornaments which she had recovered in the last mentioned suit, and she claimed that the said property and ornaments now belonged to her (F) as sole surviving widow of the said H. She prayed for a declaration that A had by her second marriage forfeited her right to the said property and ornaments, and that she (the plaintiff) was now entitled thereto; that the defendant might be ordered to deliver, &c., &c. The defendant A filed a written statement in which (*inter alia*) she contended that the plaintiff was never the wife of H, but had been merely his kept mistress; that in suit No. 227 of 1882 she (the defendant) had denied that the plaintiff F was the widow of H, that the award and decree in that suit were not made upon the basis of

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## RES JUDICATA—continued.

## (6) MATTERS IN ISSUE—continued.

her (*F's*) being such widow, and she (the defendant) submitted that the said award and decree were a bar to the present suit. It was contended for the defendant (1) that the plaintiff had in the former suit prayed for a declaration that she had been the lawful wife of *H*; that the decree in that suit contained no such declaration, and that her prayer must, therefore, be taken to have been refused under s. 13 of the Civil Procedure Code (XIV of 1882), and that she was consequently not now entitled to sue as his widow—her claim to be his widow being *res judicata*; (2) that the decree in suit No. 227 of 1882 expressly declared that the Rs 55,000 awarded to the plaintiff by that decree was in full settlement of all her claim; and that she was, therefore, precluded from claiming against the estate in any possible contingency, and that, therefore, the defendant's remarriage gave her no right to sue; (3) that the latter part of the decree amounted to a release and assignment by the plaintiff *F* to the defendant of all her (the plaintiff's) right to the property in question: *Held* that the status of the plaintiff as widow of *H* was not *res judicata*. The question of the plaintiff's marriage with *H* had not been controverted before the arbitrators and finally decided in a manner sufficient to establish *res judicata*. An award can only operate as an estoppel in respect of questions properly brought before and considered by the arbitrators. Explanation III of s. 13 of the Civil Procedure Code (Act XIV of 1882) does not apply where the Court is silent on a head of relief only claimed as ancillary to the main relief, and which by implication is rather granted than refused. It only applies where the Court is silent on an independent head of relief claimed and duly controverted. But *Held* that the award and release contained in the decree constituted a binding agreement, by which the plaintiff *F* for the sum of Rs. 55,000 waived all her rights against *A*, including the claim made in the present suit, which existed at the time of the award as a present right dependent on a contingency, and the suit, therefore, should be dismissed. *FATMABAI v. AISHABAI*.

[I. L. R. 12 Bom. 454]

*Held*, on appeal affirming the decision of SCOTT, J., that the present suit was not barred under s. 13 of the Civil Procedure Code (Act XIV of 1882) by reason of the former suit No. 227 of 1882. Although *F* litigated in the former suit as widow of *H* as she did in the present suit, the matters "substantially in issue" in the two suits were quite distinct. In the former suit she claimed her share in the estate of *H* as one of his lawful heirs entitled to succeed to him on his death. In the present suit her claim was based on a subsequent event by reason of which she contended that *A's* share was by law and custom forfeited, and reverted to the estate of *H*: *Held*, also, (affirming the decision of SCOTT, J.,) that

## RES JUDICATA—continued.

## (6) MATTERS IN ISSUE—continued.

the status of plaintiff as widow of *H* was not *res judicata*. The plaintiff in suit No. 227 of 1882, no doubt, asked for a declaration that she was the widow of *H*, and no such declaration had been made. But the declaration was not sought for by way of specific relief, but simply as the ground for the real and substantial relief to obtain which the suit was instituted, *viz.*, the payment by *A* of *F's* share of *H's* estate. Explanation III of s. 13 was not intended to apply to such a case. *Held*, (reversing the decision of SCOTT, J.,) that the declaration in the former decree, that the Rs. 55,000 were paid to the plaintiff in full settlement of all her claims upon the estate did not bar the present suit. The words of the award and decree were to be read with reference to the character in which the parties were litigating as widows of the deceased *H* claiming to succeed to his property on his death. Such general language was to be controlled by the circumstances of the case. Upon the proper construction of the award, there was no such clear intention shown to include in the settlement a contingent claim of the special nature now made as to preclude the plaintiff from setting it up in the present suit *FATMABAI v. AISHABAI*.

[I. L. R. 13 Bom. 242]

24.—*Suit for redemption—Decree for redemption without proviso for foreclosure of payment within a fixed time—Subsequent suit by mortgagee for sale—Civil Procedure Code (Act XIV of 1882), s. 13, Explanation II.* A decree for redemption which does not provide for payment of the mortgage-debt within a fixed time, or for foreclosure in case of default, operates of itself as a foreclosure decree, if not executed within three years. After such a decree is passed, it is not open to the mortgagee to file a suit to recover the mortgage-money by sale of the mortgaged property, his right of sale being barred under s. 13, Explanation II of the Code of Civil Procedure. On 12th November 1883, *A* obtained a decree for redemption on payment of a certain sum of money to *B* (the mortgagee). The decree contained no direction as to foreclosure, or as to the time within which the payment was to be made. On 26th November 1884, *B*, the mortgagee, sued to recover the mortgage-debt by sale of the property mortgaged. On 8th April 1885, *A* paid into Court the sum directed to be paid by the redemption decree. *B* refused to accept the payment, and insisted upon his right of sale. *Held*, that the mortgagee having neglected to obtain a provision for sale in the redemption suit, as he might and ought to have done, if he wished to preserve the right of sale, that right must be held, under Explanation II of s. 13 of the Code of Civil Procedure, to have been a matter directly and substantially in issue in the former suit, and to have been in effect negatived by the judgment. *MALOJI v. SAGAJI*.

[I. L. R. 13 Bom. 567]

## RES JUDICATA—continued.

## (6) MATTERS IN ISSUE—continued.

25—*Civil Procedure Code, s. 13—Substantial matters in issue decided in a former suit—Right of shebaitship of a family deb-sheba under a will.* A testator, who died leaving widows and a daughter, also three surviving brothers, bequeathed all the residue, after certain legacies, of his acquired estate, to maintain the worship of a family deity, appointing his three brothers and his eldest widow to be shebait, and providing that "the family of us five brothers shall be supported from the *prosud*, offerings to the deity." One or other of the brothers then for some years managed the estate as shebait, and the survivor of them was succeeded by his son, one of the defendants in the present suit, which was brought by the testator's only daughter as heiress to his estate, claiming that the Court should determine "those provisions which were valid and lawful, and those which were invalid and illegal." She claimed possession and an account, and also to be the shebait. In a previous suit the present shebait had obtained a decree, to which the daughter, now plaintiff, was a party defendant, affirming the validity of the will and the rights of the members of the family to be maintained under it. *Held*, that the question of the validity of all the provisions of the will having been substantially decided in the decree in the former suit which pronounced that the will was wholly valid, passing the entire estate of the testator to the *deb-sheba*, and maintaining the rights of members of the family under the will, this suit was barred under s. 13 of Act X of 1877 as to all but the claim to be shebait. KAMINI DEBI v. ASUTOSH MUKERJI; ASUTOSH MUKERJI v. KAMINI DEBI.

[I. L. R. 16 Calc. 103]

[L. R. 15 I. A. 159]

26—*Civil Procedure Code (Act XIV of 1882), s. 13—Estoppel by judgment—Act IX of 1847—Alluvion.* To apply the law of estoppel by judgment, stated in s. 6 of Act XII of 1879 and in s. 13 of Act XIV of 1882, it must be seen what has been directly and substantially in issue in the suit, and whether that has been heard and finally decided; for which purpose the judgment must be looked at. The decree is usually insufficient for showing this, as, according to the Code, it only states the relief granted, if any, or other disposal of the suit, without the ground of decision, and without affording information as to what may have been in issue and decided. The suit was to establish a right to land, and for possession, against two defendants, who alleged their rights retrospectively. The claimant had previously obtained a decree against one of the defendants, and in that decree the land now claimed had been excepted. *Held*, that the matter now in issue not having been directly and substantially in issue in the prior suit, the present suit was not barred under s. 13, Act XIV of 1882,

## RES JUDICATA—continued.

## (6) MATTERS IN ISSUE—continued.

Civil Procedure Code. KALI KRISHNA TAGORE v. SECRETARY OF STATE FOR INDIA.

[I. L. R. 16 Calc 173]

[L. R. 15 I. A. 186]

27.—*Questions not decided—Specific performance—Decree in favour of plaintiff—Rectification of decree on application of defendant—Motion to set aside decree dismissed—Subsequent application to rectify decree.* The plaintiff sued in 1877 for specific performance of an agreement, dated 27th September 1871, by which certain landed properties were to be divided, as specified in the agreement, between them and the defendants. The case came on for hearing on the 13th September 1878. The defendants did not appear, and a decree *ex-parte* was made, which declared that the plaintiffs were entitled to have the agreement of the 27th September 1871, specifically performed, and referred the suit to the Commissioner for the preparation of conveyances, &c. The decree was sealed on the 9th October 1878. No further steps were taken by any of the parties for six years, and in September 1884, the matter was first brought before the Commissioner. He then directed the defendants to lodge with him all the title-deeds of the properties which by the agreement were to go to the plaintiffs as their share. The defendants thereupon applied that the plaintiffs should be directed to lodge the title-deeds of the properties which by the agreement were to go to them, but the Commissioner refused to make this order being of opinion that he was not authorized to do so under the decree, which contained no direction to him in respect thereof. The defendants on the 10th November 1884, gave notice to the plaintiffs, that they would apply to the Court—(1) "to set aside or vary its order of the 13th September 1878, so far it related to the lodging of title-deeds, &c.; (2) to appoint a receiver of certain properties mentioned in the agreement; (3) to order the plaintiffs to deliver up to the defendants the properties which belonged to their share under the agreement; (4) to order certain accounts to be taken." This motion was not brought on until the 10th September 1885, on which day it was dismissed with costs; the Judge holding that the defendants had not shown sufficient cause to justify the setting aside of the decree under s. 108 of the Civil Procedure Code (Act XIV of 1882). The plaintiffs having still kept possession of certain of the properties which by the agreement were to go to the defendants, notice was given by the defendants to the plaintiffs on the 28th April 1887, that they would apply to the Court for an order that the plaintiffs should perform their part of the agreement of the 27th September 1871, so far as it remained unperformed by them, by giving up to the defendants possession of certain properties, and by accounting for the rents thereof, &c., &c. At the hearing of this motion, counsel for the defendants asked that the decree should be rectified, by directing

## RES JUDICATA—continued.

## (6) MATTERS IN ISSUE—continued

that the agreement should be specifically performed by the plaintiffs and defendants respectively. The defendants contended that the application was barred by lapse of time, and that the question was *res judicata* by the order of the 10th September 1885: *Held*, also, that the motion was not *res judicata* by reason of the previous order of the 10th September 1885. Although the notice of motion then served by the defendants on the plaintiffs included matters in respect of which the defendants sought relief by their present application, the Judge in making the order dealt with them as ancillary to the first and main point raised in that motion, *viz.*, the defendants' right to set aside the decree under s. 108 of the Civil Procedure Code (Act XIV of 1882). Having decided that point against them, he did not really consider the other points at all, and did not adjudicate upon them, and therefore, the present application in respect of those matters was not *res judicata*. KARIM MAMONED JAMAL v. RAJOOOMA.

[I. L. R. 12 Bom 174]

28.—*Rival suits for pre-emption—Each pre-emptor made defendant in the other's suit—Suits tried together, but decided by separate decrees—Decree allowing pre-emption in one case only on condition of default by other pre-emptor—Finality of decree in superior pre-emptor's suit—Appeal by inferior pre-emptor in his own suit—Appellate Court, power of, to alter decree so as to affect superior pre-emptor's right* In two rival suits for pre-emption each pre-emptor was made a defendant in the other's suit. The suits were tried together upon the same evidence and were disposed of by a single judgment, but by separate decrees. In one of the suits the pre-emptor obtained a decree in the terms of s. 214 of the Civil Procedure Code. In the other, the pre-emptor obtained a decree, subject to the condition that, in the event of the first pre-emptor failing to execute his decree, the second pre-emptor should be entitled to execute it. The decree in the first suit was not appealed, and became final. The second pre-emptor appealed from the decree in his own suit, upon the grounds that the amount ordered to be paid was excessive, and that the first pre-emptor had lost his right, and the decree in the second suit should not have been made subject to the condition above stated. *Held* that the appellant, if he desired to get rid of the decision regarding the first pre-emptor's preferential right, should have appealed against the first pre-emptor's decree, but that that decree having become final, the question between the two pre-emptors could not be re-opened on appeal from the second pre-emptor's decree. CHAJJU v. SHEO SAHAI.

[I. L. R. 10 All 123]

29.—*Civil Procedure Code, ss. 12 and 13—Pending suits—Malikana—Different reliefs claimed.* For the purpose of the rule of *res judicata* it is not essential that the subject-matters of the

## RES JUDICATA—continued.

## (6) MATTERS IN ISSUE—continued.

present and the former litigations should be identical. Where a recurring liability is the subject of claim, a previous judgment dismissing a suit between the same parties upon findings which do not go to the root of the title on which the claim rests, but relate merely to a particular item or instalment, cannot operate as *res judicata*. But if such previous judgment negatives the title and main obligation itself, the plaintiff cannot re-agitate the same question of title by claiming a subsequent item or instalment. *Rajah of Pithapur v. Buchi Sittya Garu*, L. R. 12 I. A. 16, referred to. The pendency of litigation regarding rent, *malikana*, or other demand for one year does not, under s. 12 of the Civil Procedure Code, bar a suit between the same parties in which the same demand is made for a subsequent year, inasmuch as the reliefs claimed in the two cases are different. S. 12 and 13 of the Code compared. On the 17th August 1885, a suit was instituted for recovery of an annual *malikana* allowance for the years 1290, 1291, and 1292 Faslis. On the 5th October 1885, the Munsif dismissed the suit. On the 10th March 1886, the Subordinate Judge on appeal reversed the Munsif's decree, and decreed the suit. On the 21st June 1886, the defendant appealed to the High Court which, on the 4th July 1887, reversed the Subordinate Judge's decree and restored that of the Munsif, on the ground that the plaintiff had never received and was not entitled to *malikana*. Meanwhile, on the 8th June 1886, the plaintiff brought another suit against the defendant for recovery of *malikana* for the year 1293 Fasil, which accrued after the institution of the former suit. By judgments dated respectively the 21st August and 27th November 1886, the lower Courts decreed this suit holding that the Subordinate Judge's decree of the 10th March 1886, in the former suit, operated as *res judicata* and was conclusive in favour of the plaintiff's title to the *malikana*. On the 17th May 1887, the defendant appealed to the High Court and on the 16th May 1888 (the High Court having in the interval dismissed the former suit by its judgment of the 4th July 1887) the appeal came on for hearing. *Held*, that the trial of the present suit by either of the lower Courts was not barred by s. 12 of the Civil Procedure Code by reason of the fact that, at the time of such trial in August and November 1886, the previous litigation between the parties was pending in second appeal before the High Court. BAL-KISHAN v. KISHAN LAL.

[I. L. R. 11 All. 148]

30.—*Code of Civil Procedure, s. 13—Omission to bring forward in a prior suit what then would have been a defence—Accounts between mortgagor and mortgagee.* A mortgage between parties who had accounts together, comprised lands which also were leased by the mortgagors to the mortgagees, who in 1878, obtained a decree upon the mortgage, although at the time they owed

## RES JUDICATA—continued.

## (6) MATTERS IN ISSUE—concluded.

to the mortgagors a considerable sum for rents. The mortgagors did not then set up the defence that they were entitled to have a general account taken, and to have the mortgagees decree limited to such balance as might be found to exist in favour of the latter. But the mortgagors alleged a specific agreement, which they failed to prove, that the rents were to be set off against the mortgage-debt, and they also stated their intention to sue separately for the rents due. No deduction was made in the decree upon the mortgage on account of these rents, for which moreover afterwards the mortgagors did obtain a decree. But the mortgagees executed their decree upon the mortgage, notwithstanding objections (which were disallowed in 1882), and having obtained leave to bid at the judicial sale purchased the property. In the present suit brought by the mortgagors to have the judicial sale set aside, and to have the mortgage-debt extinguished, by having set off against it the rents which had already accrued, or might afterwards accrue, and for possession of the lands on the expiry of the lease. *Held*, that, although an equity had been raised in favour of the mortgagors, that an account should have been taken, and that the rents payable should have been credited against the sums due by them, yet this equity could not be enforced in this suit. The proper occasion for enforcing it would have been in defence of the suit upon the mortgage; the present claim was within the meaning of s. 13 of the Code of Civil Procedure; and the plaintiffs were now barred from insisting on it. *exceptione rei judicatae*, MAHABIR PERSHAD SINGH v. MACNAGHTEN.

[I. L. R. 16 Cal. 682

[L. R. 16 I. A. 107

## (7) PARTIES.

## (a) SAME PARTIES OR THEIR REPRESENTATIVES.

See RES JUDICATA—MATTERS IN ISSUE.

[I. L. R. 12 Bom. 454

[I. L. R. 13 Bom. 242

31. — *Auction-purchaser* — “*Representative*.”] A purchaser at an execution-sale is not as such the representative of the judgment-debtor within the meaning of s. 115 of the Evidence Act. A Hindu, governed by the Mitakshara School of Law, died on the 12th May 1867, leaving him surviving a widow *B* and a brother *R*, who was admittedly the next reversioner. In July 1867, *B* purported to adopt a son *D* to *A*, and subsequently in September 1867, obtained a certificate under Act XL of 1858. In 1872 *B* obtained a loan from the plaintiff *M* of Rs. 9,000, and to secure its repayment executed a mortgage of seven *mouzahs* in favour of *M* as guardian of *D*. The money was advanced and mortgage executed at the instigation of *R* and with his consent, and upon his

## RES JUDICATA—continued.

## (7) PARTIES—continued.

## (a) SAME PARTIES OR THEIR REPRESENTATIVES—continued.

representation that *D* was the duly adopted son of *A*, and it was admitted that the money was specifically advanced for, as well as applied towards, the payment of decrees obtained against *A* in his lifetime and against his estate after his death. *B* died in 1878. On the 14th August 1880, *M* instituted a suit against *D* upon his mortgage, and in that suit he made *S* a party defendant as being the purchaser of the mortgagor's interest in one of the *mouzahs* included in his mortgage. On the 26th June 1882, *M* obtained a decree declaring that he was entitled to recover the amount due by sale of the mortgaged *mouzahs*. In the proceedings taken in execution of that decree *M* was opposed by *L*, who was afterwards held to be a *benamidar* for *S* who claimed that he had on the 8th November 1880 purchased five out of the seven *mouzahs* at a sale in execution of certain decrees against *R*. On the 29th February 1881, *L*'s claim was allowed, and on the 11th August 1884, *M* brought this suit against *L*, *S*, *R*, and *D*, and the decree-holders in the suits against *R*, for a declaration of his right to follow the mortgaged property in the hands of *S*. It was found as a fact that the adoption of *D* was invalid; that the advance by *M* to *B* was justified by legal necessity; and that *L* was the *benamidar* of *S*. It also appeared that *M* had himself become the purchaser of one of the mortgaged *mouzahs*. The lower Court gave *M* a decree declaring him to be entitled to recover the full amount of the mortgage-money from the five *mouzahs* in the hands of *S*, *L* and *S* appealed, and *M* filed a cross-appeal, alleging the adoption to be valid and binding on *S*. It was contended that *S* as the representative of *R* was estopped from denying the validity of *D*'s adoption, and thus having been a party to *M*'s first suit, the question as to the liability of the *mouzahs* to satisfy the mortgage lien was *res judicata* as against him: *Held* that, as *S* was merely a party to *M*'s original suit as purchaser of one *mouzah*, and as he, subsequently to the institution of that suit, acquired *R*'s interest in the five *mouzahs*, and as *R* was not a party to that suit, nor was his interest represented in any way, the decree was in no way binding against *R*, and therefore *S* was not barred by *res judicata* from setting up the interest of *R* in the five *mouzahs* so acquired by him. LALA PARBHU LAL v. MYLNE.

[I. L. R. 14 Cal. 401

32.—*Suit by a judgment-creditor to establish his judgment-debtor's right to property so as to make it subject to attachment in execution of his decree—Dismissal of such Suit—Judgment-debtor not represented by judgment-creditor in such suit—Subsequent suit by judgment-debtor to recover the same property*] A judgment-creditor of the plaintiff having obtained a decree against the plaintiff, attached the house in dispute. The

## RES JUDICATA—continued.

## (7) PARTIES—continued.

## (a) SAME PARTIES OR THEIR REPRESENTATIVES—continued.

defendant intervened in 1878, and set up a previous purchase of the house by himself from the plaintiff. The attachment was removed. The judgment-creditor brought a suit against the defendant for a declaration that the property belonged to the plaintiff, and, as such, was liable to be attached and sold in execution. At the hearing of this suit the judgment-creditor did not appear. The defendant appeared, and produced a sale-deed, which the Court found proved, and dismissed the judgment-creditor's suit. The plaintiff now brought the present suit against the defendant to recover possession of the house. The defendant contended (*inter alia*) that the dismissal of the former suit brought by the plaintiff's judgment-creditor, operated as *res judicata* under s. 13 of the Civil Procedure Code (Act XIV of 1882). Both the lower Courts disallowed the defendant's contention, holding that the suit was not barred. On appeal by the defendant to the High Court *Held*, confirming the lower Court's decree, that the dismissal of the former suit did not operate as *res judicata* in the absence of any evidence to show that the judgment-creditor, in point of fact, represented the plaintiff, so as to constitute him a party to the suit. *SHIVAPA v. DOD NAGAYA*.

[I. L. R. 11 Bom. 114]

33.—*Suit brought by one of several trustees after dismissal of suit brought by the other—Civil Procedure Code, s. 13, expl. V* Where the *urama* right over a certain *derasam* was vested in five trustees representing different *illams*, and a suit was brought by one of the trustees to recover certain property alleged to have been illegally alienated by three other trustees to a stranger and dismissed: *Held*, that the decree in such suit was a bar to a second suit brought for the same purpose by the fifth trustee, who had not been a party to the former suit, on the ground that he must be deemed to claim under the plaintiffs in the former suit within the meaning of s. 13, expl. V. of the Code of Civil Procedure. *MADHUVAN v. KESHAVAN*.

[I. L. R. 11 Mad. 191]

34.—*Madras Boundary Act, 1860, s. 25—Madras Regulation V of 1804—Representation of minor by manager of estate—Decision of Boundary Officer, effect of, if not contested by suit.* A Survey Officer in 1875 held an enquiry under the Boundary Act, 1860, and demarcated certain land out of a *zemindari*. At that time the *zemindar* was a minor under the Court of Wards, and he was represented at the enquiry by the manager of his estate appointed under s. 8 of Regulation V of 1804. In a suit brought by the *zemindar* to recover the land it was contended that the decision of the Survey Officer was not binding on the *zemindar* because he was not properly represented by his guardian at the enquiry: *Held*, that

## RES JUDICATA—continued.

## (7) PARTIES—continued.

## (a) SAME PARTIES OR THEIR REPRESENTATIVES—continued.

the decision of the Survey Officer was binding on the *zemindar*, and that the matter in dispute was *res judicata*, no appeal by way of suit as provided by the Boundary Act, 1860, s. 25, having been brought. *KAMARAJU v. SECRETARY OF STATE FOR INDIA*.

[I. L. R. 11 Mad. 309]

35.—*Civil Procedure Code, s. 13, expl. V—Joint Hindu family—Suit against two members—Second suit against third member* The plaintiff sued the father and brother of the defendant for trespass to a wall. His right to the wall was denied, but he obtained a decree. On executing the decree he was resisted by the defendant, who claimed the wall as his ancestral property and alleged that he was no party to the suit in which the decree has been obtained against his father and brother. His claim was registered as a suit under s. 331 of the Code of Civil Procedure. The plaintiff contended that the defendant was concluded by the decree obtained against his father and brother. *Held* that a Hindu son in a joint family becomes entitled by reason of his birth and in his own right, a right which he can enforce against his father; he does not claim under his father within the meaning of s. 13 of the Civil Procedure Code. *Held* also that the defendants in the former suit did not claim any right in common for themselves and others within the meaning of explanation V of s. 13 of the Code of Civil Procedure. The case of *Narayan Gop Habbu v Panduranga Gannu*, I. L. R. 5 Bom. 685, distinguished. *RAM NARAIN v. BISHESHAR PRASAD*.

[I. L. R. 10 All. 411]

36.—*Civil Procedure Code, s. 13—Decree in suit by a karnam, effect of, as regards his successor.* The karnam in a certain *mitta* sued to recover certain land as part of the *mirasi* property attached to his office. It appeared that the plaintiff's father and predecessor in office had sued by virtue of his office to recover the same land and that his suit had been dismissed: *Held* that the plaintiff's claim was *res judicata*. *VENKAYYA v. SURAMMA*.

[I. L. R. 12 Mad. 235]

37.—*Suit not between same parties—Suit for declaration of right to office, dismissal of.* Certain land was attached and sold in execution of a decree against the *dharmakarta* of a *devasthanam*. One claiming to be the lawful successor in office of the judgment-debtor now sued the purchaser for a declaration that the sale was invalid: *Held*, the suit should not be dismissed on proof that the plaintiff had failed to obtain a declaration of his right to the *dharmakartaship* against another claimant to the office, in a suit to which the present defendant was not a party. *RAMALINGAM v. THIRUGNANA SAMMANDHA*.

[I. L. R. 12 Mad. 312]



## RES JUDICATA—continued.

## (7) PARTIES—concluded.

## (b) Co-DEFENDANTS.

38.—*Decision when binding between co-defendants*] Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendant as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. RAM-CHANDRA NARAYAN v. NARAYAN MAHADEV.

[I. L. R. 11 Bom. 216]

39.—*Civil Procedure Code, s. 13—Issue decided in former suit, in which parties were rival defendants claiming under different titles.*] B sued L N and P V to recover certain property claimed under a nuncupative will of his father N. P V denied the will and alleged that the property was ancestral and had vested in him by survivorship. L N set up title to the property under a will in writing executed by N and denied the title both of B and of P V. The question whether P V was divided or not from N was tried. It was found that the will in writing was valid, that P V was divided, and that B's title was not proved. In a suit by L N against P V to recover certain land granted to her by the will executed by N. Held that the question whether P V was divided from N was *res judicata* under s. 13 of the Code of Civil Procedure by reason of the decision in the former suit, although in that suit P V and L N were both defendants. VENKAYYA v. NARASAMMA.

[I. L. R. 11 Mad 204]

## (8) COMPETENT COURT.

## (a) GENERAL CASES.

40.—*Civil Procedure Code, 1882, s. 244—Finality of order.*] S S brought a suit under a mortgage-bond, making R S, a subsequent incumbrancer a defendant, and obtained a decree for a sale of the whole of the mortgaged premises. After the decree a compromise was effected between all the parties, with the exception of R S, by the terms of which, in consideration of the judgment-debtors (mortgagors) undertaking to do certain acts, S S promised to execute his decree against only a 3 annas 12 dams share of the mortgaged premises. The judgment-debtors (mortgagors) having failed to carry out the compromise, S S applied for a sale of the whole of the mortgaged premises, but on the petition of R S setting out the terms of the compromise to which he was no party, the Subordinate Judge, by an order of the 7th September 1885, held that

## RES JUDICATA—continued.

## (8) COMPETENT COURT—continued.

## (a) GENERAL CASES—continued.

under the agreement S S was entitled to sell only a 3 annas 12 dams share of the mortgaged premises, which was accordingly directed to be sold. That order was not appealed against, but subsequently in March 1886, S S made a fresh application for a sale of the remainder of the premises. R S objecting. Held, that the order of the 7th September was one which the Court was competent to make under s. 244 of the Code of Civil Procedure, and by reason of that order not being appealed it became final. BASUDEO NARAIN SINGH v. SEOLJOY SINGH.

[I. L. R. 14 Cal. 640]

41.—*Foreign Court—Judgment of a Native Court—Civil Procedure Code (Act XIV of 1882), s. 13, expl. 1—Meaning of the words "a Court of jurisdiction competent to try such subsequent suit."*] The words in s. 13 of the Code of Civil Procedure (Act XIV of 1882), "a Court of jurisdiction competent to try such subsequent suit," mean a Court having concurrent jurisdiction with the Court trying the subsequent suit, whether as regards the pecuniary limit of its jurisdiction, or the subject-matter of the suit, to try it with conclusive effect. Reading Explanation VI with the earlier part of s. 13, the term "Court of competent jurisdiction" includes a foreign competent Court. The plaintiff sued as the adopted son of O to recover certain property in British territory. The defendants disputed the plaintiff's adoption. The plaintiff relied on a decree of a Native Court which he had obtained against defendant No. 2 in a suit for possession of certain other property belonging to O and situate within the territorial jurisdiction of the Native Court. In that suit the question of plaintiff's adoption had been raised and decided in plaintiff's favour. In the present suit both the lower Courts, without attaching any weight to this decree of the Native Court, held that the plaintiff's adoption was not proved, and dismissed the suit. Held, on second appeal, that the question of plaintiff's adoption was *res judicata* as between him and defendant No. 2, the judgment of the Native Court being one on the merits and conclusive between the parties within the territory of the Native State. BABABHAT v. NARHARBHAT.

[I. L. R. 13 Bom. 224]

42.—*Civil Procedure Code, s. 13—Pecuniary valuation of suit.*] A suit for two declarations filed in a Subordinate Court was valued by the plaintiffs at a sum in excess of the pecuniary jurisdiction of a District Munsif. It was pleaded that the matter in dispute was *res judicata* by reason of decrees passed in District Munsifs' Courts. No objection was taken in the Subordinate Court to the valuation of the suit. Held, that the plea of *res judicata* failed. GANAPATI v. CHATHU.

[I. L. R. 12 Mad. 223]

## RES JUDICATA—continued.

## (8) COMPETENT COURT—continued.

## (a) GENERAL CASES—concluded

43.—*Separate suit on disallowance of objection to execution—Evidence Act, s. 44* ] In execution of decree the defendant, who was sued as the representatives of her deceased brother, objected under s. 244 of the Code of Civil Procedure to the attachment of certain lands to which she set up independent title. The objection was disallowed and the land was sold. She then sued the execution-purchaser to set aside the Court sale and obtained a decree against which no appeal was preferred. She now sued for possession. *Held* that as against the execution-purchaser, the decree in the former suit was *res judicata* and therefore final. *Per cur.*—The words “not competent” in s. 44 of the Evidence Act refer to a Court acting without jurisdiction. **KETTI-LAMMA v. KELAPPAN.**

[I. L. R. 12 Mad. 228]

## (b) REVENUE COURTS.

44.—*Civil Procedure Code, s. 13—Partition—Question of title—N.-W. P. Land Revenue Act XIX of 1873, ss. 113, 114—Irregular Procedure* ] Upon an application made under Chapter IV of the N.-W. P. Land Revenue Act (XIX of 1873) for partition of common land in which the owners of six *pattis* were interested, into six equal parts, an objection was raised that the land should be divided into parts proportionate to the size of the different *pattis*. The Assistant Collector before whom the objection was made, disallowed it with reference to the provisions of the *ucyib ul-ur* in which the custom of the village was recorded, and made the partition in the manner prayed. No appeal was preferred by the objectors to the District Judge. The Collector confirmed the partition, and after an appeal to the Commissioner, the Assistant Collector's decision was upheld. The objectors then brought a suit in the Civil Court for a declaration that the defendants were only entitled to a share of the common land proportionate to the area of their *pattis*. *Held* that the objection which was raised in the Revenue Court was one which raised a question of title or of proprietary right in respect of the common land, within the meaning of s. 113 of the N.-W. P. Land Revenue Act; that the decision of the Assistant Collector was a decision within the meaning of s. 114 of the Act, and that consequently the suit was barred by s. 13 of the Civil Procedure Code. *Held* also that the question was not affected by any mistakes in procedure that had been made in the Revenue Courts. **AMIR SING v. NAIMATI PRASAD.**

[I. L. R. 9 All. 388]

45.—*Act XII of 1881 (N.-W. P. Rent Act), ss. 84, 148—Suit to contest demand of distrainer* ] A decree of a Rent Court passed upon enquiries made under ss. 84 and 148 of the Rent Act (XII of 1881), is not conclusive as between the parties

## RES JUDICATA—continued

## (8) COMPETENT COURT—continued.

## (b) REVENUE COURTS—concluded.

to the enquiry, upon the question of title, in a suit instituted in a Civil Court for declaration of right to, and possession of, the land in respect of which the Rent Court decree was passed. The period of limitation, for instituting a suit in the Civil Court as prescribed in these sections, applies only to suits brought by plaintiff or unsuccessful intervenor to have it declared that plaintiff had a title to receive the particular rent claimed, and which the Rent Court has refused to give him, and not to suits for declaration of title to, and possession of, the land in respect of which the rent accrued due. In the year 1881 plaintiffs had under the provisions of the Rent Act (XII of 1881), made a distraint for rent alleging it to be due by one of their tenants. The tenant contested the legality of the distraint by a proceeding in the Rent Court, and the defendant intervened on the ground that he had been actually and in good faith in receipt and enjoyment of the rent of the land occupied by the tenant. On the 28th of June 1881, the Rent Court decided against the defendant; but owing to some irregularity the distraint was withdrawn. Plaintiffs subsequently instituted a suit in the Rent Court against the tenant for recovery of arrears of rent and the defendant again intervened, and upon enquiry under s. 148 of the Rent Act (XII of 1881), plaintiffs' suit for arrears of rent was dismissed. Plaintiffs then instituted this suit in the Civil Court for declaration of their right to, and possession of, the land in respect of which distraint proceedings had been taken and suit for recovery of arrears of rent instituted. The Court of First Instance dismissed the suit on the merits. The plaintiffs appealed and urged, *inter alia*, that the defendant was estopped by the decision of the 28th June 1881, from contesting plaintiffs' title: *Held* that the decision of the 28th June 1881 in the enquiry held under s. 84 of the Rent Act (XII of 1881) was not conclusive between the parties in a subsequent suit between them to determine their title to the land in respect of which the distraint proceedings had been taken. **GANGA PRASAD v. BALDEO RAM.**

[I. L. R. 10 All. 347]

## (9) REFUSAL OF RELIEF.

46.—*Civil Procedure Code (Act XIV of 1882), s. 13—Omission to appeal against adverse decision in one suit—Effect of omission on decision in appeal in another.* ] The decision of an issue in one of two suits tried together, which is not appealed against, cannot be treated as *res judicata* so far as the same issue is concerned in an appeal from the decision in the other suit. *A*, a *ticadar*, sued *B* for rent in respect of a holding in the *ticca*. In that suit *B* pleaded that he was a partner of *A* in the *ticca* transaction, and that no rent was due from him in consequence thereof. *B* then sued *A* for an account of the partnership in the same transaction, and *A* in that suit denied the

**RES JUDICATA—concluded.****(9) REFUSAL OF RELIEF—concluded.**

partnership. Both suits were heard together by the Munsif who held A was not a partner. B appealed against the judgment and decree in the account suit, but did not appeal against that in the rent-suit. It was contended on the appeal that the question as to whether A was or was not a partner was *res judicata*, by reason of the decision in the rent-suit not being appealed against and having become binding: *Held*, that s. 13 of the Code of Civil Procedure did not apply, and that the question was not *res judicata*. There was no bar at the time the issue was tried and decided by the Munsif, and the Appellate Court was bound to decide the appeal upon the evidence. **ABDUL MAJID v. JEW NARAIN MATHO.**

[I. L. R. 16 Calc. 233]

**47—Civil Procedure Code, s 13—Declaratory decree—Maintenance suit, Decree in—Annual payments** ] A Hindu widow obtained a decree in 1876 which provided that she should receive future maintenance annually at a certain rate, but did not specify any date on which it should become due. In 1887 she filed the present suit claiming arrears of maintenance at the rate fixed in the decree of 1876. *Held*, that the suit did not lie. **Sabhanatha v. Lakshmi** (I L R. 7 Mad. 80), distinguished. **VENKANNA v. AITAMMA.**

[I. L. R. 12 Mad 183]

**RES NULLIUS.**

See CRIMINAL MISAPPROPRIATION,

[I. L. R. 11 Mad. 145]

See STOLEN PROPERTY—OFFENCES RELATING TO.

[I. L. R. 11 Mad. 145]

[I. L. R. 9 All. 348]

**RESPONDENTS.**

See PARTIES—ADDING PARTIES TO SUITS—RESPONDENTS.

See PARTIES—SUBSTITUTION OF PARTIES—RESPONDENTS.

**RESTITUTION OF CONJUGAL RIGHTS.**

See MAHOMEDAN LAW—DOWER.

[I. L. R. 11 Mad. 327]

**RESTITUTION OF PROPERTY, ORDER FOR.**

See MESNE PROFITS—ASSESSMENT IN EXECUTION AND SUITS FOR MESNE PROFITS.

[I. L. R. 14 Calc. 484]

**RESUMPTION.**

—*Resumption of inam village and regrant, effect of—Acts of State—Waikars, status of—Treaties of 1820—Effect of grant of inam under construction—Attachment by Government of such village, Effect of.* ] From the year 1820 down to the year 1872, the Waikar family had been in the enjoyment of the village of Pasarni under a treaty between the East India Company and one M. A and K M were brothers and the last male descendants of M. For an alleged fraud of K M Government restricted the enjoyment of the said village to his lifetime only. A predeceased K M. On the death of K M, Government, on the 31st December 1872, placed an attachment over the village. On the 13th July 1874, a judgment-creditor of A caused the lands in dispute, which were *mirasi* lands of the Waikar family situated at Pasarni, to be sold in execution of his decree against A, and they were purchased by the defendant, who was put in possession on the 22nd April 1876. In the meanwhile, Government, having chosen to recognize the plaintiff as a representative of the Waikar family, had removed the attachment, and regranted the village to the plaintiff shortly before, viz., on the 3rd April 1876. The plaintiff being dispossessed, sued the defendant, contending (*inter alia*) that A having predeceased his brother, had no interest in the lands, which had been purchased by the defendant. The Court of First Instance awarded the plaintiff's claim, and directed the defendant to pay the plaintiff's costs. The defendant appealed to the District Judge, who was of opinion that the proceedings of Government since the attachment in 1872 and restoration of the village were acts of State, and he varied the decree of the lower Court by cutting down the plaintiff's costs, made payable by the lower Court's decree, to half. On appeal by the defendant to the High Court: *Held*, reversing the decree of the lower Appellate Court, that the plaintiff's claim should be dismissed. The attachment placed by Government on the death of K M in December 1872, was limited to an exemption from assessment, and the resumption and re-grant to the plaintiff did not give the plaintiff any title to the lands in question. The proceedings of Government in 1873 and 1876, by which the plaintiff was recognised as the representative of the Waikar family, were not acts of State. The status of the Waikars and other persons, with whom the agreements of 1820 were entered into, was not that of an independent sovereign. They (the Waikars) were merely powerful *saranyandars* subordinate to the Raja of Satara, and after the annexation of the territory of the Raja in 1849 they held their lands under the East India Company. *See* *of State for India v. Narayan Balbhant Bhosle*, printed judgments for 1883, p. 241. **HARI SADASHIV v. AJMUDIN.**

[I. L. R. 11 Bom. 235]

**RESUMPTION CHITTAS.**

See EVIDENCE ACT, s. 83.

[I. L. R. 14 Calc. 120]

**REVERSIONERS.**

*See* CASES UNDER DECLARATORY DECREE,  
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**REVIEW.**

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*See* APPEAL—ORDERS.

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*See* LETTERS PATENT, HIGH COURT—  
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[I. L. R. 16 Calc. 788

**(1) ORDERS SUBJECT TO REVIEW**

1.—*Order granting leave to appeal to Privy Council*] *Per* PRINSEP, J—An order granting leave to appeal to the Privy Council is open to review. *GOPINATH BIBBAR v. GOLUCK CHUNDER BOSE.*

[I. L. R. 16 Calc. 292 note

**(2) POWER TO REVIEW.**

2.—*Second application for Review—“Final”*—*Civil Procedure Code (Act VIII of 1859) s. 378—Civil Procedure Code (Act XIV of 1882) ss. 623, 629.*] There is nothing in the Civil Procedure Code (Act XIV of 1882) which prevents a second application for a review being made after a previous application for review has been made and rejected, and such an application can therefore be entertained. The word “Final” in s. 629 of Act XIV of 1892 bears the same meaning, and ought to have the same construction put upon it, as was put upon the same word in s. 378 of Act VIII of 1859 by the Full Bench in *Nusruddin Khan v. Indronarayan Choudhry*, B. L. R. Sup. Vol. 367 *GOBINDA RAM MONDAL v. BHOLANATH BHATTA.*

[I L. R. 15 Calc. 432

**(3) REVIEW BY JUDGE OTHER THAN JUDGE IN ORIGINAL CASE.**

3.—*Civil Procedure Code (Act XIV of 1882), ss. 623 and 624—“New and important matter”*—*Money paid into Court under a decree to abide the result of an appeal to the Privy Council from a former decree on which it is based—Application to recover the money on the reversal of the former decree.*] By a deed of sale, dated 9th May 1858, certain lands belonging to a minor talukdar were

**REVIEW—continued.****(3) REVIEW BY JUDGE OTHER THAN JUDGE IN ORIGINAL CASE—continued.**

sold by his mother and natural guardian to the plaintiffs' father. The lands were described as *nakri* (i. e., held free of assessment), and the sale-deed provided that in case the vendee were at any future time compelled to pay assessment to Government in respect of the *nakri* lands, the vendor would reconp the vendee for any payment so made. In 1872 Government for the first time levied assessment on the *nakri* lands. In 1876 the plaintiffs filed a suit against the talukdar to recover the amount of assessment paid by them in respect of the *nakri* lands for the year 1872-76. The High Court passed a decree in plaintiffs' favour in March 1883. Against this decree the talukdar appealed to the Privy Council. In April 1883, the plaintiffs filed a second suit on the same cause of action to recover from the talukdar the amount of assessment levied on the *nakri* lands for the years 1877-82. In this suit a decree was passed against the talukdar solely on the strength of the High Court's decree in the former suit. In execution of this decree the plaintiffs attached the talukdar's property. Thereupon the talukdar deposited in Court the amount due under the decree, and applied to the Court for removal of the attachment, and for stay of further proceedings in execution pending the disposal of his appeal to the Privy Council in the former suit. This application was granted. In March 1887, the Privy Council decided the appeal in favour of the talukdar, and reversed the High Court's decree. Thereupon the talukdar applied for a refund of the money he had deposited in Court. The Court suggested that his proper remedy was by an application for review of the decree in the second suit. The talukdar accordingly presented a petition of review. This petition was rejected by the District Judge, on the ground that he had no jurisdiction to grant a review of his predecessor's decision, except on the grounds set forth in s. 624 of the Code of Civil Procedure: *Held*, that the District Judge had jurisdiction to entertain the application for review. The decision of the Privy Council, reversing the decree of the High Court in the first suit, having been passed subsequently to the decree in the second suit, which depended on the reversed decree of the High Court, was “new and important matter” within the meaning of ss. 623 and 624 of the Code of Civil Procedure. *WAGHELA RAISANGJI SHIVSANGJI v. MASLUDIN.*

[I. L. R. 13 Bom. 330

4.—*Code of Civil Procedure (Act XII of 1882), ss. 623, 627—Practice.*] A second appeal was, decided on the 1st June 1888 in favour of the respondent by two Judges of the High Court. On the 24th July 1888, an application for review was filed with the Registrar. Various reasons prevented the two Judges from sitting together until the month of March 1889. On the 6th March, the matter came up before them when a rule was issued, calling upon the other side to show cause

## REVIEW—continued

## (3) REVIEW BY JUDGE OTHER THAN JUDGE IN ORIGINAL CASE—concluded.

why a review of judgment should not be granted, being made returnable on the 28th March 1889. On the 28th March, one of the two judges had left India on furlough, and the rule was taken up, heard, and made absolute, by the other sitting alone. *Held*, that he had jurisdiction to hear the rule. **AUBHOY CHURN MOHUNT v. SHAMONT LOCHUN MOHUNT**

[I. L. R. 16 Calc. 788]

5.—*Civil Procedure Code, s. 621—Grant of application for review by successor of original Judge* [An application for review of judgment was presented on other grounds than those specified in s. 621 to a District Munsif, who had delivered the judgment, and he thereupon ordered the decree to be produced. The District Munsif having resigned, his successor heard and determined the application. *Held*, it was not competent to the District Munsif, who had not delivered the original judgment to entertain the application for review. **CHERU KURUP v. CHERU KANDA KURUP**.

[I. L. R. 12 Mad 509]

## (4) GROUND FOR REVIEW.

6.—*Errors of law—Law, Mistaken view of—Civil Procedure Code (Act XIV of 1882), s. 623* [A review of judgment may be granted (if it is necessary for the ends of justice that the judgment should be reviewed) where there is an error of law on the face of the judgment, or where the decision of the Court has proceeded upon a mistaken view of the law. *Reva Mahton v. Ram Kishen Sing*, I. L. R. 14 Calc. 18; I. L. R. 13 I. A. 106, referred to. In this case without deciding whether there was or not any error in law the application for review of judgment was refused on the ground that it did not appear there was any danger of its causing a miscarriage of justice. **IN THE MATTER OF THE PETITION OF SHARUP CHAND MALA, SHARUP CHAND MALA v. PAT DASSEE**.

[I. L. R. 14 Calc 627]

7.—*Subsequent publication of report of case—Case not brought forward at hearing.* [Where a review of judgment was applied for on the ground of the subsequent publication of the report of a High Court decision on a point of law which governed the case, but which had not been urged at the previous hearing, it was considered that the applicant was not to blame for his omission to bring the decision to the notice of the Court at the first hearing, and the application for review of judgment was granted. **ACHUTA v. MAMMAVU**.

[I. L. R. 10 Mad 357]

8.—*Civil Procedure Code, s. 623—Power to grant Review—“Any other sufficient reason”* [S. 623 gives a more extensive right of review than existed in England, where a review could only be obtained by showing that there was apparent on

## REVIEW—continued.

## (1) GROUND FOR REVIEW—continued.

the record error in law, or that new and relevant matter had been discovered after the judgment which could not possibly have been used when the judgment was given, or that judgment was obtained by fraud. The words “or for any other sufficient reason” mean that the reason must be one sufficient to the Court or Judge to whom the application for review is made, and they cannot be held to be limited to the discovery of new and important matter or evidence or the occurring of a mistake or error apparent on the record. Whether or not there is in such cases “any other sufficient reason” may depend on a question of law or a question of fact, or a mixed question of law and fact. *Reasat Hosein v. Hadjee Abdoolah*, I. L. R. 2 Calc. 131, referred to. In cases where a stay of execution or an injunction is granted on an *ex-parte* application, liberty to apply to the Judge to vary or set aside his order must be implied, if not expressed. *Fritz v. Hobson*, L. R. 14 Ch. Div. 512, referred to. On the 29th July 1886, an application was made by a party against whom the High Court, on second appeal, had passed a decree dated the 18th March 1816, for review of judgment. On the 28th August, the applicant made a further application that execution of the decree might be stayed pending the determination of the application for review, and an order was passed *ex-parte* granting this application. Subsequently, the opposite party applied under s. 623 of the Civil Procedure Code for a review of the *ex-parte* order on the grounds (1) that the Court had no jurisdiction to make it, and (2) that the application of the 29th July was beyond time, and therefore there could be no review of judgment, and no order for stay of execution pending such review. *Held* that the Court had power, under s. 623 of the Code, to review the *ex-parte* order of the 28th August, and that such order had been made without jurisdiction and ought to be reviewed. *Held* that, having regard to the circumstances that the order of the 28th August was made without jurisdiction, and upon an *ex-parte* application, of which the opposite party had no notice, and interfered perhaps indefinitely with his right to obtain the money in Court under the final and unappealable decree in his favour, as to which no application for review had been granted, and that the application for review of judgment was made after the statutory period of ninety days had expired, and contained no explanation of the delay, sufficient reason for reviewing the order of the 28th August had been shown. **AMIR HASAN v. AHMAD ALI**.

[I. L. R. 9 All. 36]

9.—*Civil Procedure Code, s. 623—Omission to serve notice of hearing of appeal on applicant—“Any other sufficient reason”—Practice—Notice to show cause—Right to begin.* [An appeal which was referred to the Full Bench for disposal was heard and determined by the Full Bench, and judgment given in favour of the appellant in the absence of the respondent. Subsequently the

## REVIEW—continued.

## (4) GROUND FOR REVIEW—continued.

respondent applied for a review of judgment and proved that his absence at the hearing before the Full Bench was due to a mistake which has been made in not serving him with notice of the reference. *Held* by the Full Bench that, under the circumstances, the applicant's absence at the hearing came within the words "any other sufficient reason" in s 623 of the Civil Procedure Code, and the review should be granted and the appeal re-heard. Upon the hearing of an application for review of judgment, upon which an order has been passed directing the opposite party to show cause why the application should not be granted, counsel for the opposite party should begin. GHANSHAM SING v. LAL SING.

[I. L. R. 9 All. 61]

10.—Attachment of person in Execution of decree—Liability of married woman—Application for review of an order contrary to law—Waiver.] *R* as surety for her husband, joined with him in executing a bond for Rs. 90. In a suit brought upon the bond, a decree was passed against both. *R* was arrested in execution of the decree, and brought before the Court. She was then asked if she desired to apply to be declared an insolvent under the insolvency sections of the Civil Procedure Code (Act XIV of 1882), but not doing so she was committed to jail. Subsequently however she applied to be declared an insolvent, but her application was rejected. She then claimed to be released on the ground of her coverture. The Judge rejected her application as being too late. On reference to the High Court: *Held*, that her application for release was virtually an application for review of the order for her imprisonment, on the ground that it was contrary to law; that her mere omission to take the objection at the time of her arrest could not be regarded as a waiver of her right of exemption from arrest; and having regard to the nature of the right claimed it was one which the Court could not properly decline to consider on review, however late the application might have been. IN RE THE PETITION OF RADHI.

[I. L. R. 12 Bom. 228]

11.—Erroneous application of s 575 Civil Procedure Code—Civil Procedure Code, s. 623.] One of the cases to which s 575 of the Code does not apply is where a preliminary objection being taken to the hearing of a first appeal before the High Court on the ground that the appeal is time-barred, the Judges of the Division Bench differ in opinion as to whether the appellant has shown sufficient cause, within the meaning of s. 5 of the Limitation Act (XV of 1877), for not presenting the appeal within the prescribed period. The decision of such a preliminary objection is not a "hearing" of the appeal, but precedes the hearing, or determines that there is no appeal which the Court can hear or decide. Where such a preliminary objection is allowed, it cannot be said that the Court which, by reason

## REVIEW—concluded.

## (4) GROUND FOR REVIEW—concluded.

of the Limitation Act, has no jurisdiction to hear the appeal, should nevertheless "affirm" the decree of the Court below. In the case of such a preliminary objection and such a difference of opinion (the Bench being equally divided), the opinion of the Senior Judge should, under s. 27 of the Letters Patent prevail. *Appaji Bhurav v. Sherlall Khubchand*, I. L. R. 3 Bom. 204, and *Gridharji Maharaj Tikait v. Sarashotum Gossami*, I. L. R. 10 Calc. 814, distinguished. Where, in such a case, the provisions of the second paragraph of s. 575 of the Code were erroneously applied, and the judgment of the Junior Judge holding that the appeal should be dismissed as time-barred, prevailed, and the Court on appeal under s 10 of the Letters Patent, affirmed such judgment,—*held* that, under the circumstances, there was a mistake or error apparent on the face of the record, and that there was sufficient cause for granting a review of the Court's decree, under s 623 of the Code. HUSAINI BEGAM v. COLLECTOR OF MUZAFFARNAGAR.

[I. L. R. 11 All. 176]

## (5) PROCEDURE ON RE-HEARING OF CASE.

12.—Notice of proceedings—Special Judge appointed under Dehkan Agriculturists Relief Act.] It is illegal on the part of the Special Judge, appointed under Act XVII of 1879, to reverse the decree of a Subordinate Judge on review without giving a proper and sufficient notice to the party in whose favour the decree was passed. RUPCHAND KHEMCHAND v. BALVANT NARAYAN.

[I. L. R. 11 Bom. 591]

## (6) CRIMINAL CASES.

13.—Review of judgment of High Court—Criminal Procedure Code (Act X of 1882), s. 369.] The verdict and judgment of a Divisional Bench of a High Court, coupled with the sentence in a criminal case, are absolutely final, and as soon as they have been pronounced and signed by the Judges, the High Court is *functus officio*, and neither the Court itself, nor any Bench of it, has any power to revise that decision or interfere with it in any way. IN THE MATTER OF THE PETITION OF GIBBONS.

[I. L. R. 14 Calc. 42]

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[I. L. R. 12 Bom. 561]

REVISION—CRIMINAL CASES—*contd.*

## (1) GENERAL RULES FOR EXERCISE OF POWER.

1—*Practice—Criminal Procedure Code (Act X of 1882), s. 435—Revision by the High Court—Revision where lower Court has concurrent jurisdiction with High Court* ] The High Court will not entertain an application for revision in cases where the District Court or Magistrate has concurrent revisional jurisdiction with the High Court, save on some special ground shown, unless a previous application shall have been made to the lower Court, but in cases in which concurrent jurisdiction is not possessed by the lower Courts no such general rule exists. IN THE MATTER OF THE QUEEN-EMPRESS v. REOLAH.

[I. L. R. 14 Calc. 887]

2—*Defect in enquiry by lower Court—Criminal Procedure Code, 1882, ss. 435, 439* ] The High Court will exercise its powers under ss. 435 and 439 in the interests of justice, in exceptional cases, as where the enquiry in the lower Court has been faulty. BHAWOO JIVAJI v. MULJI DAYAL.

[I. L. R. 12 Bom. 377]

## (2) ACQUITTALS.

3.—*Criminal Procedure Code, s. 423 (a), s. 439, —Order of acquittal—High Court's powers of revision—Order by High Court for re-trial after acquittal on appeal.* ] The High Court has power under s. 439 of the Criminal Procedure Code to revise an order of acquittal, though not to convert a finding of acquittal into one of conviction. In reference to orders of acquittal passed by a Court of Session in appeal, the High Court may, under s. 439, reverse such order and direct a retrial of the appeal, the proper tribunal to conduct which is the Sessions Court of appeal or such other Court of equal jurisdiction as the High Court may entrust, under s. 526 of the Code, with the trial of the appeal. QUEEN-EMPRESS v. BALWANT.

[I. L. R. 9 All. 134]

## (3) VERDICT OF JURY AND MISDIRECTION.

4.—*Sessions Judge. Opinion of—Criminal Procedure Code, s. 307—High Court, Power of.* ] In the exercise of its powers under s. 307 of the Code of Criminal Procedure the High Court will form and act upon its own view of what the evidence in its judgment proves; but, in doing so, the opinion of the Sessions Judge, no less than verdict of the jury, is entitled to its proper weight. *Reg. v. Khanderao Bayarav*, I L. R. 1 Bom. 10; *Queen v. Mukhan Kumar*, 1 C. L. R. 275; *The Empress v. Dhunum Kazeo*, I. L. R. 9 Calc. 53; *Queen-Empress v. Manma Dayal*, I. L. R. 10 Bom. 497; *The Queen v. Ram Churn Ghose*, 20 W. R. Cr. 33; *The Queen v. Sham Bagdar*, 13 B. L. R. Ap. 19; 20 W. R. Cr. 73; *The Queen v. Huro Manghee*, 14 B. L. R. Ap. 2;

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21 W. R. Cr. 4; *The Queen v. Wuzer Mundul*, 25 W. R. Cr. 25; *The Queen v. Nobin Chunder Banerjee*, 13 B. L. R. Ap. 20; 20 W. R. Cr. 70, referred to. QUEEN-EMPRESS v. ITWARI SAHO.

[I. L. R. 15 Calc. 269]

## (4) MISCELLANEOUS CASES.

5—*Criminal Procedure Code (Act X of 1882), s. 145—Order passed under s. 146 on proceedings taken under s. 145, Criminal Procedure Code—Power of Court on revision—Evidence on revision.* ] Where a Magistrate has passed an order under s. 145 of the Criminal Procedure Code, whereas the proper order in the case should have been one under s. 146 the High Court on revision will make the order which the lower Court ought to have made. Case in which the High Court on revision entered into the whole of the evidence in the case. *Raja Baboo v. Muddun Mohun Lall*, I. L. R. 14 Calc. 169, explained. REID v. RICHARDSON.

[I. L. R. 14 Calc. 361]

6.—*Criminal Procedure Code (Act X of 1882), ss. 195, 423, 439, 476—Jurisdiction of High Court in revision to quash orders under s. 476 of the Criminal Procedure Code* ] The High Court is competent in the exercise of its revisional powers to interfere with an order of a Subordinate Court, whether made under s. 195 or under s. 476 of the Criminal Procedure Code, directing the prosecution of any person for offences referred to in those sections. The High Court, under s. 439, has the powers conferred on a Court of appeal by s. 423 to alter or reverse any such order. IN THE MATTER OF THE PETITION OF KHEPU NATH SIKDAR. KHEPU NATH SIKDAR v. GRISH CHUNDER MUKERJI

[I. L. R. 16 Calc. 730]

## REVIVOR, SUBSTITUTION OF PARTIES ON.

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## RIGHT OF APPEAL.

See DECLARATORY DECREE, SUIT FOR—REQUISITES FOR THE EXISTENCE OF RIGHT.

[I. L. R. 12 Mad. 136]

See PLAINT—AMENDMENT OF PLAINT.

[I. L. R. 12 Mad. 136]

1.—*Second Appeal—Rent Suit—Bengal Act VIII of 1869, s. 102—Bengal Tenancy Act (VIII of 1885), s. 153—General Clauses Act (I of 1868), s. 6.* ] The word "proceedings" in s. 6 of Act I of 1868, as applied to a suit, means the suit as an



**RIGHT OF APPEAL—concluded.**

entirety, that is, down to the final decree. A second appeal, therefore, to the High Court on a question of the amount due as rent, will not lie when the suit was instituted previous to the passing of Act VIII of 1885, although the judgment in the suit was delivered, and the first appeal therefrom heard, subsequently to the passing of that Act. *Hurnosundari Devi v Bhajohari Das Manji*, I. L. R. 13 Calc. 86, approved. *SATGHURI v. MUJIDAN*.

[I. L. R. 15 Calc. 107]

2.—*Surety in execution-proceedings* ] A surety against whom a decree is sought to be enforced under s. 253 of the Code of Civil Procedure (Act XIV of 1882) has the right of appealing against an order made in the execution-proceedings. *SULEMAN v. SHIVRAM BHIKAJI*.

[I. L. R. 12 Bom. 71]

**RIGHT OF OCCUPANCY.**

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[I. L. R. 10 All. 615]

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[I. L. R. 10 All. 615]

**(1) ACQUISITION OF RIGHT.****(a) PERSONS BY WHOM RIGHT MAY BE ACQUIRED.**

1.—*Liability to assessment of Rent—Chur land—Jungleburi tenure.* ] *R*, a Hindu widow, granted a jungleburi tenure to certain tenants in respect of a chur belonging to her husband's estate. An *amulnama* was granted to the tenants signed by a *karpardaz* of *R* in respect of the tenure. *R* died in January 1861, and was succeeded by *J* and *P*, two daughters, the last of whom died on the 31st December 1880. On her death her grandsons succeeded to the estate. On *R*'s death *J* and *P* got possession of all estate papers, and amongst them a *dowl* granted by the tenants in return for the *amulnama*. In 1865 proceedings were taken by the tenants to obtain *kubuliat*s on the footing of those documents, which proceedings came to an end in 1868. In 1873 *J* and *P* instituted suits against the tenants, alleging the *amulnama* and *dowl* to be forgeries, and seeking to enhance the rents payable to them, as well as to have it declared that *R*'s acts did not bind them. In these suits it was found that *J* and *P* had all along been aware of the claim made by the tenants that they held a permanent tenure,

**RIGHT OF OCCUPANCY—continued.****(1) ACQUISITION OF RIGHT—continued.****(a) PERSONS BY WHOM RIGHT MAY BE ACQUIRED—continued.**

and the suits were dismissed on the ground that it was too late for *J* and *P* after the lapse of twelve years from *R*'s death, to raise the question. In 1881, *D*, a receiver, instituted a suit in the names of the grandsons to eject the tenants on amongst other grounds that the grandsons, reversors, were not bound by *R*'s acts, and that the jungleburi tenure was not binding on them; that the tenants were middlemen and had no right of occupancy, that at all events the plaintiffs were entitled to rent on the area of land then held by the defendants, as there had been large accretions to the amount covered by the *amulnama* and *dowl*. *Held* that, being middlemen, the defendants had no right of occupancy, and that were the suit not dismissed for other grounds, they were liable to have the rent assessed on the whole amount of lands held by them, which was in excess of that covered by *amulnama* and *dowl*. *DROBOMOYI GUPTA v. DAVIS*.

[I. L. R. 14 Calc. 323]

2.—*Right of occupancy in Assam—Pykes, their rights and privileges* ] The plaintiff, who held land in Assam under a settlement from Government, sued to eject the defendant from certain lands within his holding. It was proved that the defendant was a descendant from one of the *pykes* who held lands under the Assam Rajahs; that the Assam Rajahs granted the *pyke* to a certain *lakherajdar*; that the *pyke* held the lands in suits as before under the *lakherajdar*; that the *lakheraj* was subsequently resumed by Government; and that the defendant had his house and gardens on the land for a long time, and had paid rent for many years at Government rates. *Held*, that the defendant was not liable to ejectment. The rights of such tenants explained and discussed. *DINABUNDHU SURMA v. BODIA KOCH*.

[I. L. R. 15 Calc. 100]

3.—*Permanent<sup>o</sup> cultivator—Paracudi.* ] The defendant's ancestors or predecessors in title were the cultivating tenants of the lands of a certain temple from a date not later than 1827, in which year they were so described in the *paimaish* accounts. In 1834, they executed a *muchalka* to the Collector, who then managed the temple, whereby they agreed among other things to pay certain dues. They were described in the *muchalka* as *paracudis*. In 1837, the plaintiff's predecessors took over the management of the temple from, and executed a *muchalka* to, the Collector, whereby they agreed among other things not to eject the raiyats as long as they paid *kist*. In 1882, the dues (which were payable separately), having fallen into arrear, the manager of the temple sued to eject the defendants. *Held*, that there was nothing to show that the defendants were more than tenants from year to year, and they had

**RIGHT OF OCCUPANCY—continued.****(1) ACQUISITION OF RIGHT—continued.\*****(a) PERSONS BY WHOM RIGHT MAY BE ACQUIRED—continued.**

not acquired a right of occupancy. *Chockalinga Pillai v. Vythelinga Pundara Sannudiy*, 6 Mad. 164, and *Krishnasami v. Varadaraja*, I. L. R. 5 Mad 345, discussed and distinguished. *THIAGARAJA v. GIYANA SAMBANDHA PANDARA SANNADHI*.

[I. L. R. 11 Mad. 77]

**(b) SUBJECTS OF ACQUISITION.**

4.—*Suburban lands let for building purposes.*] There is no authority for the proposition "that there may be rights of occupancy in suburban lands let for purposes of building, though these rights may be cognizable under a law intended only for agricultural landlords and tenants." *Gungadhar Shikdar v. Azimuddin Shah Biswas*, I. L. R. 8 Calc 960, explained *Ramdhun Khan v. Haradhun Paramanik*, 12 W. R. 404; 9 B. L. R. 107 note, relied on. *RAKHAL DASS ADDY v. DINGMOXI DEBI*.

[I. L. R. 16 Calc. 652]

**(c) MODE OF ACQUISITION.**

5.—*Bengal Tenancy Act (VIII of 1885), ss. 20, 21—Suits pending at time Act came into force—Suit for ejectment.*] Section 21 of the Bengal Tenancy Act applies to suits pending at the time the Act came into force, viz., 1st November 1885, which had not then resulted in a decree. In a suit instituted on 8th October 1885, to eject the defendants after notice to quit, it was held that, although the defendant had held the land from which it was sought to eject him for less than twelve years, and therefore would not, if the Bengal Rent Act VIII of 1869 had been applicable, have acquired a right of occupancy, yet the effect of ss. 20 and 21 of the Bengal Tenancy Act was to give him a right of occupancy, and therefore he could not be ejected. *JOGESSUR DAS v. AISANI KOTBURTO*.

[I. L. R. 14 Calc. 553]

6.—*Agreement restricting right of occupancy—Bengal Tenancy Act (Act VIII of 1885), s. 178, Applicability of, to suits pending when Act came into force.*] S. 178 of the Bengal Tenancy Act (Act VIII of 1885) has no application to suits instituted before the date on which that Act came into force. So where a landlord sued to eject a tenant who had executed a *solenamah* agreeing to hold the land in suit for a specified period at a specified rent, and providing that the landlord was to be at liberty to enter on the lands at the expiry of the period, and the suit was instituted on the 6th October 1885, and where it was found that at the date of the *solenamah* the tenant had acquired a right of occupancy with respect to the lands in suit: *Held*, that the tenant was not entitled to the benefits conferred by s. 178, cl 1, sub-clause (b) of the Bengal Tenancy Act, but was

**RIGHT OF OCCUPANCY—continued.****(1) ACQUISITION OF RIGHT—concluded.****(c) MODE OF ACQUISITION—concluded.**

liable to be ejected. *MOHESHWAR PERSHAD NARAIN SINGH v. SHEOBARAN MAHTO MOHESHWAR PERSHAD NARAIN SINGH v. DERSUN RAUT*

[I. L. R. 14 Calc. 621]

7.—*Purchase by tenant of fractional share of proprietary interest, Effect of on acquisition of right of occupancy—Beng. Act VIII of 1869, s. 6.*] A tenant, who had commenced to occupy his holding on the 13th April 1871, acquired by purchase in the year 1878 a fractional share of the proprietary interest, and continued to occupy the holding as raiyat till the 13th May 1885, when he was dispossessed. On the 30th March 1886, he instituted a suit to recover possession, alleging that he had acquired a right of occupancy. It was contended that, owing to the purchase of the share of the proprietary interest, he could not have acquired such right. *Held*, that under Bengal Act VIII of 1869 there was nothing to prevent such right being acquired by the plaintiff if after his purchase he continued to hold the land as a raiyat, and if the relation of landlord and tenant existed between himself on the one hand and the proprietors on the other, and if the period for which he so held extended for twelve years from the date of the commencement of his holding. *GUR BUKSH ROY alias GUR BUKSH SINGH v. JEOLAL ROY*.

[I. L. R. 16 Calc. 127]

**(2) LOSS OR FORFEITURE OF RIGHT.**

8.—*Landlord and tenant—Occupancy tenant—Non-payment of rent—Abandonment of tenancy.*] Mere non-payment of rent by an occupancy raiyat, does not extinguish or constitute an abandonment of the tenancy. *Ham Chandra Chowdhari v. Chand Akund*, I. L. R. 12 Calc. 115 distinguished; *Hemnath Dutt v. Ashgar Sindar*, I. L. R. 4 Calc. 894, *Gulam Ali Mundul v. Golap Sundery Dase*, I. L. R. 8 Calc. 612; *Manirullah v. Ramzan Ali*, I. C. L. R. 293, explained. *OBHOYA CHARAN BHOOIA v. KOILASH CHUNDER DEY, OBHOYA CHARAN BHOOIA v. GOPINATH DEY*.

[I. L. R. 14 Calc. 751]

9.—*Non-payment of rent—Relinquishment, Evidence of*] Mere non-payment of rent does not extinguish or amount to a relinquishment of the right of occupancy. *Ham Chandra Chowdhari v. Chand Akund*, I. L. R. 12 Calc. 115, explained. *NILMONY DASSY v. SONATUN DOSHAYI*.

[I. L. R. 15 Calc. 17]

**(3) TRANSFER OF RIGHT.**

10.—*N. W. P. Rent Act (XII of 1881), s. 93 (b)—Mortgage by ex-proprietary tenant—Act "in consistent with the purpose for which land was let"—Act XII of 1881, ss. 9. 56*] The policy of the framers of the N. W. P. Rent Act (XII of 1881) was

**RIGHT OF OCCUPANCY—concluded.****(3) TRANSFER OF RIGHT—concluded.**

not to protect the interest of the purchaser of proprietary rights, but that of the person whose proprietary rights have been sold, and who has become an exproprietary tenant. It would be straining the law, as laid down in s 93 (b) of the Act, to hold that a mortgage of his holding granted by an ex-proprietary tenant was an act "inconsistent with the purpose for which the land was let," within the meaning of that provision. The words quoted have reference to something which may alter the character of the land, or cause injury to the land and thus to the land-holder. In the case of a mortgage by an ex-proprietary tenant, the land-holder would not be damaged by being unable, in the event of his rent being in arrear, to distrain the crops grown upon the land by the so-called mortgagee, s 56 of the Rent Act giving the land-holder a right to distrain any crops growing upon the land, by whomsoever grown, in respect of which the arrear arises, *Debi Prasad v. Har Dayal*, I. L. R. 7 All 691, followed *Wajaha Bibi v. Abhman Singh*, Weekly Notes, All 1883, 166, referred to, *FATIMA BEGAM v. HANSI*.

[I. L. R. 9 All. 244]

**RIGHT OF REPLY.**

1.—*Practice—Evidence—Prosecutor's right of reply—Witness called by Court—Tendering witnesses for cross-examination—Criminal Procedure Code (Act X of 1882), ss. 289, 540* ] The giving of any documentary evidence by an accused person, during the cross-examination of the witnesses for the prosecution, and before he is asked under s. 289 if he means to adduce evidence, does not give a right of reply to the prosecution. *The Queen-Empress v. Grees Chunder Banerjee*, I. L. R. 10 Calc. 1024, followed. *EMPRISS OF INDIA v. KALIPROSONNO DOSS*

[I. L. R. 14 Calc. 245]

2.—*Criminal Procedure Code, 289—Prosecutor's right to reply.* ] Where documentary evidence was put in by the accused during the case for the Crown and before examination of the accused *Held*, under s. 289 of the Code of Criminal Procedure, that the Crown had the right of reply—*Queen-Empress v. Grees Chunder Banerjee*, I. L. R. 10 Calc. 1024, dissented from. *QUEEN-EMPRESS v. VENKATAPATHI*.

[I. L. R. 11 Mad. 339]

**RIGHT OF SUIT.**

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[I. L. R. 16 Calc. 364]

*See* TRANSFER OF PROPERTY ACT, s 67,

[I. L. R. 11 All. 367]

**(1) INTEREST TO SUPPORT RIGHT.**

1.—*Specific Relief Act s. 39.—Sale of immoveable property—Covenant by vendor of good title—Suit and decree on a previous decree against purchaser—Suit by vendor to set aside mortgage and decree as fraudulent—Vendor and Purchaser.* ] A vendor of land who had covenanted with his vendees that he had a good title, and who after the sale had no interest remaining in the property, brought a suit in which he claimed to set aside as fraudulent a mortgage on which the defendant had obtained a decree against the vendees, and the decree itself. He based his right to maintain the suit upon his liability under his covenant. The vendees were not parties to the suit. *Held* that as the defendant's mortgage had merged in his decree, the suit could only be maintained if the plaintiff could show himself entitled to have the defendant's decree set aside, and that he had shown no interest which would entitle him to maintain a suit for such a purpose. *JHUNA v. BENI RAM*.

[I. L. R. 9 All. 439]

2. *Suit by junior members of tarwad—Fraud—Collusion between senior members and alienees.* ] A suit was brought by the junior members of a tarwad, which consisted of three stanoms and three tavaries against the karanavan and others to whom he had alienated some tarwad property, for a declaration that the alienations in question were invalid: *Held* that the plaintiffs, though junior members of the tarwad, were competent to maintain the suit if there was collusion between the senior anandravans and the alienees and the

RIGHT OF SUIT—*continued.*(1) INTEREST TO SUPPORT RIGHT—*contd.*

stani for the time being. *Anund Koor v. The Court of Wards* (L. R. 8 I. A. 22), considered. MAHOMED v. KRISHNAN.

[I. L. R. 11 Mad. 106]

3—*Caste—Re-admission to caste—Contract to procure admission to caste—Contract made by head of a caste in representative capacity not enforceable by him after he has ceased to hold office.*] The defendant was the eldest of three brothers whose mother on her marriage had been put out of the Lovana caste for having married a man belonging to a different caste. The defendant was anxious that he and his brothers should be re-admitted to the caste; and in 1864 he entered into an agreement with the plaintiff, who was at that time one of the *setids* of the caste, whereby the latter agreed to procure the admission of the plaintiff and his brothers and get them married to girls belonging to the caste. In consideration of these services the defendant was to pay the plaintiff the sum of Rs 5,000, which sum was to become due on the marriage of the defendant's youngest brother to a girl of the caste, and to be expended in purchasing caste utensils, which were to be kept for the use of the caste. The plaintiff alleged that part of this money had been already paid to him, and that on the marriage of the defendant's youngest brother in 1880 he had demanded payment of the balance (*viz.*, Rs. 3,149), which the defendant had not paid. He now sued to recover this balance. One of the witnesses at the hearing was the *setid* of the caste who had succeeded the plaintiff in that position. He stated that he and other leaders of the caste to whom he had spoken, disapproved of this suit: *Held*, that the suit was not maintainable. The agreement was made with the plaintiff as one of the heads of the caste. It was made with him in his representative, not in his personal, capacity, and the benefit of the agreement accrued, not to him, but to the caste. It was therefore for the caste to say whether they wished to enforce the agreement. The plaintiff, however, had lost his position as one of the heads of the caste in 1869, and was no longer the spokesman or the representative of the caste. His successor had told the Court that the leaders of the caste disapproved, as he did himself, of the suit. Under these circumstances the suit was not maintainable. PITAMBER RATANSI v. JAGJIVAN HANSRAJ.

[I. L. R. 13 Bom. 131]

4.—*Suit by father in his own right for defamation of daughter—Suit not maintainable*] A suit for defamation of his daughter cannot be maintained by a Hindu father suing in his own right and not as general attorney or on behalf of the daughter. A suit for defamation can only be brought by the person actually defamed, if the person is *sui juris*, and if not *sui juris*, then under the provisions of the Civil Procedure Code, by his guardian or next friend. *Dawan Singh v.*

W., D.

RIGHT OF SUIT—*continued.*(1) INTEREST TO SUPPORT RIGHT—*concl.*

*Mahip Singh*, I. L. R. 10 All. 425, and *Sarvatha v. Mannar*, I. L. R. 8 Mad. 175, distinguished. *Subbanyar v. Kristnaryar*, I. L. R. 1 Mad. 383, and *Luckunsey Rouji v. Harbin Nursey*, I. L. R. 5 Bom. 580, referred to. *DAYA v. PARAM SUREH*.

[I. L. R. 11 All. 104]

5—*Civil Procedure Code, s. 539, Interest necessary to support a suit under—Sut to remove a trustee.*] The plaintiffs having an interest as the managers of a temple in seeing to the due performance of the religious part of the administration of a certain charity endowed for the sustenance of Brahmins and connected with the temple, and being further interested in its administration as Brahmins entitled under certain circumstances to share in the benefits of the charity, sued under s. 539 of the Code of Civil Procedure to remove defendant from the trusteeship of the charity on the ground of fraudulent mismanagement. *Held*, that the plaintiffs' interest did not support the suit. *Quære*: Whether a suit for the removal of a trustee will lie under the above section. *NARASIMHA v. AYYAN CHETTI*.

[I. L. R. 12 Mad. 157]

## (2) SURVIVAL OF RIGHT.

6—*Civil Procedure Code, s. 361—Abatement of suit—Tort—Malicious prosecution, suit for—Cause of action, survival of, as against heir of a deceased wrong-doer—Act XII of 1855—“Actio personalis moritur cum persona,” application of.*] The plaintiff sued to recover damages from the defendant's father, *R*, for wrongful arrest and malicious prosecution. During the pendency of the suit, *R* died, and the plaintiff substituted the defendant as his heir and representative. The defendant contended that the suit abated. Both the lower Courts disallowed the defendant's contention, and awarded damages to the plaintiff, to be recovered from the estate of the deceased. On appeal by the defendant to the High Court: *Held*, reversing the decision of the lower Courts, that the suit abated on the death of *R*, his estate having derived no benefit, but, on the other hand, suffered loss, in consequence of his wrong-doing. *Phillips v. Homfray*, L. R. 24 Ch. D. 439, followed. It was contended for the plaintiff that Act XII of 1855 gave the plaintiff a right to continue his suit against the heir of *R*. *Held*, that Act XII of 1855 did not apply to a suit, such as this, brought originally against the wrong-doer himself, and only subsequently sought to be continued against his heir. *HARIDAS RAMDAS v. RAMDAS MATHURADAS*.

[I. L. R. 13 Bom. 677]

## (3) CASTE QUESTIONS.

7.—*Custom—Caste usage—Expulsion of member of caste under mistake of fact and without notice.*] In a suit relating to the management

RIGHT OF SUIT—*continued*(3) CASTE QUESTIONS—*concluded*.

of the common property of the members of a Hindu caste, the plaintiff's right to sue was denied on the ground that, having violated the rules of the caste, he had been expelled from it: *Held* (1) that it was open to the Court to determine whether or not the alleged expulsion from caste was valid; (2) that if the plaintiff had not in fact violated the rules of the caste, but was expelled under the *bonâ-fide*, but mistaken, belief that he had committed a caste offence, the expulsion was illegal and could not affect his rights. *Per* KERNAN, J. —A custom or usage of a caste to expel a member in his absence without notice given or opportunity of explanation offered is not a valid custom. KRISHNASAMI v. VIRASAMI.

[I. L. R. 10 Mad. 133]

8.—*Dispute as right to office of Khatib—Mahomedan Law—Bom. Reg. II of 1887, s. 21.* S. 21 of Reg. II of 1827, has no application to suits between Mahomedans. A dispute as to the right to an office, such as the office of *khatib* (or preacher) is said to be among Mahomedans, is not a caste question within the meaning of the term as used in the section; a suit will therefore lie to establish such a right. HASHIM SAHEB VALAD AHMED SAHEB v. HUSEINSHA VALAD KARMISHA FAKIR.

[I. L. R. 13 Bom. 429]

## (4) CHARITIES.

9.—*Civil Procedure Code, s. 539—Sanction granted to two persons separately to institute suit in respect of breach of charitable trust.* R. instituted a suit with Collector's sanction to compel the performance of a charitable trust; D was subsequently joined as plaintiff, having also obtained the Collector's sanction to institute the suit: *Held*, that the sanction obtained by D related back to the institution of the suit. RAMAYYANGAR v. KRISHNAYYANGAR.

[I. L. R. 10 Mad. 185]

10.—*Sanction of Advocate-General, necessity of—Civil Procedure Code 1877 and 1882, s. 539—Religious institution, suit concerning management of.* In a suit brought in 1881 with no written consent of the Advocate-General by the head of an adhinam for declarations that a math was subject to his control; that he was entitled to appoint a manager; that the present head of the math was not duly appointed and his nomination by his predecessor was invalid; and for delivery of possession of the moveable and immoveable properties of the math to a nominee of the plaintiff; the claim extended also to religious establishments at Benares and elsewhere connected with the math: *Held* that the consent of the Advocate-General to the suit was not required; the suit having been instituted under the Civil Procedure Code of 1877 and the cause of action not being

RIGHT OF SUIT—*continued*.(4) CHARITIES—*continued*.

an alleged breach of trust. GIYANA SAMBANDHA PANDARA SANNAHDI v. KANDASAMI TAMBIRAN.

[I. L. R. 10 Mad. 375]

11.—*Public charity—Trust—Public charitable or religious trust—Offerings made to an idol—Liability of persons in possession of an idol's property—Account—Jurisdiction of Civil Courts in cases relating to public charities—Civil Procedure Code (Act X of 1887), s. 539—Direct interest, "meaning of."* 1. A trust for a Hindu idol and temple is to be regarded in India as one created "for public charitable purposes" within the meaning of s. 539 of the Code of Civil Procedure (Act X of 1877). 2. The Hindu law recognizes not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious or charitable institution may, according to his law, express his purpose and endow it, and the ruler will give effect to the bounty, or at least protect it. A trust is not required for this purpose as it is by English law. 3. Those who take charge of gifts made to a religious or charitable institution—whether such gifts consist of cash, jewels or land—incur thereby a responsibility for their due application to the purposes of the institution. They are answerable as trustees would be, even though they have not consciously accepted a trust; and a remedy may be sought against them for mal-administration by a suit open to any one interested as under the Roman system in a like case by means of a *popularis actio*. The plaintiffs as relators filed this suit, under s. 539 of the Code of Civil Procedure (Act X of 1877), against the defendants as trustees of the temple of Shri Ranchhod Raiji at Dakor. The plaintiffs were five in number. The first plaintiff was the hereditary manager of the temple and its appendant villages. The other plaintiffs were priests residing at Dakor, who ordinarily took charge of pilgrims visiting the shrine, and performed worship of the idol on their behalf. The defendants were the *shevats* or ministers of the idol—about one hundred and fifty in number—who took office by hereditary descent. They remained in constant attendance on the idol, performed the daily services at the temple, collected all the offerings made at the shrine, and kept them in a *bhandar* or store-room. The god Shri Ranchhod Raiji was held in great veneration by the followers of the Vaishnava religion throughout Western India. Every full moon, thousands of pilgrims resorted to the shrine, and made offerings to the deity, of cash, ornaments, clothes, and other articles amounting in value to about a lakh of rupees in the course of a year. Besides these offerings the temple enjoyed a grant, in perpetuity, of the revenues of several *nam* villages, of which Dakor and Kangri yielded the largest income. The plaintiffs sued as persons interested in the

## RIGHT OF SUIT—continued.

## (1) CHARITIES—continued.

maintenance of this public religious and charitable institution, and prayed that the Court would make the defendants, as recipients of the offerings at the idol's shrine, accountable, as trustees, for the right disposal of the property thus acquired. The plaintiffs alleged that the income of the temple had largely increased, and had been wrongly appropriated by the defendants to their personal purposes. They, therefore, prayed for an account, for the appointment of a receiver, for the removal of the *shevaks* from their office, and for the settlement of a scheme of future management. The defendants answered (*inter alia*) that the plaintiffs had not such a direct interest in the institution as to entitle them to sue under s. 539 of Act X of 1877, that they themselves were owners of the idol and of the idol's property, and that, as such, they were not liable to render an account of the offerings they had collected at the shrine. They also contended that they were not liable to be removed from their offices, which they and their ancestors had held for several centuries past. The District Judge dismissed the suit, on the preliminary ground that except the first plaintiff, who was a hereditary manager of the temple, the other plaintiffs had not such a direct interest in the charity as to entitle them to sue under s. 539 of the Code of Civil Procedure (Act X of 1877). *Held*, reversing the decision of the District Judge, that plaintiffs Nos. 2—5, as priests residing at Dakor and taking part in the worship of the idol, were directly interested in its due performance and its maintenance. Though they might not be trustees, they were clearly among those who, in practice, benefited by the execution of the trust. They had thus an undeniable *locus standi* as relators, and the suit could proceed at their instance. *Held*, further, that the *shevaks* were not the owners of the offerings made to the idol. As recipients of those offerings they were responsible for their due application to the purposes of the foundation. They were liable, as trustees, to render an account of their management. The Court accordingly directed the District Judge (1) to take steps either by appointing a receiver, or otherwise in his discretion, for guarding the property of the temple; (2) to take an account of the property and of the receipts and disbursements of the temple; (3) to make the requisite orders for recovering property appropriated by the *shevaks*, and (4) to draw up a scheme for the future management of the temple and its funds, regard being had to the established practice of the institution and to the position of the *shevaks* and of other persons connected with it. The jurisdiction of the Civil Courts in matters of this kind discussed. *MANOHAR GANESH TAMBekar v. LAKHIMIRAM GOVINDRAM*.

[I. L. R. 12 Bom. 247]

See *MANOHAR v. KESHAVRAM*.

[I. L. R. 12 Bom. 267 note]

## RIGHT OF SUIT—continued.

## (1) CHARITIES—continued.

12—Trust for public religious purposes—Private trust—Sue by worshipper of Hindu temple relating to trust—Civil Procedure Code, ss. 30, 539—Act XX of 1863—*Hindu Law*.] The defendants made a gift of land to a Hindu temple for the purpose of defraying the expenses appertaining to the idol. The temple was built and the gift made in 1870. The defendants obtained from the Revenue authorities mutation of names in the idol's favour and an acknowledgment of the person whom they nominated as agent or manager. The plaintiff, alleging that they had subsequently repossessed themselves of the land and the profits accruing therefrom, and that he was interested as a Hindu in worshipping at the temple, and professing to sue on behalf of the entire body of the worshippers thereof, sued for a declaration that the land was *wakf*, and the idol entitled to hold it in his own name; that the defendants should be directed to apply the income of the property to the purposes of the temple, and that the Court should give such orders and instructions as might be necessary and proper for the future management of the temple and payment of income. No sanction to the institution of the suit was obtained under s. 539 of the Civil Procedure Code. *Held* by the Full Bench that the gift made by the defendants constituted a trust for the purposes of the temple. *Per* EDGE, C. J., and TYRRELL, J., that the defendants before the Court did not constitute themselves trustees in any sense. *Held* also by the Full Bench that the suit was not maintainable as against those defendants. *Per* STRAIGHT, J., that the suit was not maintainable under the Hindu law; that the trust was one for public religious purposes; that such a suit, in which the plaintiff asked to have the trust administered by the Court, could not be maintained without the sanction required by s. 539 of the Code; that assuming s. 539 to be inapplicable, and Act XX of 1863 to apply, the suit could not be maintained without the sanction required by that Act; and that, with reference to s. 30 of the Code, no cause of action had accrued to plaintiff alone on which he could maintain the suit. *Per* EDGE, C. J., and TYRRELL, J., that if the trust were one for public religious purposes, the suit as against the defendants before the Court must fail for non-compliance with the provisions of s. 539 of the Code and, if for private or quasi-private religious purposes, it must also fail, since there was no principle on which the plaintiff, as one of the public worshipping in the temple, could maintain it against those defendants who were not trustees, but (if they had wrongfully taken possession) trespassers; that Act XX of 1863 could not apply; and that, with reference to s. 30 of the Code, the plaintiff could not maintain the suit alone on his own behalf, or on behalf of himself and others against those defendants. *Jawahra v. Akbar Hussain* (I. L. R. 7 All. 178), distinguished. *Manohar Ganesh Tambekar v. Lakhmiram Govind Ram* (I. L. R. 12 Bom. 247);

## RIGHT OF SUIT—continued.

## (4) CHARITIES—continued.

*Lutfunissa Bibi v. Nazirun Bibi* (I L. R. 11 Calc. 33); and *Hira Lal v. Bharon* (I L. R. 5 All. 602), referred to. *Wajid Ali Shah v. Dumatullah Beg* (I L. R. 8 All. 31), approved. *RAGHUBAR DIAL v. KESHO RAMANUJ DAS*.

[I L. R. 11 All. 18]

13.—*Civil Procedure Code, s. 539*—Interest necessary to support a suit—Suit to remove a trustee.] The plaintiffs, having an interest as the managers of a temple in seeing to the due performance of the religious part of the administration of a certain charity endowed for the sustenance of Brahmans and connected with the temple, and being further interested in its administration as Brahmans entitled under certain circumstances to share in the benefits of the charity, sued under s. 539 of the Code of Civil Procedure to remove defendant from the trusteeship of the charity on the ground of fraudulent mismanagement: *Held*, that the plaintiffs' interest did not support the suit. *Quere*. Whether a suit for the removal of a trustee will lie under the above section. *NARASIMHA v. AYYAN*.

[I L. R. 12 Mad. 157]

## (5) COMPENSATION.

14.—*Suit for compensation for wrongful seizure of cattle—Cattle Trespass Act (I of 1871)* A suit for compensation for wrongful seizure of cattle will lie in a Civil Court, the provisions of Act 1 of 1871 being no bar to such a suit. *Nomaz Mollah v. Lall Mohun Tagadger*, 15 W. R. 279, approved; *Aslem v. Kalla Durra*, 2 C. L. R. 344, dissented from. *SHUTTRUGHON DAS COOMAR v. HOKNA SHOWTAL*.

[I L. R. 16 Calc. 159]

## (6) CONTRACTS AND AGREEMENTS

15.—*Contract Act IX of 1872, ss. 10 and 11*—*Suit on a bond passed to a minor.* A money-bond taken by minor is good in law, and may be sued on. *HANMANT LAKSHMAN v. JAYARAO NARSINHA*.

[I L. R. 13 Bom. 50]

## (7) COSTS.

16.—*Suit to recover costs incurred in former proceedings in Court having jurisdiction.* An objection to the attachment and sale of a house which was advertized for sale in execution of a decree for enforcement of lien, was allowed, upon the ground that the objector had purchased the house from the mortgagor and his purchase was not subject to the decree, to which he was not a party. The decree-holder then brought a suit against the objector, claiming a declaration of his right to recover the amount due under his decree by enforcement of lien against the house, and that the order releasing the property from attachment should be set aside, and also to recover the costs incurred by him in the execution.

## RIGHT OF SUIT—continued.

## (7) COSTS—continued.

department on the defendant's objection: *Held* also that inasmuch as where a Court, having jurisdiction, orders or refuses costs, a separate action for such costs cannot be brought, the plaintiff was not entitled to recover from the defendant the costs incurred by him in the execution-department. *Mahram Das v. Ajudha* (I L. R. 8 All. 452), followed. *KADIR BAKSH v. SALIG RAM*.

[I L. R. 9 All. 474]

## (8) DECREES, SUITS ON.

17.—*Declaratory decree — Maintenance suit, decree in—Annual payments* A Hindu widow obtained a decree in 1876 which provided that she should receive future maintenance annually at a certain rate, but did not specify any date on which it should become due. In 1887 she filed the present suit claiming arrears of maintenance at the rate fixed in the decree of 1876. *Held*, that the suit did not lie. *Sabhanatha v. Lakshmi* (I L. R. 7 Mad. 80), distinguished. *VENKANNA v. AITAMMA*.

[I L. R. 12 Mad. 183]

## (9) EASEMENTS.

18.—*Obstruction — Acquiescence — Suit for removal of obstruction — Decree for plaintiff qualified by declaring that parties retain rights exercised prior to obstruction* In a suit for the removal of a building which the defendants had erected, and which was an obstruction to the plaintiffs' right to use a court-yard adjoining their residences, it appeared that the land on which the building stood did not belong to either party, but that all the inhabitants of the *mohulla* had from time immemorial exercised a right of way over it to and from their houses. It also appeared that on a part of the same land, there had formerly stood a thatched building used as a "sitting place" by the residents of the *mohulla*. *Held* that the right which was alleged to have been obstructed was not a public right of way, but a right which was confined to the people dwelling in the *mohulla* and going to and from the houses in the *mohulla*; and that the suit, being brought in respect of an interference with a private easement, was maintainable without proof of special damage. *Karim Baksh v. Budha*, I L. R. 1 All. 249, *Gehanaji v. Ganpati*, I L. R. 2 Bom. 469, and *Uda Begam v. Imam-ud-din*, I L. R. 1 All. 82, distinguished: *Held* also that there was no principle of acquiescence involved in the case, inasmuch as there was no evidence that the plaintiffs had given their actual consent to the building, and the only evidence of their acquiescence could be that they did not immediately protest, and the defendants must have known that they were building upon a court-yard which their neighbours had a right to use. *Uda Begam v. Imam-ud-din*, I L. R. 1 All. 82, and *Ramsden v. Dyson*, L. R. 1 H. L. 129, referred to. *FATEHYAB KHAN v. MUHAMMAD YUSUF; MUHAMMAD YUSUF v. FATEHYAB KHAN*.

[I L. R. 9 All. 434]



## RIGHT OF SUIT—continued.

## (9) EASEMENTS—concluded.

19.—*Privacy, right of—Custom.*] A customary right of privacy, under certain conditions, exists in India and in the North-Western Provinces, and is not unreasonable, but merely an application of the maxims *sic utere tuo ut alienum non laedas* and *aedificare in tuo proprio solo non licet quod alteri noceat*. A substantial interference with such a right, where it exists, if without the consent or acquiescence of the owner of the dominant tenement, affords such owner a good cause of action. *GOKAL PRASAD v. RADMO*

[I. L. R. 10 All 358]

## (10) EXECUTION OF DECREE.

20.—*Objection to attachment by judgment-debtor on behalf of others—Order against decree-holder—Civil Procedure Code (Act XIV of 1882), ss 244, 278, 279, 280, 281, 282, 283.*] Where a judgment-debtor claims property which is the subject-matter of attachment, either on his own account as his own property, under whatever right, or as the representative of third parties in which capacity he has been sued, the question between him and the attaching creditor is properly one between the parties to the suit under s. 244 of the Code of Civil Procedure. But where the judgment-debtor raises the claim or objection on behalf of third parties who are not represented before the Court, the order passed thereon must be regarded as an order under s. 280 of the Code, and the only mode in which that order can be contested is in a regular suit as provided by s. 283. In execution of a decree against a judgment-debtor in his private capacity the judgment-creditor attached certain property. Thereupon the judgment-debtor objected that the property attached had been dedicated by him some time previous as *wakf* under a registered *wakfnamah*, and that he was only in possession as *mutwali* under the deed. The lower Court found that the document created a valid *wakf*, and allowed the objection and released the property from attachment. The judgment-creditor appealed. At the hearing of the appeal it was contended that no appeal lay, inasmuch as the order was one under s. 280 of the Civil Procedure Code. On behalf of the judgment-creditor it was contended that the order was one under s. 244 and was thus appealable. *Held* that the order was one under s. 280 and that no appeal lay, the remedy of the judgment-creditor being by way of a regular suit as provided by s. 283. *ROOP LALL DASS v. BEKANI MEAH; MOHINEE MOHUN ROY v. BEKANI MEAH.*

[I. L. R. 15 Calc. 437]

21.—*Civil Procedure Code (Act XIV of 1882), ss. 280—283—Judgment-debtor, suit by, to establish title to property the subject-matter of claim in execution-proceedings.*] A judgment-debtor is not necessarily a party against whom an order is made within the meaning of that term as used in s. 283 of the Code of Civil Procedure so as to preclude his instituting a suit after the lapse of

## RIGHT OF SUIT—continued.

## (10) EXECUTION OF DECREE—continued.

one year from the date of such order (the period of limitation prescribed by Art. 11, Sch. II, Act XV of 1877) to establish his title to and to recover possession of the property which has been the subject-matter of a claim in execution-proceedings, and in respect of which an order has been made under s. 280 of the Code. *KEDAR NATH CHATTERJI v. RAKHAL DAS CHATTERJI.*

[I. L. R. 15 Calc. 674]

22.—*Deceased judgment-debtor—Execution against a person not the legal representative.*] The defendants along with V and C, had brought a suit against one A, in the Civil Court at Peshawar in the Panjab, and obtained a decree on the 23rd July 1878 for Rs. 30,745-12. In 1881 application for transfer of the decree to the Court at Moradabad for execution was made and it was granted, but no steps were taken thereupon. On the 12th June 1883 A died. On the 30th April 1884 the defendants again applied to the Court at Peshawar treating their judgment-debtor as being then alive, for a fresh certificate to execute their decree in the Moradabad district, and obtained it. On the 20th of August 1885, they made an application to the District Judge of Moradabad for execution of their decree, and in it it was stated that the application was "for execution against A and after his death against A L, the own brother, and D K, widow, and L P and others, sons of A, residents of Kundarki, and the said A L at present residing at Umballa, and employed in the Commissariat Transport Department, judgment debtors." It was further stated that "the judgment-debtor is dead, and his heirs are living and in possession of his estate, and A L himself has realised Rs. 9,637-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta and appropriated the same, therefore to that extent the person of the said A L is liable." Notification of this application was issued to A L as also to the other persons named therein. A L objected to the application as against himself stating that, although he was the brother of A, deceased, yet he always lived separate and carried on business separately; and that there was no connection or partnership between him and the deceased judgment-debtor, and that he had no property of the deceased in his possession. Further that as A left issue, it was wrong to call him heir to A and take out execution-process against him. In reply to these objections the judgment-creditors (defendants) did not contend that A L was the legal representative of the deceased judgment-debtor, but treated him as a person in possession of a sum of money belonging to the deceased and therefore liable to the extent of the sum so received by him. The Subordinate Judge holding that A L was the brother of the deceased and had realised the amount from the Commissariat Office, which he failed to prove that he paid to the deceased, ordered execution to proceed against him. A L then

RIGHT OF SUIT—*continued*.(10) EXECUTION OF DECREE—*concluded*.

instituted this suit to set aside the order of the Subordinate Judge. It was contended first, that the suit was in effect a suit under s. 283 of the Code of Civil Procedure and therefore barred as not having been brought within a year from the order of the Subordinate Judge; and secondly, that the proceedings of the Subordinate Judge were held under s. 244 of the Code and therefore no separate suit would lie. *Held*, that the first contention must fail, inasmuch as an essential condition precedent to a suit under s. 288 of the Code, is the making of an attachment of some property; of objection being taken to such attachment; of investigation being made into such objection; and lastly, of its being allowed or disallowed, and these did not exist in this case. The second contention also must fail, as the Subordinate Judge never treated the proceedings in execution against A L upon the footing that he was the legal representative of the deceased judgment-debtor *Mohamed Aga Ali Khan v. Bulmukund*, L. R. 3 I. A. 241, *Nadir Hossain v. Bipen Chund Bassarat*, 3 C. L. R. 437, were referred to. *ANGAN LAL v. GUDAR MAL*.

[I. L. R. 10 All. 479]

## (11) FRESH SUITS

23.—*Civil Procedure Code*, ss. 318, 335—*Suit to recover possession of property sold in execution of decree*.] S attached certain land and a house in execution of a decree against R. M put in a claim, under s. 278 of the Code of Civil Procedure, alleging that he was in possession as purchaser from R. The claim was rejected. No suit was brought by M to contest this order. S purchased the said land and house in execution and obtained a sale-certificate. In 1884 S sued M to recover possession of the land and house, alleging that in execution-proceedings in 1882 he had been put into possession of the land, but not of the house, which was found locked up by the Court amin, and that M prevented him from enjoying both the land and house. M pleaded that S had never been put into possession, and again set up his title as purchaser from R and possession under such title. The Munsif found that S had been put into formal or constructive possession of the land, but not of the house, and decreed the claim. On appeal the District Judge held that S was bound to proceed according to the provisions of s. 335 of the Code of Civil Procedure to recover possession, and could not bring a separate suit. *Held* that, whether there had been legal delivery or not the suit was not barred. *SEVU v. MUTTUSAMI*.

[I. L. R. 10 Mad. 53]

## (12) LANDLORD AND TENANT, SUITS CONCERNING.

24.—*Madras Rent Recovery Act VIII of 1867*—ss. 39, 40, 78—*Civil Procedure Code*, s. 11—*Remedy of tenant aggrieved by notice of attachment*.] A tenant having received a notice of attachment

RIGHT OF SUIT—*continued*.•(12) LANDLORD AND TENANT, SUITS CONCERNING—*concluded*.

under s. 39 of the Rent Recovery Act sued in a District Munsif's Court to have the notice cancelled, no specific damage being alleged. *Held*, that the suit did not lie. *MAHOMED v. LAKSHMIPATI*.

[I. L. R. 10 Mad. 368]

## (13) MUNICIPAL OFFICERS, SUITS AGAINST.

25.—*Bombay District Municipal Act (VI of 1873)*, s. 33—*Suit to establish right to build structure forbidden by Municipality*.] S. 33 of the Bombay District Municipal Act (VI of 1873) gives the Municipality a discretion to issue such orders as it thinks proper with reference to a proposed building. Civil Courts cannot interfere with that discretion, unless it is exercised in a capricious, wanton, and oppressive manner. The plaintiff was the owner of two houses on each side of the passage of a *khudki*, or open square, containing three or four other houses. He proposed to connect the two houses by building a story across the passage at such a height as not to interfere with the passage of those who were entitled to go to and fro. He applied to the local Municipality for permission to build in the manner he proposed. The Municipality forbade the work, on the ground that it was likely to interfere with the access of light and air to the neighbouring houses. The plaintiff thereupon sued the Municipality to establish his right to build the proposed structure. It was contended for the plaintiff that the Municipality ought not to have refused permission in the interest of the neighbouring householders, who were able to protect their own rights in case of injury. *Held*, that the suit would not lie as the order of the Municipality refusing permission was not an unreasonable one under the circumstances of the case. *Held*, further, that the authority of the Municipality was not in any way affected by the circumstance that the proposed erection might be an encroachment on private rights subjecting the plaintiff to an action by the persons injured. *NAGAR VALAB NARSI v. MUNICIPALITY OF DHANDHUKA*.

[I. L. R. 12 Bom. 490]

## (14) OBSTRUCTION TO PUBLIC WAY.

26.—*Special damage—Lease—Right of lessee—Trespass*.] The plaintiff, a holder of a ten years' lease of the share and rights of one of the co-sharers of a village, sued for the demolition of certain buildings and constructions on a plot of land within the area of the village, on the ground that the public had been very much inconvenienced in going to and coming from the road, and in taking carts, carriages, cattle, &c., and that he by reason of his own inconvenience, and also as lessee in possession of the entire rights of his lessor, had legally and justly a right to bring the action. The findings of fact were that by the terms of the lease plaintiff was entitled to maintain the action as representing the zemindari

**RIGHT OF SUIT—continued.****(11) OBSTRUCTION TO PUBLIC WAY—continued.**

rights of his lessor; that the obstructions complained of existed when the lease was granted; that the roadway mentioned in the plaint was one used by the public in general as a foot-path and also for vehicles, and that the buildings complained of had encroached on the road. The suit was dismissed by the first Court, but decreed in appeal by the lower Appellate Court: *Held*, that in the absence of damage over and above that which in common with the rest of the public the plaintiff has sustained, his action must fail. Public nuisance is actionable only at the suit of a party who has sustained special damage, and the case law of British India in this respect is the same as the rule of English law on the subject. Further, that the lease to plaintiff failed to show either that the land upon which the defendant has built is included in the lease, or that it intended to confer upon the plaintiff any right to question the legality of the erections existing at the time of the lease. *Satku v Ibrahim Aga*, I. L. R. 2 Bom. 457, and *Karim Buksh v. Budha*, I. L. R. 1 All. 249, referred to. *RAMPHAL RAI v. RAGHUNANDAN PRASAD*.

[I. L. R. 10 All. 498]

27.—*Obstruction by building—Suit by zemindar for removal of building—Special damage* ] The plaintiff, who is the zemindar of the village, brought an action claiming to have a *chabutra* or building erected by the defendant in one of the village roads removed. The road in question was a *katcha* road used by the village over which the public had a right of way, and it had been dedicated as a road for the use and convenience of the general public. The plaintiff got a decree for the removal of the *chabutra* and the defendant appealed: *Held*, that the rule of English law that a member of the public cannot maintain an action for obstruction to a public road without showing special injury to himself beyond that suffered by any member of the public, does not apply to a zemindar who or whose predecessor in title had dedicated to the public the road over his zemindari land. A zemindar in giving the public a right of road of way over his land does not give the public or any one else a right to interfere with the soil of the road, as by erecting a building upon it. In such a case the zemindar has in common with the public the right to use the road as a road; over and above it, he has a right to the soil in the road, which he had never given to the public. In an action of this kind, the zemindar does not sue as a guardian of the public, but in respect of an interference with his own rights of property. *Baroda Prasad Mustafae v. Gorachand Mustafae*, 3 B. L. R. A. C. 295, 12 W. R. 160, discussed. *Doraston v. Payne*, 2 Smith's L. C. 9th Ed., 151, *R. v. Pratt*, 4 E. & B. 860, *Rolls v. Vestry of St. George the Martyr Southwark*, 14 Ch. D. 785, and *Goodson v. Richardson* (L. R. 9 Ch. D. 221), referred to. *TOTA v. SARDUL SINGH*.

[I. L. R. 10 All. 553]

**RIGHT OF SUIT—continued.****(15) OFFICE OR EMOLUMENTS.**

28.—*Karnam—Madras Regulation XXXIX of 1802, s. 7—Office of karnam in a zemindari village, Succession to—Female claimant—Incapacity of next heir* ] The karnam of a zemindari village having died, leaving a widow his heir, the zemindar appointed her to the office of karnam. The nearest male *sapinda* of the deceased karnam (from whom he was divided) sued to establish his right to the office of karnam. *Held* (1) that a woman cannot hold the office of karnam: *Held* further, (2) that when the immediate heir is incapacitated, the nearest male *sapinda* of the deceased karnam is entitled to succeed to the office, he was therefore the proper person to maintain the suit. *CHANDRAMMA v. VENKATRAJU*.

[I. L. R. 10 Mad 226]

29.—*Civil Procedure Code, s. 11—Hereditary right to an office—Declaratory decree—Jurisdiction—Emolument* ] A suit for the establishment of a right to the hereditary title of musicians to a *sutra* will lie under s. 11 of the Code of Civil Procedure, notwithstanding that the right sought to be established is one which brings in no profit to those claiming it. *MAMAT RAM BAYAN v. BAPU RAM ATAI BURA BHAKAT*.

[I. L. R. 15 Calc. 159]

30.—*Civil Court's Jurisdiction over suits in respect of an injury caused by exclusion from an hereditary office—Bombay Hereditary Offices' Act (III of 1874), s. 40—Election of an officer—Free election—Agreement in restraint of free election—Bombay Act X of 1876, s. 4, Its application to suits between private persons* ] The plaintiff and his co-sharers in a *kulkarni dutan*, entered into an agreement in 1869 for the performance of the duties of the *dutan* by the several sharers in turn. The agreement provided that if any of the sharers prevented the nomination of a sharer to officiate in his turn, he should pay Rs. 100 as damages to the person thus excluded from office. The plaintiff alleged that in 1883 it was his turn to officiate, that the defendants, instead of electing him in accordance with the agreement, nominated another person, who was confirmed in the appointment by the Collector. The plaintiff, therefore, sued the defendants to recover Rs. 100 as damages for breach of the agreement of 1869: *Held* that the agreement could not be enforced by a civil suit, as it was opposed to the policy of s. 40 of Bombay Act III of 1874, which contemplates a free election of an officer by the whole body of registered representative *ratandars* to whom the Collector issues his notice—an election unfettered by any promises made beforehand by any of the sharers: *Held*, also, that a suit in respect of any injury caused by exclusion from office or service is barred by the second paragraph of cl. (a) of s. 1 of Act X of 1876. Having regard to the wording of the several clauses of s. 4, the bar therein provided is not limited to

RIGHT OF SUIT—*continued*.(15) OFFICE OR EMOLUMENTS—*concluded*.

suits against Government. NARO PANDURANG v. MAHADEV PURSHOTAM

[I. L. R. 12 Bom 614

31—*Civil Procedure Code*, 1882, s. 11—*Suit for an office to which no fixed fees are attached.* Under s. 11 of the Code of Civil Procedure (Act XIV of 1882), a suit for an office will lie, even though the office be a religious one, to which no fixed fees are attached. HASHIM SAHEB VALAD AHMED SAHEB v. HUSEINSHA VALAD KARIMSHA FAKIR.

[I. L. R. 13 Bom. 429

32—*Suit for a declaration of plaintiffs' right to officiate as priests and receive offerings—Jurisdiction of Civil Court.* A suit will lie in a Civil Court for a declaration of the plaintiffs' right to officiate, in alternate years, as priests in a temple and receive the offerings to the idol. LIMBA BIN KRISHNA v. RAMA BIN PIMPLU.

[I L. R. 13 Bom. 348

## (16) OFFICIAL ASSIGNEE.

33—*Suit for unauthorized payment made by assignee—Insolvent Act 11 and 12 Vic, c 21, ss 28 and 29—Fraud.* The account of an estate formerly in the hands of a derivative executor who became insolvent and died in 1856, having been pending in Court for many years, some of the parties being interested in the original estate and others as the insolvent's creditors a compromise was effected, under which a suit, brought in 1858 by the official assignee, representing the deceased insolvent, was dismissed by the consent of parties in 1875. Part of a sum of money paid to the credit of the insolvent's estate in pursuance of the compromise, was made over, upon the passing of the consent decree, with the knowledge of the assignee, but without notice to or the sanction of the Court, to a person who had assisted in taking the account. From the representatives of the latter, he being now deceased, the successor in office of the assignee claimed repayment. In regard to the facts, that he was neither a party to nor had any control over, the compromised suit, that he owed no duty to the Court in respect of it, nor to the creditors of the estate, and that he had taken no unfair advantage of the assignee. *Held* that there were no grounds upon which this repayment could be claimed. ABDUL HOSSEIN ZENAIL ABADI v. TURNER (OFFICIAL ASSIGNEE)

[I. L. R. 11 Bom 620

[L. R. 14 I. A. 111

## (17) POSSESSION, SUITS FOR.

34.—*Suit for possession by purchaser at sale in execution of decree—Civil Procedure Code (Act XIV of 1882), ss 11, 318—Concurrent remedies.* A purchaser at a sale in execution not having applied to the Court for possession under s. 318 of the Code of Civil Procedure, brought a regular

RIGHT OF SUIT—*continued*.(17) POSSESSION, SUITS FOR—*concluded*.

suit to obtain possession of the property purchased: *Held*, that, although a remedy might be open to the plaintiff under s. 318, still he was not precluded from bringing a regular suit, the remedies being concurrent. KISHORI MOHUN ROY CHOWDHRY v. CHUNDER NATH PAL

[I. L. R. 14 Calc. 644

## (18) PUBLIC OR PRIVATE RIGHTS.

35.—*Right to graze cattle—Civil Procedure Code, ss 31, 53—Public right—Amendment of plaint.* A sued for an injunction to restrain interference with his right to graze cattle on the bed of a certain tank. The other raiyats of the village in whom the same right vested were originally joined as plaintiffs, but the plant was amended under s. 53 of the Code of Civil Procedure, and their names were struck off the record. A proved no special damage. *Held* that the fact that the other raiyats of the village had similar rights did not make A's right a public right in the sense that no action could be brought upon it unless special damage was proved. VENKATACHALA v. KUPPU-SAMI.

[I. L. R. 11 Mad 42

## (19) SALE IN EXECUTION OF DECREE.

36—*Suit to set aside sale for irregularity—Bengal Act VII of 1880—Civil Procedure Code, 1882, ss. 311, 312.* The words "in respect of sales in execution of decrees" in s 19 of Bengal Act VII of 1880, do not include any proceedings instituted after the sale for setting it aside. Ss. 311 and 312 therefore of the Civil Procedure Code do not apply to sales under a certificate. A suit therefore to set aside such a sale for irregularity is not barred by s. 312. SADHUSARAN SINGH v. PANCHDEO LAL.

[I. L. R. 14 Calc. 1

RAM LOGAN OJHA v. BHAWANI OJHA.

[I L. R. 14 Calc. 9

37—*Suit to set aside sale—Fraud—Sale under Act X of 1859—Civil Procedure Code, s 241—Act XXIII of 1861, s 11.* B obtained an *ex-parte* decree for arrears of rent against S. under Act X of 1859, and in execution of that decree brought the tenure to sale. At the sale the tenure was purchased by N. S then brought a suit against B and N to set aside the sale on the ground that the rent decree and all execution-proceedings taken thereunder were fraudulent, and alleging that B was the actual purchaser in the name of N. An objection was taken that the suit would not lie, and that the questions in the suit were such as could have been determined, and were determined, by the Court executing the decree: *Held* that neither s. 244 of the Civil Procedure Code, nor the corresponding s 11 of Act XXIII of 1861, has any application to proceedings in execution of a decree under Act X of 1859, and that the suit, being one to set aside

RIGHT OF SUIT—*continued*(19) SALE IN EXECUTION OF DECREE—*concluded.*

the sale on the ground of fraud, was maintainable. *Sarada Churn Chuckerbutty v. Mahomed Isuf Meah*, 1 L. R. 11 Calc. 376, distinguished. *Brojo Gopal Sarkar v. Busirunnisa Bibi*.

[I. L. R. 15 Calc. 179]

*See Mohendro Narain Chaturaj v. Gopal Mondul.*

[I. L. R. 17 Calc. 769]

## (20) SUBSCRIPTION.

38.—*Subscription, Suit for—Liability of subscribers to a proposed Town Hall.*] A suit will lie to recover a subscription promised, the subscriber knowing that, on the faith of his and other subscriptions, an obligation is to be incurred to a contractor for the purpose of erecting a building to be paid for out of the moneys subscribed. *Kedar Nath Bhattacharji v. Gorie Mahomed*.

[I. L. R. 14 Calc. 64]

## (21) TAX.

39.—*Suit to recover tax illegally levied—Bombay Abkari Act (V of 1878), s. 29, Omission to stay proceedings under.*] Though a person subjected to an undue demand may, under s. 29 of the Act, take steps by which the Collector's proceedings may be stayed, still his abstention from such a course will not deprive him of his ordinary right to recover money wrongfully taken from him for the benefit of a third person. *Narayan Venku v. Saktharam Nagu*.

[I. L. R. 11 Bom. 519]

## (22) WITNESS.

40.—*Cause of action—Suit for damages caused by false statement of witness in a suit*] No action will lie against a witness for making a false statement in the course of a judicial proceeding. *Chidambara v. Thirumanthi*.

[I. L. R. 10 Mad. 87]

41.—*Slander — Privilege of witness — Slander uttered by witness whilst under examination in a judicial proceeding.*] A witness in a Court of Justice is absolutely privileged as to anything he may say as a witness having reference to the enquiry on which he is called as a witness. The plaintiff sued to recover damages for slander, the statement complained of being alleged in the plaint to have been made by the defendant while being examined as a witness during the hearing of a case before a Magistrate. It was found that the statement was made in answer to questions put to the defendant as a witness and allowed by the Court as relevant to the case. The plaintiff alleged that the statement was made maliciously, that the defendant bore him a grudge, and that it was to give vent to that grudge and to injure his reputation that the statement was made. *Held*, that the plaint

RIGHT OF SUIT—*continued.*(22) WITNESS—*continued.*

disclosed no cause of action, and that the suit had been properly dismissed. *Bhikumber Singh v. Becharam Sirkar*, *Bhikumber Singh v. Goti Kristo Das*.

[I. L. R. 15 Calc. 264]

42.—*Defamation—Cause of action—Verbal abuse—Special damage—Witness—Privilege.*] The plaintiff was cited as a witness by one S in a suit instituted by him against defendant. After plaintiff's evidence had been concluded, in which he stated that there was no enmity between him and defendant, the defendant was examined by the Court, and stated that there was enmity between him and plaintiff, and on the Court inquiring to know what was the cause of enmity, defendant used words conveying the meaning that plaintiff's descent was illegitimate. In a suit for slander instituted by the plaintiff :—*Held* by Brodhurst, J., that, under the circumstances, the statement complained of was made by defendant while deposing in the witness-box, and was therefore absolutely privileged. *Per* Mahmood, J. (*contra*), that the question whether or not the statement complained of was made by defendant in course of his deposition, or after it was finished and when he was no longer in the witness-box, had not been tried, and the order remanding the case for trial on the merits was right. Further, that the English law of slander as forming part of the law of defamation, and, as such, drawing somewhat arbitrary distinctions between words actionable *per se* and words requiring proof of special or actual damage, is not applicable to this country, either by reason of any statutory provision or by any uniform course of decision sufficient to establish such distinctions as part of the common law of British India; that whilst the English law of defamation recognises no distinction between defamation as such and personal insult in civil liability, the law of British India recognises personal insult conveyed by abusive language as actionable *per se* without proof of special or actual damage; that such abusive and insulting language, unless excused or protected by any other rule of law, is in itself a substantive cause of action and a civil injury, apart from defamation, and that malice is an element of liability for abusive and insulting language, and that such malice will be presumed or inferred, unless the contrary is shown that when the defendant is not absolutely privileged and protected by reason of the office or occasion on which he employed such language, he renders himself subject to a civil liability for damages, irrespective of any plea of justification based upon proving the truth of the statements contained in the abusive and insulting language complained of; that the rule of English law as to the privilege or protection of a witness in regard to defamatory statements made in the witness-box is based upon a public policy which is equally applicable to insulting and abusive language used by such

**RIGHT OF SUIT—concluded.****(22) WITNESS—concluded.**

witness ; and such statements when made in the witness-box are privileged and protected, even though made maliciously and falsely, so long as they are relevant to the inquiry in the broadest sense of the phrase ; and that even where such statements have no reference to the inquiry, the defendant may prove the absence of malice and that they were made in good faith for the public good. *DAWAN SINGH v. MAHIP SINGH.*

[I. L. R. 10 All. 425]

**RIGHT OF WAY**See **RIGHT OF SUIT—EASEMENTS.**

[I. L. R. 9 All. 434]

**RIGHT TO BEGIN.**

1.—*Application for Review—Order to show cause.*] Upon the hearing of an application for review of judgment, upon which an order has been passed directing the opposite party to show cause why the application should not be granted, counsel for the opposite party should begin. *GHANSHAM SINGH v. LAL SINGH.*

[I. L. R. 9 All. 61]

2.—*Hearing of case on preliminary issue.*] At the hearing of a case on a preliminary issue the defendant, by whom the issue was raised, was held to have the right to begin. *FATMABAI v. AISHABAI.*

[I. L. R. 12 Bom. 454]

**RIGHT TO USE OF WATER.**

—*Easements Act (V of 1882) ss. 6, 7, 17—Natural streams — Surface water — Rights of riparian owners.*] The owners of a tank fed by natural streams, which depended for their supply on natural rainfall and surface water, sued for an injunction to restrain superior riparian owners from damming the streams or interfering with the supply of water, over which the plaintiffs claimed a right of easement. The issue as to the ownership of the land on which the streams rose was undecided. *Held*, (1) The Easements Act only declared the existing law as to easements over water ; (2) An easement can therefore be acquired in regard to the water of the rainfall. But surface water not flowing in a stream and not permanently collected in a pool tank or otherwise, is not a subject of easement by prescription, though it may be the subject of an express grant or contract ; (3) It is the natural right of every owner of land to collect or dispose of all water on the surface which does not pass in a defined channel ; (4) Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture, subject to the condition (i) that the use is reasonable, (ii) that it is required for their purposes as owners of the land, and (iii) that it does not destroy or render useless or materially

**RIGHT TO USE OF WATER—continued.**

diminish or affect the application of the water by inferior riparian owners in the exercise either of their natural right of their right of easement if any ; (5) It was therefore necessary to ascertain where the streams rose, and the course, source and length of their tributaries. *PERUMAL v. RAMASAMI.*

[I. L. R. 11 Mad. 16]

**RIOTING.**See **SENTENCE—CUMULATIVE SENTENCES.**

[I. L. R. 16 Calc. 442, 725]

—*Unlawful Assembly—Penal Code (Act XLV of 1860), ss. 141 and 147.*] A party of persons consisting of some five *peadas* and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of *M*, for the purpose of either repairing or erecting a *bund* across it to cause the water to flow down a channel on the lands of their master *T*. The river at the time was almost dry, and the party did not go armed ready to fight or use force, and they did not during the subsequent occurrence use force. Having arrived at the spot about 10 A.M. they proceeded to work at the *bund* until the afternoon. At about 4 P.M. a body of men, consisting of about 1,200 in all, many of them armed with *lathies* and headed by the prisoners, who were servants of *M*, which had been seen collecting together during the day, proceeded to the spot, and about 25 or 30 of them attacked *T*'s men, some five of whom were more or less severely wounded with the *lathies*. The occurrence resulted in the conviction of some of *M*'s servants for rioting under s. 147 of the Penal Code. *M*'s people wholly denied any right on the part of *T* to construct on repair the *bund*, and had previously denied the existence of such right, and refused permission to *T* to exercise it. It was contended that the assembly of *M*'s people was not an "unlawful assembly ;" that the interference by *T*'s people with the channel of the river justified them in coming to stop the work, and the show and use of force in compelling them to do so : *Held*, that the prisoners had been rightly convicted. *Queen v. Mitto Singh*, 3 W. R. Cr. 41 ; *Shanker Singh v. Burmah Mahto*, 23 W. R. Cr. 25, and *Birjoo Singh v. Khub Lall*, 19 W. R. Cr. 66, referred to and commented on. *GANOURI LAL DAS v. THE QUEEN-EMPRESS.*

[I. L. R. 16 Calc. 206]

**ROAD CESS ACT (BENGAL ACT IX OF 1880) s. 47.**See **SPECIAL APPEAL—ORDERS SUBJECT TO APPEAL.**

[I. L. R. 16 Calc. 638]

—, ss. 50—71.—*Cesses—Rent-free lands—Notice.*] Plaintiffs sued to recover arrears of road and public works cesses on account of certain rent free land, claiming double the amount under s. 58

# ROAD CESS ACT (BENGAL ACT IX OF 1880), ss. 50, 70—concluded.

of the Cess Act (Bengal Act IX of 1880). It was found that no notice of the valuation had been published as required by s. 52 of the Act, and it was held by the lower Court that the plaintiffs were therefore not entitled to recover double the amount under s. 58. It was then contended that he was at any rate entitled to recover the amount of the cesses with interest under s. 62. *Held*, that the latter section did not give the holder of the estate or tenure a right to recover the cesses payable under s. 56 before publication of notice, and that the plaintiff was therefore not entitled to a decree, and that his suit must be dismissed. *RAS BEHARI MUKERJEE v. PITAMBORI CHOWDHURANI*.

[I. L. R. 15 Calc. 237]

## RULES MADE UNDER ACTS.

See MADRAS ABKARI ACT, SS. 29, 55.

[I. L. R. 11 Mad. 250]

See STAMP ACT, 1879, s. 3, CL. 10.

[I. L. R. 11 Mad. 377]

—*Boundary-marks*—*Bombay Act V of 1879—Rules 101 and 111, ch. 3 (a) of the rules made under the Bombay Land Revenue Act V of 1879, s. 214—Survey settlement, meaning of* ] The accused was charged before a Second Class Magistrate with digging earth within a space of two cubits of an earthen boundary-mark, in contravention of Rule 101 of the Rules made by Government under s. 214 (g) of the Bombay Land Revenue Code (Act V of 1879). The Magistrate convicted the accused under Rule 111, cl. 3 (a), and sentenced him to a fine of one rupee. *Held*, the Rule 101 is not such a rule as can be legally made under s. 214 (g) of the Code. It is not a rule "for the administration of a survey settlement." Such a settlement is a settlement of the land revenue, and relates only to such matters as are referred to in Chapter VIII of the Code, and not to boundaries or boundary-marks, which were dealt with in Chapter IX. *QUEEN-EMPERESS v. IRRAPPA*.

[I. L. R. 13 Bom. 291]

## RULES OF HIGH COURT, BOMBAY.

—, Rule 6

See PRACTICE—CIVIL • CASES—COMMISSIONER FOR TAKING ACCOUNTS.

[I. L. R. 13 Bom. 368]

—, Rule 190 of 1885

—*Civil Procedure Code, 1882, s. 549—Practice—Appeal—Security for costs—Costs of the appeal.*] The rule (190 of the High Court Rules) that an appellant shall, with the memorandum of appeal, deposit in Court the sum of Rs. 500 as security for the costs of respondent in the appeal,

## RULES OF HIGH COURT, BOMBAY.

concluded.

is one which though possibly not without exception, is generally applicable to all cases independently of any consideration as to what the costs of the appeal will amount to. *AHMED BIN ESSA KHALIFFA v. ESSA BIN KHALIFFA*.

[I. L. R. 13 Bom. 458]

—, Rule 208.

See SMALL CAUSE COURT, PRESIDENCY TOWNS—PRACTICE AND PROCEDURE—REHEARING

[I. L. R. 12 Bom. 408]

## RULES OF HIGH COURT, CALCUTTA.

—, Rules and Orders, Appellate Side, 86, 162

See PLEADER—APPOINTMENT AND APPEARANCE,

[I. L. R. 15 Calc. 706]

See PRACTICE—CIVIL CASES—PLEADER APPEARANCE OF.

[I. L. R. 15 Calc. 706]

—, Rules No. 341, 436.

See REGISTRAR OF HIGH COURT, AUTHORITY OF.

[I. L. R. 16 Calc. 330]

## RULES OF HIGH COURT, N.-W. P.

See JUDGMENT—CIVIL CASES—FORM AND CONTENTS OF JUDGMENT.

[I. L. R. 9 All. 93]

1.—*Admission of appeals under Letters Patent N.-W. P., cl. 10—Limitation—Rules of practice of High Court of 21st May 1873.*] It must be assumed that Rule I of the "Rules of Practice adopted by the High Court for the North-Western Provinces on the 21st May 1873, regarding the admission of appeals under s. 10 of the Letters Patent," which provides that such appeals must be presented to the Assistant Registrar within ninety days of the judgment appealed from, had a legal origin, and was not *ultra vires* of the Court. *Harrak Singh v. Tulsi Ram Sahu*, 5 B. L. R. 47, and *Fazal Muhammad v. Phul Kuar*, I L. R. 2 All. 192, referred to. *NAUBAT RAM v. HARNAM DAS*.

[I. L. R. 9 All. 115]

2.—*Rules of Court of 22nd May 1883—Practice—Pleader—Vakalatnama—Pleader handing over his brief to another—Civil Procedure Code, ss. 36, 37, 39, 635.*] The Rule of Court, dated the 22nd May 1883, and authorising legal practitioners in certain cases to appoint other legal practitioners to hold their briefs and appear in their place was passed to facilitate the work of



# **RULES OF HIGH COURT, N.-W. P.—** *concluded.*

- the Court and for the convenience of the pleaders practising before it, and was fully within the powers conferred upon the High Court by s 635 of the Civil Procedure Code. *MATADIN v. GANGA BAI.*

[I. L. R. 9 All. 613]

## **RULES OF PRIVY COUNCIL.**

—, Rules of 31st March 1871.

See PLEADER—APPOINTMENT AND APPEARANCE.

[I. L. R. 16 Calc. 636]

See PRIVY COUNCIL, PRACTICE OF—ADMISSION TO PRACTICE.

~ [I. L. R. 16 Calc. 636]

## **SALARY.**

See CASES UNDER ATTACHMENT—SUBJECTS OF ATTACHMENT—SALARY.

## **SALE.**

See CUSTOM.

[I. L. R. 11 Mad. 459]

See TRANSFER OF PROPERTY.

[I. L. R. 11 Mad. 459]

## **SALE BY AUCTION.**

—*Auctioneers—Agent bidding “kutchu-pucca”—Usage of trade—Custom—Condition of sale.*] An agent of the defendants made, at an auction-sale, a bid for certain goods: this bid was not at the time accepted by the auctioneers, but was referred to the owners of the goods for approval and sanction, the agent agreeing to such reference. The conditions of sale contained no clause stipulating for such procedure. Previous to any reply being received by the auctioneers from their principals, the principals of the agent bidding refused to acknowledge the bid of their agent. In a suit brought by the auctioneers to recover a loss on a re-sale of the goods, the plaintiffs set up a usage of trade, whereby it was alleged that the bidder at such a sale was not at liberty to withdraw his bid until a reasonable time had been allowed for the auctioneers to refer the bid to the owner of the goods. The only evidence on this point was that of an assistant to the firm of the plaintiffs, who stated “that such an arrangement had never been repudiated.” *Held*, that the conditions of sale containing no clause to the effect of the usage claimed, and there being no sufficient evidence that the usage was so universal as to become part of the contract by operation of law, there was no contract between the parties, and therefore that no suit would lie. *MACKENZIE LYALL & CO. v. CHAMROO SINGH & CO.*

[I. L. R. 16 Calc. 702]

## **SALE FOR ARREARS OF RENT. Col.**

1. Madras Act VIII of 1865 ... 920
- 2 Setting aside sale ... 920
  - (a) Irregularity ... 920
  - (b) Other grounds ... 921

### **(1) MADRAS ACT VIII OF 1865.**

1.—*Madras Rent Recovery Act, s. 38—Mulageni lease—Encumbered tenancy.*] A demised land to B on a *mulageni* lease. B mortgaged his tenancy to A. The rent under the *mulageni* lease fell into arrears, and A obtained a decree against B for the amount:—*Held*, that arrears of rent are not a first charge on the tenant's holding, and accordingly that the landlord could not execute his decree by sale of the tenancy free from the mortgage created by the tenant. *Rajagopal v. Subbaraya* (I. L. R. 7 Mad. 31), followed. *PADAKAN-NAYA v. NARASIMMA.*

[I. L. R. 10 Mad. 266]

### **(2) SETTING ASIDE SALE**

#### **(a) IRREGULARITY.**

2.—*Construction of Regulation VIII of 1819 s. 8, para. 2—Publication of copy or extract of such part of the notice of sale as may apply to the tenure of the defaulter.*] Publication of the notice of sale of a tenure under Reg. VIII of 1819 is required to be in the manner prescribed in s. 8, cl. 2; and personal service on the defaulter is not sufficient. The object of directing local publication of the notice, *viz.*, to warn the under-lessees of the sale-proceedings and also to advertise the sale to those who might bid, would be frustrated if it were sufficient to publish the notice at a distant *katcheri* or to serve it personally. If there is a *katcheri* on the land of the defaulting *putnadar*, meaning the land which is to be sold for arrears of rent, the copy or extract of such part of the notice of sale as may apply to the tenure in question must be published at that *katcheri*, and if there is no such *katcheri* on the land held by the defaulter, the copy or extract must be published at the principal town or village on the land. In the description of this in cl. 2, as “the notice required to be sent into the *mofussil*,” the word “*mofussil*” is opposed to the *sadar katcheri* of the *zemindar*, and refers to the subordinate estate, which is the subject of the sale-proceedings. Where a *zemindar*, selling the tenure of a defaulting *putnadar* under the Regulation, had caused to be stuck up the requisite petition and notice at the Collector's *katcheri*, and the notice at the *zemindar's katcheri*, but not the copy or extract which is directed by the Regulation to be similarly published at the *katcheri* nor had published it at any other place upon the land of the defaulter: *Held* that the *zemindar* had not observed a substantial part of the prescribed process, and that this was for the defaulting *putnadar* “a sufficient plea” within the meaning of the Regulation. *MAHARANI OF BURDWAN v. KRISHNA KAMINI DAS.*

[I. L. R. 14 Calc. 365]

MAHARANI OF BURDWAN v. MIRTUNJOY SINGH.

[I. L. R. 14 I. A. 30]

# SALE FOR ARREARS OF RENT— concluded

## (2) SETTING ASIDE SALE—concluded

### (a) IRREGULARITY—concluded.

See *AHSANULLA KHAN BAHADOOR v. HURRI CHURN MUZOOMDAR.*

[I. L. R. 17 Calc. 474]

### (b) OTHER GROUNDS.

3.—*Bengal Regulation VIII of 1819, ss. 3, 5, 6, 14—Sale of putni tenure—Registered putnidars—Suit by unregistered putnidars* [An unregistered proprietor of a putni tenure is entitled to sue to set aside a sale held under Reg. VIII of 1819 *Shunder Pershad Roy v. Chuvudra Kumar Shahaiba*, I. L. R. 12 Calc. 622, followed. *JOY-KRISHNA MUKHOPADAYA v. SARFANNESSA.*

[I. L. R. 15 Calc. 345]

# SALE FOR ARREARS OF REVENUE.

1. Protected tenures	...	Col.	921
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(a) Irregularity	..	...	924
(b) Other grounds	...	...	924

See *MADRAS REVENUE RECOVERY ACT, ss. 41, 42.*

[I. L. R. 11 Mad. 330]

## (1) PROTECTED TENURES.

1—*Act XI of 1859, s. 52—Plantation.* [The plaintiff was the purchaser at a sale under Act XI of 1859 by the Collector of the 24-Pergunnahs for arrears of revenue, of an estate in the Sunderbunds in which the defendant was holder of a *mokurari maurasi jungleburi* tenure, under which he was to clear away the jungle, and then to cultivate the land with paddy. In a suit after notice to quit to eject the defendant, and obtain possession of the land, or to have the defendant's tenure annulled. *Held*, that the defendant's tenure was not protected as being one of "lands whereon plantations have been made" within the meaning of s. 52 of Act XI of 1859. *BHOLANATH BANDYOPADHYA v. UMACHURN BANDYOPADHYA. UMACHURN BANDYOPADHYA v. BHOLANATH BANDYOPADHYA.*

[I. L. R. 14 Calc. 440]

## (2) INCUMBRANCES.

### (a) ACT XI OF 1859.

2.—*Liability to incumbrances—Act XI of 1859, ss. 13 and 51—Mokurari lease—Inquiry as to title of alleged owners of share sold—Benami transfers—Limitation (Act XV of 1877), Sch II, Art. 144.* [After the sale of a share in an estate under the provisions of Act XI of 1859, a suit was brought to establish a *mokurari* lease, as an incumbrance

# SALE FOR ARREARS OF REVENUE— continued

## (2) INCUMBRANCES—continued.

### (a) ACT XI OF 1859—continued.

under s. 54, upon the share in the hands of the purchaser. This share having been held by several successive *benami* holders, the main question was whether those who had granted the *mokurari* were entitled to all or to any, and what part, of the land comprised in their grant; and as to this point the most important fact was the actual possession or receipt of the rents; this being also material in regard to limitation under Act XV of 1877, Sch. II, Art. 144, the twelve years' bar commencing from the date of possession first held adversely. *IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.*

[I. L. R. 14 Calc. 109]

[L. R. 13 I. A. 160]

3.—*Act XI of 1859, ss. 37, 52—Sunderbund Estate—District of which portion only is permanently settled—District. Meaning of—Beng Reg. IX of 1816 and III of 1828—Estate—Bengal Act VII of 1868.* [The plaintiff was the auction-purchaser at a sale under Act XI of 1859 by the Collector of the 24-Pergunnahs for arrears of revenue of an estate in the Sunderbunds on which the defendant was the holder of a *mokurari maurasi jungleburi* tenure, under which he was to clear away the jungle and then to cultivate the land with paddy. The estate was one borne on the register of revenue-paying estates in the Collectorate of the 24-Pergunnahs, and therefore within that Collectorate with regard to the provisions of Bengal Act VII of 1868, s. 10. The district of the 24-Pergunnahs is a permanently-settled district, but the portion of it forming the Sunderbunds was declared by Reg. III of 1828 s. 13, not to be included in the permanent settlement. The Sunderbund tract was moreover under Reg. IX of 1816 formed into a separate jurisdiction for settlement purposes under an officer styled the Commissioner of the Sunderbunds, who is subject to the direct control of the Board of Revenue, and independent of the Collector of the 24-Pergunnahs. In a suit after notice to quit to eject the defendant, and obtain possession of the land, or to have the defendant's tenure annulled. *Held* that, whether the term "district" was used with reference to the jurisdiction of the Civil Courts or the Revenue Collector, the plaintiff was the purchaser of an estate in a "permanently-settled district" within the meaning of s. 37 of Act XI of 1859, and not in a district "not permanently-settled" within s. 52 of that Act; and he was therefore entitled to eject the defendant. The position of the estate within the district of the 24-Pergunnahs was not affected by the appointment of the Commissioner of the Sunderbunds as an officer specially invested with the powers of the Collector within a certain portion of that district. *Held*, also, that the defendant's tenure was not protected as being one of "lands whereon plantations

# SALE FOR ARREARS OF REVENUE— continued.

## (2) INCUMBRANCES—concluded.

### (a) ACT XI OF 1859—concluded.

have been made' within the meaning of s. 52 of Act XI of 1859 *Held* further that though there was no permanent settlement of the lands sold to the plaintiff, they fell within the definition of an "estate" as given in Beng. Act VIII of 1868. *BHOLANATH BANDYOPADHYA v. UMACHURN BANDYOPADHYA*. *UMACHURN BANDYOPADHYA v. BHOLANATH BANDYOPADHYA*.

[I. L. R. 14 Calc. 440]

4.—*Ejectment, Right of—Benami lease obtained by defaulting proprietor from purchaser at Revenue sale, Effect of on under-tenures—Act XI of 1859, ss. 37, 53.* [A *mehal* belonging to defendants Nos 1 and 2 was brought to sale for arrears of Government revenue and purchased by defendant No 6, from whom the plaintiff obtained a *talukdari patta* of a portion of the land comprised in the *mehal*. The plaintiff thereupon sued to eject defendant No. 4, who was in possession of the land under a lease which was found to have been granted previous to the revenue-sale. In the suit it was found that the plaintiff obtained the *talukdari patta* as mere *benamidar* for defendant No. 1. *Held*, that the provisions of s. 53 of Act XI of 1859 applied to the case, and that the plaintiff was not entitled to interfere with the tenancy of defendant No 4 or eject him, and that the suit had been rightly dismissed. *RASH BEHARI BOSE v. PURNA CHUNDER MOZUMDAR*.

[I. L. R. 15 Calc. 350]

## (3) DEPOSIT TO STAY SALE.

5.—*Madras Revenue Recovery Act, s. 35—Contract Act, ss. 69, 70—Right to contribution where part owner pays revenue due on whole estate to save his own interests* [In 1831 while the *patta* of certain land held on *raiya* tenure stood in the name of defendant No. 1, the real owner being defendant No. 2, the revenue fell into arrear. Subsequently plaintiff and defendant No. 3 each bought a portion of the land, and defendant No. 3 sold his portion to defendant No. 4. After this, the land in plaintiff's possession was attached for the said arrears of revenue, and plaintiff paid the whole amount to prevent a sale. Plaintiff sued to recover from defendants 1 to 4 a portion of the arrears paid by him. He also prayed that the land in the possession of defendant No. 4 might be held liable. The claim was decreed, but on appeal by defendants 3 and 4, the suit was dismissed as against them. Plaintiff appealed, making defendant No. 4 alone respondent.—*Held*, that plaintiff was entitled to a decree for contribution against defendant No. 4 and to a charge on the land in his possession. *SESHAGIRI v. PICHU*.

[I. L. R. 11 Mad. 452]

# SALE FOR ARREARS OF REVENUE— continued.

## (4) SETTING ASIDE SALE.

### (a) IRREGULARITY.

6.—*Madras Revenue Recovery Act II of 1864, ss. 25, 27—Madras Regulation V of 1804, s. 20—Omission to serve notice on minor defaulter* [A *mitta* consisting of an unsurveyed village, of which the plaintiffs (minors) were the registered proprietors of an undivided moiety, was brought to sale for arrears of *kist* and was purchased for the plaintiffs by their guardian, duly appointed under Reg. V of 1804, s. 20. The sale was subsequently cancelled; and further arrears having accrued, the *mitta* was attached again. Before the second attachment took place, the guardian died, and no one having been appointed to succeed him, though an application was made to the Court for that purpose, a written demand under Revenue Recovery Act, s. 25, was tendered to the plaintiffs' mother and affixed to the wall of the house on 17th January, and notice under s. 17 was served on 17th February. The sale took place in September, and defendant No 2 became the purchaser. It was admitted that a division of the village was impracticable. In a suit by the plaintiffs by their mother and next friend to set aside the sale: *Held*, since service of a demand upon the defaulter is an essential preliminary to sale, the sale was invalid so far as the share of the plaintiffs was concerned, and the sale as a whole was vitiated by the irregularity. *MEKAPERUMA v. COLLECTOR OF SALEM*.

[I. L. R. 12 Mad. 445]

### (b) OTHER GROUNDS

7.—*Madras Regulation (X of 1831), ss. 1, 2, 3—Madras Regulation (V of 1804), s. 11 (4), s. 20—Sale for arrears of revenue of *mitta* held by tenants-in-common during minority of some of the owners.* [A *mitta* held by tenants-in-common was sold for arrears of revenue at a time when the owners of a moiety thereof were minors. In a suit brought by the mother of these minors on their behalf against the Collector to set aside the sale, the District Court held that Reg. X of 1831, s. 2, absolutely debarred the Collector from selling the estate of the minors during their minority and set aside the sale so far as their interests were concerned. *Held*, on appeal, that the minors not being sole proprietors, their estate was not one of which the Court of Wards could assume the management, and therefore s. 2 of Reg. X of 1831 did not affect the sale. *KRISHNA v. MEKAPERUMA*. *COLLECTOR OF SALEM v. MEKAPERUMA*.

[I. L. R. 10 Mad. 44]

8.—*Fraud—Bidders, Dissuasion of* [In a suit by some of the co-sharers in a *mouza* against the others to set aside a sale for arrears of revenue, the finding of the Court of First Instance established that a certain co-sharer in a *mouza* had intentionally withheld the payment of a

# SALE FOR ARREARS OF REVENUE— concluded.

## (a) SETTING ASIDE SALE—concluded.

### (b) OTHER GROUNDS—concluded.

small arrear of Government revenue, and had thereby caused the property to be sold under Act XI of 1859, purchasing it himself at a small sum in the name of certain other persons; and had also dissuaded certain intending bidders from bidding at such sale: *Held*, that the evidence did not warrant such a finding, but that assuming these facts to have been established, the right of the co-sharer to buy up the estate at the revenue-sale was not based upon any right or interest common to himself and his co-sharers, and that in the absence of misrepresentation or concealment, the fact that he had intentionally defaulted as found, did not constitute fraud; nor did the fact that he had deterred others from bidding for the property, necessarily constitute an act of fraud. *Bhoobun Chunder Sen v. Ram Soonder Surma Mozoomdar*, I. L. R. 3 Cal. 300, distinguished. *DOORGA SINGH v. SHEO PERSHAD SINGH*.

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# SALE IN EXECUTION OF DECREE. Col.

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2. Stay of sale	...	926
3. Purchasers, right of	...	926
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# SALE IN EXECUTION OF DECREE— continued.

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See MORTGAGE—SALE OF MORTGAGED PROPERTY—PURCHASERS.

[I. L. R. 9 All. 690

## (1) PLACE OF SALE.

1.—*Sale of moveable property in execution of decree—Place of holding the sale—Practice.* Under the Code of Civil Procedure (Act XIV of 1882) it is intended that a sale of moveable property attached in execution of a decree should ordinarily be held in some place within the jurisdiction of the Court ordering the sale. Good and sufficient reasons must be shown for directing otherwise. Where the only ground urged for directing a sale outside the Court's jurisdiction was that the property would probably fetch a better price, and it was found by the Court that a fair sale could be had on the spot: *Held*, that no sufficient reason was shown for departing from the usual practice. *LAKSHMIBAI v. SANTAPA REVAPA SHINTRE*.

[I. L. R. 13 Bom. 22

## (2) STAY OF SALE.

2.—*Civil Procedure Code, s. 291—Tender of debt by transferee of property.* *Held*, that the assignees of a purchaser from a judgment debtor of property, the subject-matter of a decree for enforcement of hypothecation, were entitled to come in and protect the property from sale in execution of the decree by tendering the debt and costs under s. 291 of the Civil Procedure Code, and that the executing Court was bound to accept the money and stop the sale. *BEHARI LAL v. GANPAT*.

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## (3) PURCHASERS, RIGHTS OF.

3.—*Malabar Law—Personal decree against karnavan—Civil Procedure Code s. 325.* A sued for possession of certain shops belonging to a Malabar *tarwad*, which had been attached in execution of a personal decree passed against a *karnavan* in a suit for a private debt. In the execution proceedings, an objection petition was put in, stating that the shops were *stridhanam* and was rejected; and the order of rejection was not appealed against for one year. Respondents Nos. 1 to 4, the husbands of the persons who put in the objection petition, were in possession and were now sued for possession. The plaintiff was assignee of the purchaser at the execution sale: *Held*, that upon the facts found the plaintiff acquired nothing under the Court-sale. *ACHUTA v. MAMMAVU*.

[I. L. R. 10 Mad. 357

# SALE IN EXECUTION OF DECREE— continued.

## (3) PURCHASERS, RIGHTS OF—continued.

4.—*Sale of rights and interests in mouzah consisting of two mehals—Submersion of mehal at time of sale—Sale certificate not specifically mentioning submerged mehal—Passing of right in submerged mehal to purchaser.* The rights and interests of certain judgment-debtors in a mouzah consisting of two separate mehals, respectively known as the Uparwar mehal and the Kachar mehal, were brought to sale in execution of the decree. At the time of the sale the Kachar mehal was submerged by the river Ganges, and in the sale-notification the revenue assessed upon the Uparwar mehal only was mentioned, and there was no specific attachment of the Kachar or submerged land, but the property was sold as that of the judgment debtors in the mouzah. Subsequently the river having receded, the auction-purchaser attempted to obtain possession of the Kachar land, but was resisted by the judgment-debtors on the ground that their rights and interests in that land had not been conveyed by the auction-sale, but only their rights and interests in the Uparwar mehal: *Held* that either the whole rights of the judgment-debtors in both mehals were sold, or, if not, their rights in the Uparwar mehal with the necessary and contingent right to any lands which might subsequently appear from the river's bed and accrete to such mehal and the mere fact of the mention in the sale-notification of the revenue of the Uparwar mehal did not affect what passed by the sale: *Held* also, that the attachment of the judgment debtors' entire proprietary rights in the mouzah included their interests in both mehals, and the sale-certificate clearly showed that all their rights in the village were passed to the purchaser. *Mahadeo Dubey v. Bholanath Dicht*, I L R. 5 All. 86, and S. A. No 818 of 1885 referred to. *Fida Husain v. Kutub Husain*, I L R. 7 All. 38, dissented from *MUHAMMAD ABDUL KADIR v. KUTUB HUSAIN*. *KAMAL-UD-DIN AHMAD v. KUTUB HUSAIN*.

[I. L. R. 9 All 136]

5.—*Property liable to attachment and sale—Grant to Hindu widow for maintenance for life—Reversionary right of grantor—Act VIII of 1859 s. 205—Civil Procedure Code s. 266, (b)* One N, the sole owner of a certain village, had a son J. J had two wives. By his first wife he had a son U J's second wife was G by whom he had a son whose widow was K, the defendant in the suit. J died leaving U his son, G his widow, and K his son's widow, and on his death U inherited the village. Prior to the year 1874 U had made a gift to G of 105 bighas situate in the village. In 1874 the rights and interests of U in the village were sold by auction and purchased by T, the ancestor of the plaintiffs. G by a deed of gift conveyed the 105 bighas to K, and ultimately died on 26th January 1883. Plaintiffs then sued to set aside the gift and for possession of the land. The learned Judge found that the land was given

# SALE IN EXECUTION OF DECREE— continued.

## (3) PURCHASERS, RIGHTS OF—concluded

to G in lieu of her maintenance which she was to hold rent-free for her life and that she had been in possession thereof for twenty years. Further that U had the right to resume the land and assess it to rent on the death of G and all the rights and interests of U in the land were attached and sold in 1874. On second appeal it was contended that the interest of U in the land at the time of the sale of the village by auction was in the nature of a mere expectancy and therefore could not be sold and was not sold. *Held*, that U gave to G the usufruct of the land for her life in lieu of her maintenance; that after the gift the interest of U in the land was of the same character and carried with it the same consequences as the reversion, which the lessor would have for land leased for life or years, and analogous to the right which a mortgagor who had granted a usufructuary mortgage would have and that U had a vested right in the land which was capable of being sold and that right passed to the auction-purchaser at the sale of 1874. *Koraj Koonwar v. Kaml Koonwar*, 6 W. R. 34, *Ram Chander Tantra Das v. Dharmo Narain Chuhar-batty*, 7 B. L. R. 341, 15 W. R. F. B. 17, *Tufazzol Hussain Khan v. Raghunath Pershad*, 7 B. L. R. 186; 14 Moore's I. A. 40, distinguished. *KACHWAIN v. SARUP CHAND*.

[I. L. R. 10 All. 462]

## (4) JOINT PROPERTY.

6.—*Judgment-debtor's share in joint ancestral estate—Mitakshara law—Execution of decree by sale of such share—Rights of co-sharers not being parties to the decree or execution-proceedings—Sale-certificate.* The question was whether the whole estate belonging to a joint family, living under the Mitakshara, including the shares of sons, or the shares of their father alone, passed to the purchaser at a sale in execution of a decree against the father alone upon a mortgage by him of his right. *Held* that, as the mortgage and decree as well as the sale-certificate, expressed only the father's right, the *prima facie* conclusion was that the purchaser took only the father's share, a conclusion which other circumstances—the omission on the part of the creditor to make the sons parties and the price paid—not only did not contract but supported. The enquiry in recent cases regarding the liability of the estate of co-sharers in respect of transfers made by, or execution against, the head of the family has been this, *viz.*, what, if there was a conveyance, the parties contracted about, or what, if there was only a sale in execution, the purchaser had reason to think he was buying. Each case must depend on its own circumstances. *Upooroop Tirary v. Lalla Bandhjee Sukay*, I L R. 6 Calc. 749, distinguished. *SIMBHUNATH PANDE v. GOLAP SINGH*.

[I. L. R. 14 Calc. 572]

[L. R. 14 I. A. 77]

# SALE IN EXECUTION OF DECREE— —continued.

## (4) JOINT PROPERTY—continued.

7.—*Civil Procedure Code, Act VIII of 1859, s. 261*—Execution of decree against a member of an undivided family by sale of his personal interest in the family estate, which was an impartible zemindari; such interest, by reason of his death before the sale, consisting only of the rents and profits then uncollected.] On a sale of the right, title, and interest in an impartible zemindari, in execution of decrees against the zemindar, the head of an undivided family, the question was whether (a) only his own personal interest, or (b) the whole title to the zemindari, including the interest of a son and successor, passed to the purchaser. The proclamation of sale purported to relate to (a) only, and between the dates of proclamation and the auction-sale the zemindar died. On the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that could it sell, and that under the circumstances it could sell, and was bound to sell (b); because, the debts, the subject of the decrees under execution, not having been incurred by the late zemindar for any immoral purpose, the entire zemindari formed assets for their payment in the hands of his son. —*Held*, that the question of what the Court could, or should, have sold had not arisen. All that required decision was what the Court had sold. If (a) only was put up for sale, then that interest only could have been purchased. Two Courts having concurred in finding that (a) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser. *PETTACHI CHETTIAR v. SANGILI VIRA PANDIA CHINNATAMBIAR*.

[I. L. R. 10 Mad. 241

[L. R. 14 I. A. 84

8.—*Purchaser at a sale in execution of a decree directing sale of the whole right, title, and interest of grandfather—Assignment by grandsons of the same property subsequently to such sale, effect of*] In 1858, S mortgaged certain ancestral property to the first defendant for a term of nine years. In 1864, S being then dead, the defendant sued R, the son of S, to recover the money-debt, and obtained a decree against the estate of the deceased. The land in question was thereupon attached and sold on the 13th August 1873, subject to defendant's mortgage lien, and was purchased for the defendant by his cousin. The certificate of sale was drawn up in accordance with the decree, and recited that the purchaser bought the whole right, title, and interest of S. On the 3rd August 1882, the plaintiff purchased from R's son, the share of R in S's estate. The plaintiff sued the defendant to redeem the property. The Court of First Instance rejected his claim. On appeal, the lower Appellate Court reversed that decree, and remanded the case for retrial. Against this order of remand, the defendant appealed to the High Court. *Held*, restoring the decree of the Court of First Instance,

W., D.

# SALE IN EXECUTION OF DECREE— —continued.

## (1) JOINT PROPERTY—continued.

that the language of the decree showed that the intention was to make the land itself liable for the debt, and not merely S's interest. By his purchase the defendant was to be regarded as having bargained for and purchased the entire interest, in the land. *Naromi Babuasing v. Modhan Mohun*, I L. R. 13 Cal. 21, followed. *SAKHARAM SHET v. SITARAM SHET*.

[I. L. R. 11 Bom. 42

9.—*Joint Hindu family—Fraudulent hypothecation by father—Suit upon the personal obligation against the father only—Money-decree, sale in execution of—Sale-certificate referring to rights and interests of father only in joint family property—Suit by sons for declaration of right to their shares—Form of decree.*] If a person in possession of property which originally belonged to the members of a joint Hindu family, of whom the father was one, can produce as his document of title only a sale-certificate showing him to have bought, in execution of a money-decree against the father only, the right, title, and interest of the father, then he has bought nothing more than such interest, and he is liable to be compelled to restore to the other members of the joint family their interests, which had not, upon the face of the sale-certificate, passed by the sale. The father and manager of a joint Hindu family executed a deed whereby he hypothecated certain zemindari property, covenanting to put the mortgagee in proprietary possession thereof if the debt should not be paid on a certain date. This transaction afterwards turned out to be fraudulent on his part, as he had no interest in this property, and the obligors then sued him to recover the debt upon the personal obligation, and obtained a money-decree, in execution whereof the right, title, and interest of the judgment-debtor in certain joint family property was notified for sale, and a sale took place at which, upon the face of the sale-certificate, only that right, title, and interest was sold. The auction-purchasers, having obtained possession, asserted a right to the whole of the joint family estate, upon the ground that, as the judgment-debtor was father of the family, the decree must be assumed to have been passed against him in his capacity as *karta*, and that the other members of the family were therefore bound by the decree and sale. The other members brought a suit to recover possession of their share: *Held* that inasmuch as upon the terms of the sale-certificate, nothing more passed to the defendants at the sale than the right, title, and interest of the father, the plaintiffs were entitled to maintain the suit, and to have a decree declaring them entitled to the whole property, subject to a declaration that the defendants, as auction-purchasers of the father's share, might come in and claim a partition of that share out of the joint estate. *Per MAHMOOD, J.*, that the plaintiffs were entitled to succeed on the further ground that the debt for which the decree against

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**SALE IN EXECUTION OF DECREE—**  
*continued.*

(4) **JOINT PROPERTY—continued.**

the father was passed was immoral within the meaning of Hindu law *Simbbhunath Panday v. Golap Singh*, L. R. 14 I. A. 77; I. L. R. 14 Calc. 572; *Deendyal v. Jugdeep Narain Singh*, L. R. 4 I. A. 247; I. L. R. 3 Calc. 198, and *Hirdev Narain Sahu v. Ruder Perhash Misser*, L. R. 11 I. A. 26; I. L. R. 10 Calc. 626, referred to. *RAM SAHAI v. KEWAL SINGH*

[I. L. R. 9 All. 672]

10.—*Decree against father—Sale of ancestral estate in execution of money-decree—Son's rights and liabilities.* A purchased the half share of the judgment-debtors in certain immoveable family property, at a court-sale held in execution of money-decrees against B and his brother, who were members of an undivided Hindu family. B's undivided son sued A—B and the remaining members of his family, being also joined as defendants—to recover a share in the land, alleging that his interest was not bound by the sale, but he did not prove that the debt for which the decrees were passed was immoral, and it appeared that A had bargained and paid for the entire estate. The plaintiff was a minor at the time of the sale, and B was now the managing member of the family. Held that the court-sale was binding on the plaintiff's share—*Nanomi Babuasin v. Modhur Mohun* (L. R. 13 I. A. 1; I. L. R. 13 Calc. 21) discussed and followed. *KUNHALI BEARI v. KESHAVA SHANBAGA*.

[I. L. R. 10 Mad. 64]

11.—*Joint family—Mortgage by father and eldest son—Death of father and eldest son—Decree obtained by mortgagee against minor son represented by the widow—Sale in execution—Subsequent suit by minor to set aside sale.* In 1862 R and his son A mortgaged the property in dispute to B. In 1863 R died, leaving a widow, S and two sons, viz., A and P, a minor. In 1866, A and S, the latter of whom acted for herself and as guardian of her minor son P, settled the account with B the mortgagee, obtained a fresh advance, and passed a fresh mortgage-bond to him. In 1868 A died. In 1869 B's assignee filed a suit upon the mortgage, and obtained a decree against the mortgaged property against S both as guardian of the minor P and also against her in her individual capacity. At the court-sale held in execution of this decree, D purchased the property in dispute in 1870. In 1881 P filed the present suit to recover possession of the property, alleging that D's purchase was invalid as against him, he having been a minor at the time of the court-sale. Held, upon the merits, that the debt for which the decree was passed, being a family and ancestral debt, was binding upon the whole family, including the plaintiff, who was, therefore, not entitled to disturb the execution purchaser. *DAJI HIMAT v. DHIRAJRAM SADARAM*.

[I. L. R. 12 Bom. 18]

**SALE IN EXECUTION OF DECREE—**  
*continued.*

(4) **JOINT PROPERTY—continued.**

12.—*Joint family—Money-decree—Decree against father alone—Purchaser at execution-sale under such decree—How far such sale binding on the interest of the sons not parties to the suit or execution-proceedings.* In the case of a joint Hindu family whose family property is sold by the father alone by private conveyance, or where it is sold in execution of a decree obtained against him alone, the mode of determining whether the entire property, or only his interest in it, passes by the sale, is to inquire what the parties contracted about in the case of a conveyance, or what the purchaser had reason to think he was buying, if there was no conveyance, but only a sale in execution of a money-decree. In the case of an execution-sale the mere fact that the decree was a mere money-decree against the father as distinguished from one passed in a suit for the realization of a mortgage-security directing the property to be sold, is not a complete test. The plaintiff claimed certain property from the defendant, alleging that he had purchased it from a third person, who had purchased it at an auction-sale held in execution of a money-decree obtained against the first defendant alone. The first defendant was the father of the remaining defendants, and they constituted a joint Hindu family. The sons contended that only the father's interest was bound by the sale; and the lower Courts decided in their favour. On appeal, the High Court reversed the decree, and sent back the case for a fresh decision, on the ground that the lower Courts had decided the question in the case exclusively on the ground that the property had been purchased in execution of a money-decree without referring to the execution-proceedings. *KAGAL GANPAYA v. MANJAPPA*.

[I. L. R. 12 Bom. 691]

13.—*Sale for debt of father—Suit by son to set aside sale—Failure to prove immoral purpose of debt.* A sale in execution of a decree against a zemindar for his debt purported to comprise the whole estate of his zemindari. In a suit brought by his son against the purchaser making the father also a party defendant to obtain a declaration that the sale did not operate as against the son as heir not affecting his interest in the estate, the evidence did not establish that the father's debt had been incurred by him for any immoral or illegal purpose: Held that the impeachment of the debt failing, the suit failed: and that no partial interest, but the whole estate, had passed by the sale, the debt having been one which the son was bound to pay. *Hardi Narain Sahu v. Ruder Perhash Misser*, I. L. R. 10 Calc. 626, L. R. 11 I. A. 26 (where the sale was only of whatever right, title, and interest the father had in property) distinguished. *MINAKSHI NAYUDU v. IMMUDI KANAKA RAMAYA GOUNDAN*.

[I. L. R. 12 Mad. 142]

[L. R. 16 I. A. 1]



# SALE IN EXECUTION OF DECREE— *continued.*

## (4) JOINT PROPERTY—*concluded.*

14 — *Personal decree against managing member of joint family not impleaded as such—Effect of sale in execution of such decree—Transfer of Property Act, s. 99—Sale of mortgage property in execution of decree on a money-bond for interest due on the mortgage.* The managing member of a joint Hindu family executed in 1878 a mortgage on certain lands, the property of the family, to secure a debt incurred by him for family purposes, and in 1881 he together with his brother executed to the mortgagee a money-bond for the interest then due on the mortgage. In 1882 the mortgagee brought a suit on the money-bond; and having obtained a personal decree against the two brothers merely, brought to sale in execution part of the mortgaged property which was purchased by a third person: *Held* that the sale did not convey the interest of another undivided brother, who was not a party to the decree. *Held*, further, *per* KERNAN, J., that the sale in execution was invalid under the Transfer of Property Act, s. 99. *SATHUVAYYAN v. MUTHUSAMI.*

[I. L. R. 12 Mad. 325]

## (5) MORTGAGED PROPERTY.

15 — *Mortgaged land subsequently sold by mortgagee in execution of a money-decree—Purchaser at such sale without notice of mortgage—Mortgagee estopped from subsequently enforcing his mortgage as against purchaser—Fraudulent concealment of lien—Registration not equivalent to notice in case of fraud—Civil Procedure Code (VIII of 1859), s. 213.* Where a judgment-creditor in execution of a money-decree sells property as belonging to his judgment-debtor, he is afterwards estopped from enforcing, as against the purchaser, a previous mortgage of the property which has been created in his own favour, but of which he has given no notice at the time of the sale, and in ignorance of which the purchaser has bid for the property and paid the full price. This principle applies even though the mortgage-deed has been registered. In 1867, *R* and *G* mortgaged certain lands to *G R* by a registered deed of that date. In 1870, *G R* obtained a money-decree against *R* and *G*, and in execution put up the mortgaged land for sale. The plaintiff purchased it without notice of the mortgage; and in February, 1872, obtained possession through the Court. In the meantime *G R* brought another suit upon his mortgage against his mortgagors. He obtained a decree, and in April 1872 ejected the plaintiff and obtained possession. In 1883 the plaintiff filed the present suit against *R*, *G* and *G R* to recover the lands: *Held* that the plaintiff was entitled to recover. *G R* (the mortgagee), when bringing the land to sale in execution of his decree was bound by s. 213 of the Civil Procedure Code (VIII of 1859) to disclose the limited interest of his judgment-debtors in it. By concealing his lien he had induced the plaintiff to pay full value for the property, and he could not, therefore, retain his lien.

# SALE IN EXECUTION OF DECREE— *continued.*

## (5) MORTGAGED PROPERTY—*continued.*

By his omission he was estopped from disputing the plaintiff's title. The rule, that registration of a mortgage amounts to notice to all subsequent purchasers of the same property, does not apply to a case where there has been a fraudulent concealment by a judgment-creditor of the extent of his judgment-debtor's interest in the property brought by the judgment-creditor to sale. *AGARCHAND GUMANCHAND v. RAKHMA HANMANT.*

[I. L. R. 12 Bom. 678]

16 — *Sale of equity of redemption—Suit by mortgagee for sale of mortgaged property—Purchaser not a party to suit—Sale of mortgage property in execution of decree obtained by mortgagee—What passed—Right of purchaser of equity of redemption—Redemption.* On the 21st December 1871 three of the defendants in this suit mortgaged four groves to *H*. In 1872 the plaintiffs obtained a money-decree against one *D*, and in August, 1872, in execution of that decree, sold the said groves, and at the sale purchased them and also two mills which were not in dispute in this suit. The decree against *D* was found to have the same effect as if it were had and obtained against all the mortgagors. Of this sale *H* had notice, in fact he opposed it. Subsequently *H*, the mortgagee, sued the mortgagors on their mortgage, and obtained a decree on it, and under the decree brought the said groves to sale in 1877, and purchased them himself. In May 1880, *H* sold the groves to two of the defendants. The plaintiffs, who were not parties to the suit, which resulted in the decree under which the groves were sold in 1877, instituted this suit for possession of the groves: *Held*, that notwithstanding the sale of 1872, what was sold under the decree of 1877 was the right, title and interest of the mortgagors, as they existed at the date of the mortgage of the 21st December 1871, with which would go the rights and interest of the mortgagee; and although at a sale under a decree for sale by a mortgagee the right, title and interest of the mortgagor which is sold is his right, title and interest at the date of the mortgage, and any right, title and interest he may have acquired between the date of mortgage and of the sale, still any puisne incumbrancer or purchaser from the mortgagor prior to the date of mortgagee's decree, and who was not a party to the suit in which the mortgagee obtained his decree, would have the right to redeem the property which the mortgagor would have had but for the decree. This view is consistent with the principles of equity and recognised by the Transfer of Property Act. *Muhammad Samud-udin v. Man Singh*, I. L. R. 9 All. 125, followed. *GAJADHAR v. MUL CHAND.*

[I. L. R. 10 All. 520]

17.—*Purchase of mortgaged property, by mortgagee, at judicial sale, on leave obtained to bid.* Where mortgagees executed their decree on the

SALE IN EXECUTION OF DECREE—  
*continued*

(5) MORTGAGED PROPERTY—*concluded*.

mortgage, and having obtained leave to bid at the judicial sale, purchased the property. *Held*, that they could not be held to have purchased as trustees for the mortgagors, the leave granted to bid, having put an end to the disability of the mortgagees to purchase for themselves, putting them in the same position as any independent purchasers. MAHABIR PERSHAD SINGH v. MACNAGHTEN.

[I. L. R. 16 Calc 632

[L. R. 16 I. A. 107

18.—*Rights of purchaser of mortgaged property—Equities of mortgagor* ] In a suit for possession by the certificated purchaser of one-third of certain *mouzas* which had been sold in execution of a decree obtained by the mortgagee against the defendant as mortgagor, it appeared that the defendant had, in a previous execution-sale at the instance of a second mortgagee of the same property, bought the same subject to his own first mortgage. The High Court held that the plaintiff should be treated not as a purchaser, but as a mortgagee in respect of his purchase-money. They then directed that only so much of the original mortgage-debt as should be apportioned against the share bought by the plaintiff should be realized in his favour. *Held* that this ruling and direction were founded on a misapprehension; that the purchaser had a right to possession of the property which he had bought, and that the defendant had no equity to prevent it. LUIF ALI KHAN v. FUTTEH BAHADOOR.

[L. R. 16 I. A. 129

[I. L. R. 17 Calc. 23

(6) DECREES AGAINST REPRESENTATIVES.

19.—*Sale in execution of a decree against a deceased person represented by a minor son—How far such sale affects interest of an heir not party to decree or execution-proceedings.* ] K, a Mahomedan woman, who was a co-sharer in a certain *khoti ratan*, died indebted, and was sued after her death as "represented by her minor son represented by his guardian." A decree having been obtained against K, as so represented, her share in the *khoti* was put up for sale in execution, and was purchased by the plaintiff, who obtained a sale-certificate reciting that the right, title, and interest of K in the said *khoti* had been purchased by him. He now sued the defendants, who were K's co-sharers in the *khoti*, to recover the profits of K's share which they had received. K, besides her minor son, had left her surviving a daughter who had not been made a party to the suit or to the execution-proceedings, and the defendants contended that her share in her mother's estate had not passed to the plaintiff. *Held*, that the plaintiff was entitled to the whole of K's share. The debt due by K was one for which the daughter was equally responsible; and having regard to the

SALE IN EXECUTION OF DECREE—  
*continued*.

(6) DECREES AGAINST REPRESENTATIVES  
—*concluded*.

form of the suit and the execution-proceedings, the plaintiff was justified in assuming that he was bidding for the entirety of K's share, and would acquire a title unimpeachable by the daughter. KHURSHET BIBI v. KESO VINAYEK

[I. L. R. 12 Bom. 101

20.—*Civil Procedure Code, s. 231—Sale in execution of decree against deceased Mahomedan's estate—Representation of deceased by some only of his next-of-kin—Sale held to be valid.* ] V, a Mahomedan woman, died, leaving her husband and several minor children as her representatives. In execution of a money-decree obtained against V, the creditor attached certain land which belonged to V, and made her husband and two of her children parties to the execution-proceedings. The land was sold and purchased by the decree-holder. *Held*, in a suit brought by the children of V, to set aside the sale on the ground, *inter alia* that some of them were no parties to the proceedings in execution, and that the others, being minors at the time, had not been represented by a guardian appointed by the Court, that the sale was valid. KANHAMMAD v. KUTTI.

[I. L. R. 12 Mad 90

(7) RE-SALES.

21.—*Civil Procedure Code, 1882, s. 293—Defaulting purchaser answering for loss by re-sale—Description of property at sale and re-sale, Difference of.* ] The sale contemplated by s. 293 of the Civil Procedure Code must be a sale of the same property that was first sold and under the same description, and any substantial difference of description at the sale and re-sale, in any of the matters required to be specified by s. 287, to enable intending purchasers to judge of the value of the property, will disentitle the decree-holder to recover the deficiency of price under s. 293. *Scemle*: That even if the difference of description was due to the value of the property having been changed, between the sale and re-sale, owing to causes beyond the control of any person, the decree-holder is entitled to claim damages against a defaulting purchaser at the first sale, must proceed against him by way of suit and not by an application under s. 293. BAIJNATH SAHAI v. MOHEEP NARAIN SINGH.

[I. L. R. 16 Calc 535

22.—*Civil Procedure Code, 1882, s. 293, 306—Liability of defaulting purchaser.* ] At a sale in execution of a decree a decree-holder, who had obtained leave to bid, was alleged to have made a bid through his agent of Rs. 90,000, but he shortly afterwards repudiated the bid and did not pay the deposit. The property was put up for sale again on the following day under s. 306 of the Code of Civil Procedure and was in due

# SALE IN EXECUTION OF DECREE— *continued.*

## (7) RE-SALES—*concluded.*

course knocked down for a smaller sum. The judgment-debtor filed a petition under s. 293 to recover from the decree-holder the loss by re-sale, the petition was rejected. On appeal, *held* that the property having been forthwith put up again and sold under s. 306 of the Code of Civil Procedure was resold within the meaning of s. 293. **VALLABHAN v. PANGUNNI,**

[I. L. R. 12 Mad. 454]

## (8) PURCHASERS, TITLE OF.

### (a) CERTIFICATES OF SALE.

23.—*Certificate of sale, application for—Civil Procedure Code (Act XIV of 1882), s. 316—Court Fees Act (VII of 1870), s. 6.]* An application by an auction-purchaser for a certificate of sale need bear no Court-fee stamp, since by s. 316 of the Civil Procedure Code (Act XIV of 1882) it is not even required to be in writing. **HIRA AMBAIDAS v. TEKCHAND AMBAIDAS.**

[I. L. R. 13 Bom. 670]

24.—*Unregistered certificate of sale—Interest of purchaser—Second sale of same property in execution of subsequent decree—Interest of purchaser at such subsequent sale subject to interest of purchaser under prior sale—Registered certificate of second sale—Act VIII of 1859.]* In 1881 the plaintiff brought the present suit against the defendant to recover possession of a certain house which he had purchased at a sale held on the 15th March 1880 in execution of a money-decree obtained against one C. He obtained a certificate of sale on the 3rd January 1880, which was registered on the 15th of the same month. The defendant had previously purchased the same property at a sale held on the 22nd November 1875, in execution of a decree obtained by him as mortgagee against the said C. The defendant had obtained a certificate of sale and was put into possession, but had not then registered the certificate. He subsequently obtained another certificate, which was registered in June 1882. In a suit by the plaintiff for possession, *held* that the plaintiff could not recover. The defendant had acquired under the Civil Procedure Code (Act VIII of 1859) by the sale and the confirmation of it, a beneficial interest, and the plaintiff by his subsequent purchase in execution of a money-decree against C took subject to that interest. The grant to the defendant of the second certificate, which was registered, sufficiently proved that the sale to him had been confirmed. **CHINTAMANRAV NATU v. VITHABAI.**

[I. L. R. 11 Bom. 588]

25.—*Civil Procedure Code, 1859, s. 259—Registration Act, 1866, s. 49—Proof of title without production of certificate of sale—Omnia presumuntur rite esse acta.]* Assuming that s. 49 of the Registration Act 1866, required that a certificate

# SALE IN EXECUTION OF DECREE— *continued.*

## (8) PURCHASERS, TITLE OF—*concluded.*

### (a) CERTIFICATES OF SALE—*concluded.*

of the sale of land in execution of a decree passed under the Civil Procedure Code 1859, should be registered, a plaintiff who has purchased land at such a sale is not bound to rely on the certificate to prove his title. If it is proved *alunde* that the sale took place and that possession was given, the Court should presume, after long lapse of time and possession by a mortgagee of the purchaser, that the sale was duly made by the Court. **VELAN v. KUMARASAMI.**

[I. L. R. 11 Mad. 296]

26.—*Confirmation of sale, effect of—Title of auction-purchaser without certificate of sale.]* The plaintiff as an agriculturist sued the defendant to redeem certain land mortgaged to him with possession by her deceased husband. The defendant (the mortgagee) pleaded that he had bought the mortgagor's interest in the property at an auction-sale held in execution of a decree obtained against the mortgagor (the plaintiff's husband), and that therefore the right to redeem was gone. The defendant was, however, unable to produce a certificate of sale, and the Subordinate Judge held, therefore, that he had failed to prove his title, and accordingly directed that the mortgage account should be taken under the Dekkan Agriculturists Relief Act (XVII of 1879). The defendant afterwards found his sale-certificate, and obtained a review of the above order, but on review the Subordinate Judge confirmed his decision, holding that as the sale-certificate was unregistered, it could not be received in evidence. The defendant then obtained a fresh certificate, registered it, and renewed his application to the Subordinate Judge, who reversed his previous order, and rejected the plaintiff's claim. The plaintiff appealed to the District Judge, who reversed the lower Court's order and remanded the case. On appeal by the defendant to the High Court, *held* that the order of the District Judge should be discharged. A sale-certificate was not necessary for the purpose of establishing the defendant's title to the property as against the plaintiff. Where property has been sold in execution of a decree, a party to the suit in which the decree has been passed, or his representative cannot, after the sale has been confirmed, dispute the title of the purchaser at the sale. The order confirming the sale completes the title of the latter as against the former. **KHUSHAL PANACHAND v. BHIMABAI.**

[I. L. R. 12 Bom. 589]

## (9) DISTRIBUTION OF SALE PROCEEDS.

27.—*Civil Procedure Code, ss. 276, 295—Claim to rateable distribution under s. 295—Sale pending attachment.]* A claim under s. 295 of the Civil Procedure Code is not enforceable as an attachment against which an assignment is rendered

SALE IN EXECUTION OF DECREE—  
*continued.*

(9) DISTRIBUTION OF SALE PROCEEDS—  
*continued.*

void by the provisions of s. 276. *Ganga Din v. Khushali*, I. L. R. 7 All. 702, followed. *DURGA CHURN RAI CHOWDHRY v. MCMAHONIN DASL*.

[I. L. R. 15 Calc. 771

28.—*Civil Procedure Code*, ss 294, 295—*Suit for refund of rateable amount*] *M* and *C* each obtained a decree against the same judgment-debtor and applied for execution. *C*, in execution of his decree, attached certain immoveable property, and, with the permission of the Court, purchased the same under s. 291 of the Code of Civil Procedure and set off his purchase-money against the decree. *M* claimed that the proceeds of the sale to *C* should be rateably distributed under s. 295 of the Code and that *C* should either elect to have the property re-sold or pay into Court the rateable proportion due to *M*. *C* objected to a re-sale or to pay. *Held* that *C* might be compelled to refund the rateable amount due to *M* by summary process in execution. *MADDEN v. CHAPPANI*.

[I. L. R. 11 Mad. 356

29.—*Civil Procedure Code*, 1882—ss 235, 295, 190—*Application for execution, necessity of, in order to share in distribution under s. 295—Attachment before judgment, effect of—Decree-holder with an attachment before judgment, omission by, to apply for execution under s. 235, effect of, on right to share in distribution.*] A decree-holder who has attached before judgment is not entitled to rank under s. 295 of the Civil Procedure Code (Act XIV of 1882) as an applicant in execution, and as such to obtain, in execution, a rateable share of the property which he has attached, unless, subsequently to his decree, he has applied for execution under s. 235 *et seq.* of the Civil Procedure Code. S. 490 of the Civil Procedure Code does not by implication confer upon a decree-holder who has attached before judgment the right to come in under s. 295 and share in the distribution of the property which he has attached. The effect of that section is merely to take away the necessity for a re-attachment of the property. The attachment before judgment enures and becomes an attachment in execution. *PALLONJI SHAPURJI v. JORDAN*.

[I. L. R. 12 Bom. 400

30.—*Civil Procedure Code*, s. 295—"Decree for money"—"Same judgment-debtor"—*Decree for enforcement of lien and against judgment-debtor personally—Decree-holder entitled to proceed against property or person as he may think fit.*] *U* held a money-decree against *B*, *P*, and *R*, in execution whereof he caused to be attached and sold certain property belonging to *B*. *D* held a decree against *B*, *P*, *R*, and *S*, which so far as *P*, *B*, and *S* were concerned, was a decree for enforcement of hypothecation by sale of the judgment-debtor's

SALE IN EXECUTION OF DECREE—  
*continued.*

(9) DISTRIBUTION OF SALE PROCEEDS—  
*continued.*

property, but which did not direct the sale of specific property belonging to *B*. An application by *D*, under s. 295 of the Civil Procedure Code, for an order enabling him to share rateably in the proceeds of *U*'s execution was rejected. *Held* that there being no question of fraud in the case, *D* was entitled to enforce his decree in the first instance against the property of *B*; that his decree against *B* did not lose the character of a decree for money under s. 295 of the Code, because it directed a sale of the property of the other judgment-debtors; and that the fact that there were four judgment-debtors in *D*'s decree and only three in *U*'s would not deprive *D* of the right to share rateably. *Shumbhoo Nath Poddar v. Lucky Nath Dey*, I. L. R. 9 Calc. 920, referred to. *Debaki Nundun Sen v. Hart*, I. L. R. 12 Calc. 298, *Jagat Narain Pal v. Dhundhrey Rai*, I. L. R. 5 All. 566, and *Hart v. Tara Prasanna Mukerji*, I. L. R. 11 Calc. 718, distinguished. *DELHI AND LONDON BANK v. UNCOVENANTED SERVICE BANK, BAREILLY*.

[I. L. R. 10 All. 35

31.—*Civil Procedure Code*, 1882, s. 294—*Decree-holder, Purchase by—Satisfaction pro tanto—Mortgagee not trustee for mortgagor in sale-proceeds*] A mortgagee who has obtained a mortgage-decree, and after obtaining permission to bid at the sale held in execution of such decree has become the purchaser, does not stand in a fiduciary position towards his mortgagor. *Hart v. Tara Prasanna Mukerji*, I. L. R. 11 Calc. 718, distinguished. A mortgagee in such a position, therefore, is at liberty to take out further execution for any balance of the amount decreed that may be left after deducting the price for which the mortgaged property was sold, and is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court. *SHEONATH DOSS v. JANKI PRASAD SINGH*.

[I. L. R. 16 Calc. 132

32.—*Civil Procedure Code* (Act XIV of 1882), s. 295—*Execution—Decree—Rateable distribution of proceeds of decree—Power of Court to inquire into bona fides of the decree-holders while distributing such proceeds—Practice.*] In distributing the proceeds of execution under s. 295 of the Civil Procedure Code (Act XIV of 1882), the Court has power to inquire into the bona fides of the several decree-holders that apply for rateable distribution, if the same has been called in question, and to decide it in the same manner as all other questions that arise in execution. The party aggrieved by such a decision is entitled, under the last clause of the section, to bring a regular suit to compel the successful judgment-debtor in execution to refund. *In re Sunderdass*, I. L. R. 11 Calc. 42, followed. *CHHAGANLAL v. FAZARALI*.

[I. L. R. 13 Bom. 154

# SALE IN EXECUTION OF DECREE— continued.

## (9) DISTRIBUTION OF SALE PROCEEDS— concluded.

33.—*Civil Procedure Code*, 1882, s. 295—*Purchaser of decree against estate of a deceased person by the legal representative of such deceased person—Right of such purchaser to participate in proceeds realized in execution of decree* ] *H K* was the holder of a decree in suit No. 657 of 1869 for Rs. 69,167 against the firm of *H B & Co.*, and in execution thereof he attached a certain house belonging to the estate of one *H D.*, deceased, who had been a partner in that firm. *V* (the respondent), was the legal representative of *H D.* On the 9th November 1886, *V* purchased the decree from *H K* for Rs. 18,000, which sum she obtained for the purpose as a loan from *C P & Co.* As a security for this loan she gave *C P & Co.* a letter, dated the 9th November 1886, whereby she agreed to repay the loan out of the proceeds of the sale of the house which had been attached in execution of the decree which she had purchased. In the meantime another decree, viz. in suit No. 8 of 1870, had been obtained against the firm of *H B & Co.* and had been, prior to the 9th November 1886, purchased by the appellant *M.* who had also, prior to the 9th November 1886, applied for execution. On the 6th April 1887, the attached house was sold by the Sheriff, and realized Rs. 45,000. On the 5th September 1887, an order was made in Chambers that the Sheriff should divide rateably the moneys in his hands in suit No. 657 of 1869 between *M* and *V.* *M* appealed, and contended that by the transaction between *V* and *H K* the decree in suit No. 657 of 1869 had been extinguished as against the estate of *H D.* and that the said transaction amounted, in law and fact, to a purchase, on behalf of the estate of *H D.* of the properties attached in the said suit or the proceeds thereof. *Held*, confirming the order appealed from, that *V* was entitled to a rateable proportion of the moneys in question. She was only liable under the decree held by the appellant *M* as the representative of *H D.* So far as she might have had property of her own, not derived from *H D.*'s estate, available for the purchase of *H K*'s decree she stood in the same position as a third party who might have purchased *H K*'s share of the proceeds before they were realized. The purchase of *H K*'s share with her own money could not prejudice *M* any more than if an entire stranger had purchased. The fact that she borrowed the money and gave the share as a security to the lender did not affect the question. If the money did not come from *H D.*'s estate it could not matter whether it came directly from *V*'s pocket or from another person at her request. If the money was derived from a source having no connexion, directly or indirectly, with the estate indebted, there is no distinction, in principle, between the representative of the indebted estate and a stranger. *MUNMOHANDAS JAISKONDAS v. VIZBAI.*

[I. L. R. 13 Bom. 171

# SALE IN EXECUTION OF DECREE— continued.

## (10) INVALID SALES.

### (a) FRAUD.

34.—*Gift in fraud of creditors—Subsequent sale by creditors in execution of subject-matter of gift—Purchase at execution-sale for inadequate price by means of fraud—Suit by donee to set aside sale for fraud—Rescission when granted* ] In June 1875 *A* being in pecuniary difficulties executed a deed of gift of all his property in favour of his wife and minor sons, the plaintiffs *B.* one of his then existing creditors, subsequently obtained a decree against him, and in execution sold part of the said property. At the sale the first defendant by means of false representation became the purchaser at an inadequate price. In July 1879 *A* applied to have the sale set aside on the ground of the fraud of the first defendant, but his application was rejected. In 1884 the plaintiffs by their next friend sued to set aside the sale, contending that at the date of *B*'s decree the property was theirs by virtue of the deed of gift of June 1875, and further that the sale was void by reason of the defendant's fraud. *Held*, rejecting the plaintiff's claim, that the plaintiffs could not be allowed to set up their deed of gift as against the proceedings in execution under which the defendant acquired his title as purchaser. That gift was made to them by *A* when he was in pecuniary difficulties, and included all *A*'s property. It was, therefore, void as against his then existing creditors, of whom *B* was one. *B* was therefore entitled to sell the property in execution of his decree. *Held*, also, that the plaintiffs were not entitled to set aside the sale on the ground of fraud, and that the only remedy, if any, open to them was a suit for damages. The gift by *A* in 1875 was made to his wife as well as to the plaintiffs (his sons), and it gave them the property as tenants-in-common. The plaintiffs were, therefore, only owners of their respective shares, and were not entitled to have the sale set aside *in toto*. This, however, was what they sued for in their plaint. *A*'s wife could not now join in rescinding the sale, as she must have known in 1879 of the fraud, her husband having immediately after the sale endeavoured to set aside the sale on that ground. A transaction cannot generally be rescinded, unless the party seeking it is able to rescind it *in toto*, except where the transaction is severable. *HORMUSJI v. COWASJI.*

[I. L. R. 13 Bom. 297

### (b) DECREE AFTERWARDS REVERSED.

35.—*Sale in execution pending appeal from decree—Application for confirmation of sale after reversal of decree—Court not competent to grant confirmation—Civil Procedure Code, s. 312.* ] Where a sale in execution of a decree has taken place pending an appeal, and the decree has subsequently been reversed, the Court executing the decree cannot, after such reversal, grant confirmation

SALE IN EXECUTION OF DECREE—  
*continued.*(10) INVALID SALES—*continued.*

(b) DECREE AFTERWARDS REVERSED—*concluded.*  
of the sale. *Busappa bin Malappa Aki v. Dundaya bin Shirlingaya*, I. L. R. 2 Bom. 540, referred to. *MUL CHAND v. MUKTA PRASAD*.

[I. L. R. 10 All. 83]

36.—*Effect of reversal of decree upon sale in execution—Sale to bonâ fide purchaser, not a party to the decree, distinguished from sale to decree-holder.* A sale having duly taken place in execution of a decree in force at the time cannot afterwards be set aside as against a bonâ fide purchaser, not a party to the decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an Appellate Court. A suit was brought by a judgment-debtor to set aside sales of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as it finally stood, it would have been satisfied without the sales in question having taken place. He sued both those who were purchasers at some of the sales, being also holders of the decree to satisfy which the sales took place, and those who were bonâ fide purchasers at other sales, under the same decree, who were not parties to it: *Held* that, as against the latter purchasers, whose position was different from that of the decree-holding purchasers, the suit must be dismissed. *ZAIN-UL-ABDIN KHAN v. MUHAMMAD ASGHAR ALI KHAN*.

[I. L. R. 10 All. 166]

[L. R. 15 I. A. 12]

## (c) DECREE SATISFIED BUT NOT CERTIFIED TO COURT.

37.—*Suit to set aside sale—Fraud—Auction-purchaser acting bonâ fide.—Fraudulent execution of decree after adjustment—Execution of decree adjusted, but of which satisfaction has not been entered, Effect of, on rights of innocent purchaser—Adjustment of decree without certifying.* In 1881 *R* obtained a decree against *M* for possession of certain property with costs. Subsequently a compromise of the questions at issue in the suit was come to between *R* and *M*, one of the terms of which was that *R* gave up his claim to costs. Satisfaction of the decree was not entered up in Court. In 1884 *K* purporting to be acting on behalf of *R*, but without his knowledge or sanction, applied for execution of the decree for costs, and in the execution-proceedings which followed a share of *M* in a tank was sold and purchased by *A*. *M* thereupon brought a suit against *A*, *R*, *K*, and others to set aside the sale, alleging that the whole of the execution-proceedings had been taken without notice to him, and had been fraudulently taken by the defendants, in collusion with one another in order to deprive him of his share in the tank. It was found that

SALE IN EXECUTION OF DECREE—  
*continued.*(10) INVALID SALES—*continued.*(c) DECREE SATISFIED BUT NOT CERTIFIED TO COURT—*concluded.*

1's purchase was an innocent one, and untainted with fraud. *Held*, upon the authority of *Rever Mahton v. Ram Kishen Singh*, L. R. 13 I. A. 106; I. L. R. 14 Calc. 18, that the sale could not be set aside. Such a sale could only be set aside if it were shown that the Court had no jurisdiction to execute the decree; but as the decree remained an unsatisfied decree so far as the Court was concerned, and capable of being executed, the compromise not having been certified to the Court, the Court had jurisdiction to execute it. *Put Dasi v. Surup Chand Mala*, I. L. R. 14 Calc. 376, commented on. *Held*, further, that the execution-proceedings could not be held to be void, as, although instituted by a person who had no authority to institute them, they were instituted in the name of the decree-holder, and neither the Court nor the auction-purchaser was bound to see that the application was made bonâ fide on his behalf. *MOFHURA MOHUN GHOSE MONDUL v. AKHOY KUMAR MITTER*.

[I. L. R. 15 Calc. 557]

## (d) WANT OF SALEABLE INTEREST.

38.—*Civil Procedure Code, ss. 313, 320—Transfer of execution of decree to Collector—Jurisdiction of Civil Courts to entertain application under s. 313—Rules prescribed by Local Government under s. 320—Notification No. 671 of 1880, dated the 30th August.* *Held* that an application under s. 313 of the Civil Procedure Code by the purchaser at a sale in execution of a decree, which had been transferred for execution to the Collector in accordance with the rules prescribed by the Local Government, was entertainable by the Civil Courts, and the Collector had no jurisdiction under the Code or under Notification No. 671 of 1880, to entertain it. *Mudho Prasad v. Mansa Kuar*, I. L. R. 5 All. 314, referred to. *NATHU MAL v. LACHMI NARAIN*.

[I. L. R. 9 All. 43]

See *KESHABDEO v. RADHE PRASAD*.

[I. L. R. 11 All. 94]

39.—*Civil Procedure Code, s. 313—Setting aside sale in execution of decree—Incumbrance.* The fact that property sold in execution of a decree is incumbered, even when the incumbrance covers the probable value of the property, is not sufficient to sustain a plea that the person whose property is sold had no saleable interest therein. S. 313 of the Civil Procedure Code contemplates that either the judgment-debtor had no interest at all, or that the interest was not one he could sell; and the fact that the property may fetch little or nothing if sold does not affect the

# SALE IN EXECUTION OF DECREE— continued.

## (10) INVALID SALES—concluded.

### (d) WANT OF SALEABLE INTEREST—concluded.

question. *Naharmul v. Sulut Ali*, 8 C. L. R. 468, distinguished. *Protap Chunder Chuckerbutty v. Panoty*, I. L. R. 9 Calc. 506, referred to. *SANT LAL v. RAMJI DAS*.

[I. L. R. 9 All. 167]

### (c) WANT OF JURISDICTION.

40.—*Mortgage decree for sale of properties in different districts and jurisdictions—Civil Procedure Code (Act XIV of 1882), ss. 19, 223 (c), Sch. IV, Form 128.* A decree obtained in a suit, brought under the provisions of s. 19 of the Code of Civil Procedure in the Court of the Subordinate Judge of Rajshaye on a mortgage of certain properties situated in the districts and jurisdiction of Rajshahye and Nyadumka, directed that the properties mentioned in the mortgage should be sold and the proceeds applied in payment of the mortgage-debt. The properties were sold by the Court of Rajshaye. *Held* that the authority given by s. 19 of the Code included an authority to make the order for the sale of the properties, and that the Rajshaye Court was within its jurisdiction in directing and carrying out the sale. *Quare*—Whether, where a sale takes place under a money-decree of property partly within the local limits of the Court whose decree is being executed, and partly without that Court's jurisdiction, the sale of the property without the jurisdiction would be valid and binding in consequence of the provisions of ss. 19 and 223 of the Court of Civil Procedure. *MASEYK v. STEEL & Co.*

[I. L. R. 14 Calc. 661]

## (11) SETTING ASIDE SALE.

### (a) IRREGULARITY—GENERAL CASES.

41.—*Civil Procedure Code, 1885, s. 311*—"Any person whose immoveable property has been sold," *Interpretation of* ] The words "any person whose immoveable property has been sold," in s. 311, are sufficiently wide to include a person who is neither the decree-holder nor the judgment-debtor, nor the auction-purchaser; but who alleges that the property sold in execution is his. *ABDUL HUQ MOZOOMDAR v. MOHINI MOHUN SHAHA*.

[I. L. R. 14 Calc. 240]

42.—*Civil Procedure Code, ss. 311, 295*—*Person entitled to apply to set aside sale*—"Decree-holders" entitled to rateable distribution.] Where one decree-holder had attached certain land and another decree-holder against the same debtor had entitled himself to rateable distribution of the assets under s. 295 of the Code of Civil Procedure: *Held* that the latter was entitled to apply, under s. 311 of the Code, to set aside the sale on the ground of material irregularity. *LAKSHMI v. KUTTUNNI*.

[I. L. R. 10 Mad. 57]

# SALE IN EXECUTION OF DECREE— continued.

## (11) SETTING ASIDE SALE—continued.

### (a) IRREGULARITY—GENERAL CASES—continued.

43.—*Civil Procedure Code, s. 311*—*Objection to sale by wife of judgment-debtor*] A person who claims to be a purchaser from a judgment-debtor prior to, in attachment is not entitled to come in under s. 311 of the Civil Procedure Code and object to the sale of the judgment-debtor's property. *ABDUL HUQ MOZOOMDAR v. MOHINI MOHUN SHAHA*, I. L. R. 14 Calc. 240, overruled. Rule that a person applying to set aside a sale for irregularity must be one who has sustained substantial injury arising therefrom, as laid down in *Joge Narain Singh v. Bhugband*, 2 W. R. Mis. 13, and explained by *Krishnarav Venkatesh v. Vasudeo Anant*, 11 Bom. H. C. 15, approved. *ASMUTUNISSA BEGUM v. ASHRUFF ALI*.

[I. L. R. 15 Calc. 488]

44.—*Failure by purchaser to make the deposit required by s. 306 of the Civil Procedure Code—Material irregularity in conducting sale—Civil Procedure Code (Act XIV of 1882), ss. 241, 306, 308, 311, and 312.* Failure on the part of the person declared to be the purchaser at a sale in execution of a decree to make, and on the part of the officer conducting the sale to receive, the deposit of 25 per cent. on the amount of the purchase-money in the manner required by s. 306 of the Code of Civil Procedure constitutes a material irregularity in conducting the sale, which must be inquired into upon an application under s. 311, and consequently a separate suit to set aside a sale on such a ground will not lie. *Intizam Ali Khan v. Narain Singh*, I. L. R. 5 All. 316, dis-sented from. *BHIM SING v. SARWAN SINGH*.

[I. L. R. 16 Calc. 33]

45.—*Civil Procedure Code, ss. 311, 312*—*Objection to sale—Legal disability—Limitation Act XV of 1877, s. 7*—*Order confirming sale before time for filing objections has expired—Appeal from order.* Although s. 312 of the Civil Procedure Code contemplates that objections to a sale under s. 311 shall be filed before an order for confirmation is passed, if the precipitate action of the Court has led to the confirmation of a sale before the time allowed for filing objections to the sale has expired, whether or not that Court could entertain such objections after confirming the sale, the High Court on appeal is bound to interfere and to see that objections which by law the appellant is empowered to make are heard and determined before a sale of his property is confirmed or becomes absolute. An application under s. 311 of the Civil Procedure Code, on behalf of a judgment-debtor who was a minor, was rejected on the ground that the applicant did not legally represent the minor, and the Court thereupon confirmed the sale. A second application to the same effect was then filed on behalf of the minor by his guardian, and was rejected on the ground that



SALE IN EXECUTION OF DECREE—  
*continued.*

(11) SETTING ASIDE SALE—*continued.*

(a) IRREGULARITY—GENERAL CASES—*continued.* the Court had already confirmed the sale, and was precluded from entertaining objections after such confirmation, prior to which, no proper application of objection had been filed. From this order the judgment-debtor appealed. *Held*, that the appeal must be considered to be one from an order under the first paragraph of s. 312 of the Civil Procedure Code, confirming the sale after disallowing the appellant's objection, and that it would therefore lie: *Held*, that assuming the first application on the minor's behalf to have been rightly rejected, the second was made by a duly authorized guardian, and, with regard to s. 7 of the Limitation Act (XV of 1877), was not barred by limitation; the judgment-debtor had therefore a right to make it, and the Court should have entertained and dealt with it before proceeding to confirm the sale or grant a sale-certificate. The order disallowing the application and the order confirming the sale were set aside, and the case remanded for disposal of the appellant's objections. *Phoolbas Koonwar v Jageshwar Sahoy*, I L R. 1 Calc. 226, referred to. BALDEO SINGH v. KISHAN LAL.

[I. L. R. 9 All. 411]

46.—*Civil Procedure Code*, ss. 290, 311—*Sale of immovable property in execution of decree—Sale held before expiration of thirty days from the proclamation—Application by judgment-debtor to set aside sale—“Illegality”—“Material irregularity”—Proof of substantial injury, whether necessary.* Where a sale of immovable property in execution of a decree took place before the expiration of the thirty days required by s. 290 of the Civil Procedure Code, and without the consent of the judgment-debtor, held by EDGE, C. J., (BRODHURST, J., dissenting) that the holding of the sale under these circumstances was not merely an irregularity within the meaning of s. 311 of the Code, but was an illegality, and that it was open to the judgment-debtor to object to the sale and to apply to have it set aside, on the ground of such illegality, without proving that he had sustained any substantial injury. *Held* by BRODHURST, J., *contra*, that infringement of the rule contained in s. 290 of the Code does not of itself vitiate a sale in execution of decree, but is a “material irregularity” within the meaning of s. 311—that expression being wide enough to include illegalities—and that before such a sale can be set aside, the judgment-debtor must prove that he has sustained substantial injury by reason of such irregularity. *Olpherts v. Mahabir Pershad Singh*, I. L. R. 10 I. A. 25; *Megh Lall Poorvee v. Shib Pershad Madi*, I. L. R. 7 Calc. 34; *Kalytara Chowdhraim v. Ramcoomar Goopta*, I. L. R. 7 Calc. 466; *Tripura Sundari v. Durga Churn Pal*, I. L. R. 11 Calc. 74; *Bonomali Mozumdar v. Woomesh Chunder Bundopadhya*, I. L. R. 7 Calc. 730; *Bandy Ali v. Madhub Chunder Nag*, I. L. R. 8 Calc. 932; *Nathu v. Harbhuj*, Weekly Notes, All.

SALE IN EXECUTION OF DECREE—  
*continued.*

(11) SETTING ASIDE SALE—*continued.*

(a) IRREGULARITY—GENERAL CASES—*continued.* 1885, p. 304; *Jasoda v. Mathura Das*, I. L. R. 9 All. 511; and *Bakhshi Nand Kishore v. Maluk Chand*, I. L. R. 7 All. 289, referred to. GANGA PRASAD v. JAG LAL RAI.

[I. L. R. 11 All. 333]

47.—*Civil Procedure Code*, s. 311—*Material irregularity in publishing or conducting sale—Substantial injury—Notification omitting to state place of sale—Sale held after date advertised—Civil Procedure Code*, ss. 287, 290] Where a proclamation of sale of immovable property in execution of a decree omitted to state the place of sale, and where the sale took place on a date other than that notified in the proclamation, and before the expiration of the thirty days required by s. 290 of the Civil Procedure Code, held that the non-compliance with the provisions of ss. 287 and 290 of the Code was more than mere irregularity, that it must have caused substantial injury, and that the order confirming the sale must be set aside. *Bakhshi Nand Kishore v. Maluk Chand*, I. L. R. 7 All. 289, referred to. *Per MAHMOOD, J., quære*, whether material irregularities such as the above were not in themselves sufficient, within the meaning of the first paragraph of s. 311 of the Code, to justify a Court in setting aside a sale, without inquiring whether such irregularities had resulted in substantial injury within the meaning of the second paragraph. JASODA v. MATHURA DAS.

[I. L. R. 9 All. 511]

48.—*Civil Procedure Code*, ss. 247 and 289—*Proclamation—Property broken up into lots—Separate proclamations.* Where property intended to be sold in execution of a decree is divided into a number of small lots, as a means of obtaining a better aggregate price, the law does not require that a separate proclamation of sale should be made on each lot into which the property is so divided. A mere breaking up of a property into lots does not necessarily make it several properties for the purposes of a proclamation of attachment or sale. Where estates, though embraced in the same process, are really at such a distance that there is no moral certainty of communication to persons on or interested in the one of what is publicly done on the other, there should, no doubt, be a separate proclamation on each, in order that full intimation may be given of what is to be done. *DE PENHA v. JALBOY ARDESHIR SET*.

[I. L. R. 12 Bom. 368]

49.—*Proclamation of sale—Sale before hour fixed—Civil Procedure Code (Act XIV of 1882)*, s. 287—*Sale set aside as being no sale.* A property, advertised for sale under s. 287 of the Code of Civil Procedure, was sold on the day

# SALE IN EXECUTION OF DECREE— —continued.

## (1) SETTING ASIDE SALE—continued.

### (a) IRREGULARITY—GENERAL CASES—continued.

fixed, but at an earlier hour than that stated in the proclamation: *Held*, that there had been no sale within the meaning of the Code, proclamation of the time and place of sale and the holding of the sale at such time and place, being conditions precedent to the sale being a sale under the Code. *BASHARUTULLA v UMA CHURN DUTT*.

[I. L. R. 16 Calc. 794]

50.—*Attachment before judgment—Termination of attachment—Sale in execution—Material irregularity in publishing or conducting sale without attachment—Waiver—Civil Procedure Code, ss. 311, 483.* The plaintiff instituted a suit against defendant for recovery of money, and previous to judgment, that is, on the 8th of January 1885, applied for, and on the 11th obtained, an order for attachment of several houses and premises belonging to defendant and such attachment was made. The suit was dismissed, but eventually on appeal it was decreed; but the attachment was never withdrawn. Plaintiff then applied for execution of his decree and his application was granted by an order directing that the property of the judgment-debtor should be notified for sale on the 1st February 1887, and accordingly on the 21st December 1880, a sale-notification was issued. The judgment-debtor twice applied for postponement of sale, but his applications were refused, and the sale took place on the date fixed. The judgment-debtor then objected to the confirmation of the sale, urging that the property sold was never attached in execution of the decree, and the attachment previous to judgment was infructuous, because afterwards the claim was dismissed by the Court of First Instance; that there had been several other irregularities in publishing and conducting the sale; and that, owing to the irregularities, property had been sold at a grossly inadequate price causing substantial injury. The Subordinate Judge overruling the objections confirmed the sale. On appeal by the judgment-debtor, *held* following *Mahadeo Dubey v. Bholu Nath Dohit*, I. L. R. 5 All. 86, that a regularly perfected attachment is an essential preliminary to sales in execution of decrees for money; and where there has been no such attachment, any sale that may have taken place is not simply voidable but *de facto* void, and may be set aside without any inquiry as to substantial injury being sustained by the judgment-debtor for want of a valid attachment; and that an attachment before judgment, like a temporary injunction, becomes *functus officio*, as soon as the suit terminates. Further, that the phrase "a material irregularity in publishing or conducting" in the first paragraph of s. 311 of the Code of Civil Procedure should be liberally construed, and that absence of attachment of property at the

# SALE IN EXECUTION OF DECREE— —continued.

## (11) SETTING ASIDE SALE—continued.

### (a) IRREGULARITY—GENERAL CASES—continued.

time of sale thereof is "a material irregularity," attachment being the first step which a Court in executing a simple money-decree has to take to assert its authority to bring property to compulsory sale. *RAM CHAND v. PITAM MAL*.

[I. L. R. 10 All. 506]

51.—*Civil Procedure Code, 1882, s. 290—Ground for setting aside sale* The infringement of the provisions of s. 290 of the Civil Procedure Code is not a mere irregularity, but it vitiates the sale. —*Bakshi Nand Kishore v. Malak Chand*, I. L. R. 7 All. 289. *SADHUSARAN SINGH v. PANCHDEO LAL*.

[I. L. R. 14 Calc. 1]

52.—*Civil Procedure Code, 1882, s. 294—Validity or otherwise of sale.* In a suit in which it was contended that a purchaser at a sale in execution of a decree had under s. 294 of the Civil Procedure Code taken nothing by the purchase because he was the holder of the decree in execution of which the property was sold, it was held following *Jacherbai v. Haribai*, I. L. R. 5 Bom. 575, that the purchase was not void *ab initio*, but only voidable "on the application of the judgment-debtor or other person interested in the sale." *CHINTAMANRAV NATU v. VITHA-BAI*.

[I. L. R. 11 Bom. 588]

53.—*Civil Procedure Code, 1877, s. 246—Execution of Cross-decrees—Power of Court executing decree—Bond fide purchaser—Presumption of validity of order for sale* If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution, any more than into the correctness of the judgment upon which the execution issues. Notwithstanding anything in s. 246 of the Code of Civil Procedure, he is not bound to inquire whether the judgment-debtor holds a cross-decree of higher amount against the decree-holder any more than he is to inquire, in an ordinary case, whether the decree, under which execution has issued, has been satisfied or not. These are questions to be determined by the Court issuing execution. Where property, sold in execution of a valid decree, under the order of a competent Court, was purchased *bona fide* and for fair value. *Held*, that the mere existence of a cross-decree for a higher amount in favour of the judgment-debtor, without any question of fraud, would not support a suit by the latter against the purchaser to set aside the sale. *REWA MAHTON v. RAM KISHEN SINGH*.

[I. L. R. 14 Calc. 18]

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# SALE IN EXECUTION OF DECREE— concluded.

## (11) SETTING ASIDE SALE—concluded.

### (b) SUBSTANTIAL INJURY.

54.—*Civil Procedure Code, s. 311—Alleged irregularity attending sale in execution—Failure to prove substantial injury resulting* [A judgment-debtor having allowed the execution-sale of immoveables to be completed without objecting on the ground afterwards alleged by him, viz., insufficiency of description within the requirements of s. 287, he having been throughout aware of what the description was, the sale is not invalid on this ground alone without more. No evidence having been given in the Court executing the decree of substantial injury having resulted by reason of such irregularity, *re*, the alleged misdescription. *Held*, that although the Appellate Court below had assumed that the property had been sold for less than it ought to have fetched, such substantial injury as inadequacy of price should have been proved to have occurred in order to bring the case within s. 311. *Marnaghten v. Mahabir Pershad Singh*, I. L. R. 9 Calc. 656, referred to and followed. *ARUNACHELLAM v. ARUNACHELLAM*

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### (c) RIGHT OF PURCHASERS—RECOVERY OF PURCHASE-MONEY.

55.—*Suit to recover purchase-money—Civil Procedure Code, ss 313, 315—Want of saleable interest—Order confirming sale, effect of on suit* [P bought certain land at a sale in execution of a decree. Before the purchase-money was paid, P applied to the Court by petition to set aside the sale and return the deposit money on the ground that the judgment-debtor had no saleable interest in the land. The Court rejected the petition and confirmed the sale on the 15th March 1881. The sale was subsequently set aside by a decree obtained by P in a suit against P, and the judgment-creditor. P then sued the judgment-creditor to recover the purchase-money. The District Judge dismissed the suit on the ground that P was debarred from suing by the order of 15th March 1881: *Held*, that the order did not conclude P from bringing this suit. *PACHAYAPPAN v. NARAYANA*.

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# SALE OF GOODS, AGREEMENT RE- LATING TO.

See STAMP ACT, 1879, SCH. II, CL. 2 (a).

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# SALE OF GOODS BY DESCRIPTION.

See CONTRACT ACT, s. 78.

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# SANCTION TO PROSECUTION.

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## (1) APPLICATION FOR AND GRANT OF SANCTION.

1.—*Effect of grant of sanction—Criminal Procedure Code (Act X of 1882), ss 195 and 478—Civil Court's power to proceed under s. 478 after sanction given to a private person—Dismissal of a complaint by a private person, Effect of.* [The granting of sanction to a private person under cl (a) of s. 195 of the Code of Criminal Procedure (Act X of 1882) does not debar a Civil Court from proceeding under s. 478, nor can the dismissal by a Magistrate of a complaint made by a private person be held to be a bar, till set aside, to a proceeding under that section. *QUEEN-EMPRESS v. SHANKAR*.

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2.—*Practice in granting sanction—Criminal Procedure Code (Act X of 1882), s 195—Revisory power, Exercise of, by High Court.* [When Subordinate Courts grant sanction to prosecute under s. 195 of the Criminal Procedure Code, it is incumbent on them so to frame the proceedings before them as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not. A Magistrate, in disposing of a charge of theft, delivered the following judgment: "The charge of theft of doors and

**SANCTION TO PROSECUTION—contd.****(1) APPLICATION FOR AND GRANT OF SANCTION—concluded.**

windows is not proved at all against the accused. They are acquitted." There was no further record of the proceedings. On an application to the High Court to revoke the sanction: *Held* that the mere fact of the charge laid by the complainant not having been proved, was not in itself sufficient ground for granting sanction to prosecute him under ss. 182 and 211 of the Penal Code, and as, beyond the judgment of the Magistrate, there was nothing on the record to show that there were sufficient grounds for granting the sanction, it should be revoked. **KEDAR NATH DAS v. MOHESHI CHUNDER CHUCKERBUTTY.**

[I. L. R. 16 Cal. 661]

**(2) WHERE SANCTION IS NECESSARY.**

3.—*Criminal Procedure Code, s. 195—Registration Act, s. 41—Sanction of Registrar—Condition precedent to trial for forgery of will registered*] A Sub-Registrar acting under s. 41 of the Registration Act, 1877, is a "Court" within the meaning of s. 195 of the Code of Criminal Procedure. His sanction, therefore, was held to be necessary under s. 195 before a Criminal Court could take cognizance of an offence committed before the Registrar while so acting. **IN RE VENKATACHALA.**

[I. L. R. 10 Mad. 154]

4.—*Criminal Procedure Code, 1882, s. 195—Police-officer acting under s. 361—Prosecution for giving false evidence to a police-officer.*] A Police-constable taking down a statement under s. 161 of the Criminal Procedure Code is not a Judge, nor is the place where he officiates a Court. His sanction is, therefore, not necessary under s. 195 of the Criminal Procedure Code, to a prosecution for a false statement made to him, whether the charge be framed singly or alternatively. **QUEEN-EMPRESS v. ISMAL VALAD FATARU.**

[I. L. R. 11 Bom. 659]

5.—*Criminal Procedure Code, s. 195—Registration Act (III of 1877), s. 34—Forged Document registered by Sub-Registrar.*] A Sub-Registrar acting under s. 34 of the Registration Act 1877, is not a "Court" within the meaning of s. 195 of the Code of Criminal Procedure. **QUEEN-EMPRESS v. SUBBA.**

[I. L. R. 11 Mad. 3]

6.—*Registration Act, 1877, ss. 82, 83—Criminal Procedure Code, s. 195*] Certain persons were charged with offences falling under s. 82 of the Indian Registration Act 1877, and also with forgery of a document presented to, and registered by, a Sub-Registrar; the Sub-Registrar having granted sanction to prosecute the persons concerned without holding any enquiry, the Sessions Judge referred the case to the High

**SANCTION TO PROSECUTION—contd.****(2) WHERE SANCTION IS NECESSARY—concluded.**

Court under s. 215 of the Code of Criminal Procedure in order that the commitment might be quashed on the ground that there was no legal sanction—*Held*, that no sanction was necessary as to the charge of forgery, and that the provisions of s. 195 of the Code of Criminal Procedure were not applicable. **QUEEN-EMPRESS v. VYTHILINGA.**

[I. L. R. 11 Mad. 500]

7.—*Criminal Procedure Code (Act X of 1882), s. 195—Sub-Registrar—Forgery—Penal Code (Act XLV of 1860), ss. 463, 467—Court—Judicial inquiry—Administrative inquiry.*] A Sub-Registrar under the Registration Act (III of 1877) is not a Judge, and, therefore, not a "Court" within the meaning of s. 195 of the Code of Criminal Procedure (Act X of 1882). His sanction is, therefore, not necessary for a prosecution for forgery in respect of a forged document presented for registration in his office. *In re Venkatachala*, I. L. R. 10 Mad 154, dissented from. The word "Forgery" is used as a general term in s. 463 of the Penal Code (Act XLV of 1860); and that section is referred to in a comprehensive sense in s. 195 of the Criminal Procedure Code (Act X of 1882), so as to embrace all species of forgery, and thus includes a case falling under s. 167 of the Penal Code. The definition of "Court" given in the Evidence Act (I of 1872) is framed only for the purposes of the Act itself, and should not be extended beyond its legitimate scope. Distinction between a judicial and an administrative inquiry pointed out. **QUEEN-EMPRESS v. TULJA**

[I. L. R. 12 Bom. 36]

8.—*Criminal Procedure Code, s. 195—Registration Act (III of 1877), ss. 34, 35, 41—Forged document registered by Sub-Registrar*] A mortgagor was charged with making a fraudulent alteration in his mortgage-deed which was then registered by a Sub-Registrar: *Held*, that the sanction of the Sub-Registrar was not necessary for a prosecution on a charge of forgery. *In re Venkatachala* (I. L. R. 10 Mad. 154), and *Queen-Emress v Subba* (I. L. R. 11 Mad. 3) explained. **QUEEN-EMPRESS v. SOBHANADRI.**

[I. L. R. 12 Mad. 201]

**(3) NOTICE OF SANCTION.**

9.—*Criminal Procedure Code, s. 195—Notice to accused.*] A conviction for preferring a false complaint is not illegal only by reason of the prosecution having been sanctioned without notice previously given to the accused. Sanctioning a prosecution for an offence is a judicial act, and the party to whose prejudice it is done must be previously heard and a judgment formed upon legal evidence. In cases in which the Magistrate dismisses the original complaint upon a report from the Police, there is no legal evidence before him

SANCTION TO PROSECUTION—*contd.*(3) NOTICE OF SANCTION—*concluded.*

on which to form his judgment. In cases, however, in which the Magistrate examines the complainant and hears the evidence and acquits or discharges the accused, and then, without notice to the complainant, sanctions this prosecution for preferring a false charge, sanction cannot be said to be improperly given. *QUEEN-EMPRESS v. BEARI.*

[I. L. R. 10 Mad. 232]

10.—*Criminal Procedure Code, s. 195—Omission to give notice of sanction to accused*.] A Magistrate in disposing of a charge of theft, delivered the following judgment. "The charge of theft of doors and windows is not proved at all against the accused. They are acquitted." There was no further record of the proceedings. Immediately on the judgment being delivered, the pleader appearing for the accused applied for sanction to prosecute the complainant under ss. 182 and 211 of the Penal Code. The Magistrate refused to hear the application then, on the ground that it was not the proper time fixed by him to hear applications. The attorney for the complainant, who had expressed his willingness to have the application heard and disposed of there and then intimated that he was prepared to show cause why sanction should not be granted, and asked that notice of any future application might be given to the complainant. The accused renewed the application the following day without notice to and in the absence of the complainant or his attorney, and the Magistrate granted the sanction asked for. On an application to the High Court to revoke the sanction: *Held*, that the Magistrate did not exercise a proper discretion under the circumstances in neglecting to give the complainant notice of the application, and an opportunity of being heard. *KEDARNATH DASS v. MOHESH CHUNDER CHUCKERBUTTY.*

[I. L. R. 16 Calc. 661]

## (4) NATURE, FORM AND SUFFICIENCY OF SANCTION.

11.—*Form of sanction—Suggestion that persons ought to be prosecuted.*] When a Subordinate Magistrate, after trying a case, sent the record to the District Magistrate with a suggestion that certain persons ought to be prosecuted under s. 211 of the Penal Code, the High Court held that this did not constitute a sanction to prosecute. IN THE MATTER OF THE PETITION OF KHEPU NATH SIKDAR *KHEPU NATH SIKDAR v. GIRISH CHUNDER MUKERJI.*

[I. L. R. 16 Calc. 730]

## (5) POWER TO GRANT SANCTION.

12.—*Criminal Procedure Code, 1882, s. 195—Sanction to prosecute—"Subordinate Court, what is a—Sanction to prosecute refused by Subordinate Judge in suit over Rs. 5,000—Jurisdiction*

SANCTION TO PROSECUTION—*contd.*(5) POWER TO GRANT SANCTION—*continued.*

*of District Court to grant sanction in cases to which appeal lies to High Court from Subordinate Judge.*] In matters relating to the grant of sanction to prosecute under s. 195 of the Criminal Procedure Code (Act X of 1882), a Court is regarded as "Subordinate" to another Court where the latter is the Court to which an appeal from the former *ordinarily* lies, and an application for such sanction must be made to such superior Court even in those particular cases in which an appeal lies to some other Court, *e. g.*, to the High Court. A decree-holder applied to the first class Subordinate Judge for sanction to prosecute his judgment-debtor under ss. 206 and 421 of the Indian Penal Code, for fraudulent concealment of certain moveable property, worth about Rs. 10,000, awarded by the decree. This application was rejected by the Subordinate Judge. The District Judge declined to interfere, on the ground that the decree being appealable to the High Court the High Court alone could deal with the application under s. 195 of the Criminal Procedure Code. *Held*, that though the decree in the present instance was appealable to the High Court, still as appeals from the Court of the first class Subordinate Judge ordinarily lay to the District Court, the former was *subordinate* to the latter Court within the meaning of s. 195 of the Criminal Procedure Code. IN RE ANANT RAMCHANDRA LOTLIKAR.

[I. L. R. 11 Bom. 438]

13.—*Criminal Procedure Code, s. 195—Sanction for prosecution of witness for perjury by village Munsif.*] V was tried and convicted under s. 193 of the Penal Code for giving false evidence before the Court of a village Munsif in a suit in which V was defendant. The village Munsif sanctioned the prosecution of V under s. 195 of the Code of Criminal Procedure. On appeal the Sessions Judge acquitted V on the ground that a village Munsif had no power to sanction the prosecution because s. 195 of the Code of Criminal Procedure did not apply. *Held* that the village Munsif had power to grant the sanction and that the objection to the conviction was bad in law. *QUEEN-EMPRESS v. VENKAYYA.*

[I. L. R. 11 Mad. 375]

14.—*Criminal Procedure Code, s. 195—Sanction for prosecution for giving false evidence in a suit under Act XII of 1881 tried by an Assistant Collector of the second class—Sanction granted by Collector—Jurisdiction of Sessions Judge to entertain application to revoke sanction.*] A suit for arrears of rent under s. 93, cl. (a), Act XII of 1881 was heard by a Tahsildar having the powers of and acting as an Assistant Collector. Application was made to him for an order sanctioning the prosecution of a witness for having given false evidence in the course of the trial of the suit. The Tahsildar referred the matter to the Magistrate of the District, who

SANCTION TO PROSECUTION—*contd.*(5) POWER TO GRANT SANCTION—*concluded.*

was the Collector, and that officer made an order sanctioning the prosecution. From this order the witness applied to the Court of the District Judge to revoke the sanction. That Court being of opinion that the Court of the Collector was not subordinate to it in the matter within the meaning of s 195 of the Code of Criminal Procedure, 1882, declined to interfere. The witness then applied to the Commissioner of the Division, and that officer, holding that he had no jurisdiction in the matter, also declined to interfere. On application by the witness to the High Court for revision of the order of the Court of the District Judge: *Held*, that the Court of a Collector, when granting sanction for prosecution under s. 195 of the Code of Criminal Procedure, 1882, in respect of false evidence given in the course of the trial of a rent-case from the final decision in which there was no appeal to the Court of the Judge of the District, was still to be deemed subordinate to it, within the meaning of that section, and the Court of the District Judge may be taken to be the Court to which appeals from the decisions of the Collector ordinarily lie. *HARI PRASAD v. DEBI DIAL.*

[I. L. R. 10 All. 582]

15.—*Criminal Procedure Code (Act X of 1882), ss. 195, 476—Order sanctioning prosecution—Evidence necessary for such order.* Before a Court is justified in making an order under s. 476, directing the prosecution of any person, it ought to have before it direct evidence, fixing the offence upon the person whom it is sought to charge, either in the course of the preliminary enquiry referred to in that section, or in the earlier proceedings out of which the enquiry arises. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that the person had been guilty of an offence; but there must be distinct evidence of the commission of an offence by the person who is to be prosecuted. *Queen v. Bayoo Lal* (I. L. R. 1 Calc. 450) and *In the matter of the Petition of Kali Prasunno Bagchee* (23 W. R. Cr. 23), followed. *IN THE MATTER OF THE PETITION OF KHEPU NATH SIKDAR. KHEPU NATH SIKDAR v. GRISH CHUNDER MUKERJI.*

[I. L. R. 16 Calc 730]

## (6) REVOCATION OF SANCTION.

16.—*Power to revoke sanction—Distinction between a sanction granted to a private person and a Complaint by a Court—Criminal Procedure Code (Act X of 1882), ss. 195 and 476.* S. 195 of the Criminal Procedure Code (Act X of 1882) distinguishes between the sanction granted by a Court to a prosecution by a private individual and a complaint made by the Court itself. A superior Court to which such Court is subordinate may revoke the sanction granted in the former case to the private prosecution, but it has no

SANCTION TO PROSECUTION—*concl.*(6) REVOCATION OF SANCTION—*concluded.*

power in the latter case to set aside a complaint duly made by a subordinate Court. *Ishri Prosad v. Shum Lal*, I. L. R. 7 All. 871; *Queen v. Bayoo Lal*, I. L. R. 1 Calc 450, and *Gyan Chunder Roy v. Protap Chunder Dass*, I. L. R. 7 Calc. 208, referred to. *QUEEN-EMPRESS v. RACHAPPA.*

[I. L. R. 13 Bom. 109]

## (7) NON-COMPLIANCE WITH SANCTION.

17.—*Criminal Procedure Code, s. 195—Effect on sanction of death of grantee.* A Civil Court granted sanction under s. 195 of the Code of Criminal Procedure to the defendant in a suit to prosecute certain witnesses for perjury. The defendant died without having preferred a complaint. His brother, thereupon, preferred a complaint and the Magistrate dismissed it under s. 253 of the Code of Criminal Procedure, on the ground that the sanction died with the defendant. The Sessions Judge held that the sanction was alive and directed the District Magistrate to make further inquiry under s. 437. *Held*, that the Sessions Judge was right. *IN RE THATHAYYA.*

[I. L. R. 12 Mad. 47]

## SANCTION TO SUE.

See RIGHT OF SUIT—CHARITIES.

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## SECURITY FOR COSTS

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## SECURITY FOR COSTS—continued.

## (1) SUITS.

1.—*Poverty—Speculative suit.*] The mere fact that a plaintiff is a poor man, and has parted with a portion of his interest in the subject-matter of the suit for the purpose of obtaining funds to carry on the suit, is no sufficient ground to ask that security for the costs of the suit may be required of him: it is otherwise where he is not the real litigant, but a mere puppet in the hands of others. *KHAJAH ASSENOOLLAJOO v. SOLOMON*

[I. L. R. 14 Calc. 533]

## (2) APPEALS.

2.—*Civil Procedure Code, s. 549—Security for costs—Amount of security not fixed—Dismissal of appeal—Practice.*] S. 549 of the Civil Procedure Code contemplates an order by which some ascertained amount of security is required. The last paragraph of this section seem to contemplate that, on failure to furnish security within the time fixed, an order for rejecting the appeal should be obtained from the Court that gave the order to furnish security. Upon the application of the respondent in a second appeal pending before the High Court, an order was passed requiring the appellant to furnish security for the costs of the appeal, and to lodge such security at any time before the hearing. This order purported to be made under s. 549 of the Civil Procedure Code, but neither the application nor the order stated the amount of the security required. At the hearing at the appeal, no security having been lodged, the respondent objected that, with reference to the terms of s. 549, the Court had no option but to dismiss the appeal: *Held* that the objection had no force no such order as was contemplated by s. 549 having been made. *Held* also that the proper course was to have applied to the Judge who passed the order for security, at any time before the case came on for hearing, for the rejection of the appeal, and that it was too late at the hearing to ask the Court to reject the appeal. *THAKUR DAS v. KISHORI LAL*.

[I. L. R. 9 All. 164]

3.—*Civil Procedure Code, 1882, s. 549—Application for extension of period for finding security for costs of appeal after default.*] S. 549 of the Code of Civil Procedure being imperative, the time cannot be extended after the expiry of the period fixed in the order directing the appellant to find security for the costs of an appeal. *Haidri Bai v. East Indian Railway Company*, I. L. R. 1 All. 687, followed. *SHRAJUDIN v. KRISHNA*.

[I. L. R. 11 Mad. 190]

4.—*Civil Procedure Code, 1882, s. 549—Poverty of appellant—Vexatious conduct—Ground for requiring security.*] An appellant (residing within the jurisdiction) who has been ordered to pay the costs of the original hearing and has not done so, cannot be required to furnish security for such costs before he is allowed to prosecute his

## SECURITY FOR COSTS—concluded.

## (2) APPEALS—concluded.

appeal, unless his conduct be shown to be vexatious—that is such as indicates a wilful determination on his part not to obey the order of the Court. His not paying, if it be caused by inability to pay, is not vexatious. *AIKED BIN ESSA KALIFFA v. ESSA BIN KALIFFA*.

[I. L. R. 13 Bom. 458]

## SECURITY FOR GOOD BEHAVIOUR.

—*Criminal Procedure Code, ss. 107, 112, 117, 118, 239—“Show cause”—Burden of proof—Joint inquiry—Opposing factions dealt with in one proceeding—Nature and quantum of evidence necessary before passing order for security.*] Upon general principles, every person is entitled, in the absence of exceptional authority conferred by the law to the contrary effect, when required by the judiciary either to forfeit his liberty or to have his liberty qualified, to insist that his case shall be tried separately from the cases of other persons similarly circumstanced. Where an order has been passed under s. 107 of the Criminal Procedure Code requiring more persons than one to show cause why they should not severally furnish security for keeping the peace, the provisions of s. 239 read with s. 117 are applicable, subject to such modifications as the latter section indicates, and to such procedure as the exigencies of each individual case may render advisable in the interests of justice. A joint inquiry in the case of such persons is therefore not *ipso facto* illegal; and even in cases where one and the same proceeding taken by the Magistrate under ss. 107, 112, 117, and 118 improperly deals with more persons than one, the matter must be considered upon the individual merits of the particular case, and would at most amount to an irregularity which, according to the particular circumstances, might or might not be covered by the provisions of s. 537. *Queen-Empress v. Nathu*, I. L. R. 6 All. 214, and *Empress v. Batuk*, Weekly Notes All. 1881, p. 54, referred to. An order passed by a Magistrate under ss. 107 and 112 of the Criminal Procedure Code, requiring any person to “show cause” why he should not be ordered to furnish security for keeping the peace, is not in the nature of a rule nisi implying that the burden of proving innocence is upon such person. The onus of proof lies upon the prosecution to establish circumstances justifying the action of the Magistrate in calling upon persons to furnish security. *Dunne v. Hem Chandra Chowdhry*, 4 B. L. R. F. B. 46, and *Queen v. Nirunjun Sing*, 3 N. W. 431, referred to. Where, according to the nature of the information received by the Magistrate, there were two opposing parties inclined to commit a breach of the peace: *Held*, applying by analogy the principles relating to the trial of members of opposing factions engaged in a riot, that the Magistrate acted irregularly in taking steps against both parties jointly, and in holding the inquiry in a single proceeding. Such a procedure is not *ipso facto* null and void, but only



## SECURITY FOR GOOD BEHAVIOUR— concluded.

where the accused have been prejudiced by it. *Empress v. Luchan*, Weekly Notes All. 1881, p. 28, and *Hossein Buksh v. The Empress*, I. L. R. 6 Calc. 96, referred to. In proceedings instituted under s. 107 of the Criminal Procedure Code against more persons than one, it is essential for the prosecution to establish what each individual implicated has done to furnish a basis for the apprehension that he will commit a breach of the peace. In holding such an inquiry it is improper to treat what is evidence against one of such persons as evidence against all, without discriminating between the cases of the various persons implicated. *Queen-Empress v. Nathy*, I. L. R. 6 All. 214, referred to. Although in an inquiry under s. 117 the nature or quantum of evidence need not be so conclusive as is necessary in trials for offences, the Magistrate should not proceed purely upon an apprehension of a breach of peace, but is bound to see that substantial grounds for such an apprehension are established by proof of facts against each person implicated, which would lead to the conclusion that an order for furnishing security is necessary. What the nature of the facts should be depends upon the circumstances of each case, but where the nature of the Magistrate's information requires it, overt acts must be proved before an order s. 118 can be made, and such an order cannot be passed against any person simply on the ground that another is likely to commit a breach of the peace. *Queen v. Abdool Hugg*, 20 W. R. Cr. 57, *Goshain Luchman Pershad Poorce v. Pohanp Narain Poorce*, 24 W. R. Cr. 30, *Rajah Run Bahadoor v. Rance Tillessuree Koer*, 22 W. R. Cr. 79, and *In the matter of Kashi Chunder Doss*, 10 B. L. R. 441; 19 W. R. Cr. 47, referred to. **QUEEN-EMPRESS v. ABDUL KADIR.**

[I. L. R. 9 All. 452]

## SENTENCE.

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1. Cumulative sentences	...	961
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### (1) CUMULATIVE SENTENCES.

1.—*Penal Code, s. 71 and ss. 147, 149, and 325—Rioting—Grievous hurt committed in the course of riot and in prosecution of the common object—Distinct offences—Separate sentences—Act VIII of 1882, s. 1—Criminal Procedure Code, s. 235.* S. 149 of the Penal Code creates no offence, but was intended to make it clear that an accused person whose case falls within its terms cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object. In prosecution of the common object of an unlawful assembly *M*, with his own hand, caused grievous hurt. *M* and other members of

W., D.

## SENTENCE—continued.

### (1) CUMULATIVE SENTENCES—continued.

the assembly, as to whom it did not appear whether or not any of them personally used force or violence, were convicted of rioting under s. 117 and grievous hurt under s. 325 of the Penal Code, and were each sentenced to separate terms of imprisonment for each offence. The highest aggregate punishment, which was *M*'s. was six years rigorous imprisonment, being one year for rioting and five years for causing grievous hurt. *Held* that, assuming s. 71 of the Penal Code to be applicable, the sentences were not illegal, as the combined periods of imprisonment did not, in the case of any prisoner, exceed the maximum punishment of seven years' rigorous imprisonment which could have been awarded for the offence punishable under s. 325. *Held* also, that the riot could not, in any of the cases, be considered a part of the offence under s. 325, that s. 71 did not apply, and that the sentences were legal. *Queen-Empress v. Ram Partab*, I. L. R. 6 All. 121, dissented from. *Queen-Empress v. Dangar Singh*, I. L. R. 7 All. 29, *Queen-Empress v. Ram Sarup*, I. L. R. 7 All. 767, *Queen v. Rubbee-oallah*, 7 W. R. Cr. 13, *Loke Nath Sarkar v. Queen-Empress*, I. L. R. 11 Calc. 349, *Queen-Empress v. Parshad*, I. L. R. 7 All. 411, *Chandru Kant Bhat-tacharjee v. Queen-Empress*, I. L. R. 12 Calc. 498, and *Rea v. Tekajay bin Tanawan*, I. L. R. 1 Bom. 214, referred to. **QUEEN-EMPRESS v. BISHESHAR.**

[I. L. R. 9 All. 645]

2.—*Personating public servant—Extortion—Conviction for each offence proved necessary—Separate sentences—Sentence necessary upon each conviction—Penal Code Act XLV of 1860, ss. 71, 179, 313—Criminal Procedure Code, ss. 35, 235.* Where more than one offence is proved in respect of which the accused has been charged and tried, a conviction for each such offence must follow, whether s. 71 of the Penal Code applies to the case or not; and, subject to the provisions of s. 71, a separate sentence must be passed in respect of each such conviction. Under s. 35 of the Criminal Procedure Code, sentences of imprisonment cannot be passed so as to run concurrently. In a trial for offences under ss. 170 and 383 of the Penal Code, committed in the same transaction, it appeared that but for personating a public servant the accused would not have been in a position to commit the act of extortion complained of. *Held* that the first and second paragraphs of s. 71 of the Penal Code did not apply to the case; that the third paragraph also did not apply, because the words "constitute an offence" refer to the definitions of offences contained in the Code, irrespective of the evidence whereby the acts complained of are proved, and personating a public servant as defined in s. 170 was not a constituent element of extortion as defined in s. 383; that in the present case the former offence was completed before the latter had begun; and that separate sentences for each offence were, therefore, not illegal. **QUEEN-EMPRESS v. WAZIR JAN.**

[I. L. R. 10 All. 58]

## SENTENCE—continued.

## (1) CUMULATIVE SENTENCES—continued.

3.—*Criminal Procedure Code*, ss. 25, 235—*Penal Code*, ss. 379, 380, 454—*House-breaking in order to the commission of theft—Theft—Separate convictions and sentences.*] Under ss. 35 and 235 of the *Criminal Procedure Code* a Magistrate may legally pass a separate sentence of two years' rigorous imprisonment and fine under each of the ss. 379 or 380 and 454 of the *Penal Code* for house-breaking in order to the commission of theft, and theft, the two offences forming part of the same transaction and being tried together. In such a case, where the prisoner had been three times previously convicted: *Held* that the better course would have been to commit him to the Court of Session under ss. 454 and 75 of the Code. But a Sessions Judge trying such a case under s. 379 and s. 454 would under no circumstances be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454 and of four years' imprisonment under s. 380. The latter portions of ss. 454 and 457 were framed to include the cases of house-trespassers and house-breakers who had not only intended to commit but had actually committed theft. *Queen-Empress v. Ajudha*, I. L. R. 2 All. 644, and *Queen-Empress v. Sakharan Bhan*, I. L. R. 10 Bom. 493, referred to. *QUEEN-EMPRESS v. ZOR SINGH*.

[I. L. R. 10 All. 146]

4.—*Criminal Procedure Code*, s. 35—*Penal Code*, ss. 71, 72, 352, 426, 457—*Separate convictions for different offences in the same transaction.*] An accused person was convicted under s. 457 of the *Penal Code* of house-breaking by night in order to commit an offence (mischief and assault), and also under ss. 426 and 352 for the offences of mischief and assault, and punished separately for each offence. These offences formed parts of one transaction: *Held*, that the sentences were legal. *QUEEN-EMPRESS v. NIRICHAN*.

[I. L. R. 12 Mad. 36]

5.—*Separate sentences for rioting and grievous hurt—Penal Code*, s. 71, paras. 1, 144, 147, 148, 334—*Act VII of 1882—Criminal Procedure Code (Act X of 1882)*, s. 35 *Per Curiam* (TOTTENHAM J., dissenting), Separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under s. 149 of the *Penal Code*. *Empress v. Ram Partab*, I. L. R. 6 All. 121, approved. *Loke Nath Sarkar v. Queen-Empress*, I. L. R. 11 Calc. 349, overruled. *NILMONEY PODDAR v. QUEEN-EMPRESS*.

[I. L. R. 16 Calc. 442]

6.—*Rioting—Distinct offences—Conviction for rioting and causing hurt and grievous hurt—Separate conviction for more than one offence when acts combined form one offence—Abetment of grievous hurt during riot—Penal Code (Act XLV of 1860)*, ss. 147, 323, 325 ] Six accused persons were charged

## SENTENCE—continued.

## (1) CUMULATIVE SENTENCES—concluded.

with and convicted of rioting, the common object of which was causing hurt to two particular men. Four of the accused were also charged with, and convicted of, respectively, causing hurt during the riot to the two men and a woman, and were sentenced to separate terms of imprisonment under ss. 147 and 323 of the *Penal Code*. *Held*, that the sentences were legal. During the course of a riot, in which X was attacked and beaten by several of the rioters, one of them A inflicted grievous hurt on X by breaking his rib with a blow struck with a *lathi*; A and three others of the rioters were charged with offences under ss. 147 and 325 of the *Penal Code*, and A was convicted under those sections. The other three were convicted under s. 147 and also under s. 325 read with s. 109. Separate sentences were passed on A and also on the other three for each of the offences: *Held*, that the sentences on A were legal, but that as there was nothing to show that the other three had abetted the particular blow which caused the grievous hurt, although they had each of them assaulted X, the conviction of them under s. 325 read with s. 109 could not be supported. IN THE MATTER OF THE PETITION OF MOHUR MIR *v.* THE QUEEN-EMPRESS. IN THE MATTER OF THE PETITION OF KALI ROY *v.* THE QUEEN-EMPRESS.

[I. L. R. 16 Calc. 725]

7.—*Criminal Procedure Code*, s. 35—“*Distinct offences*”—*Penal Code*, ss. 75, 411 ] A person convicted under ss. 411 and 75 of the *Penal Code* is not convicted of “distinct offences” within the meaning of s. 35 of the *Criminal Procedure Code*. *Queen-Empress v. Zor Singh*, I. L. R. 10 All. 146, explained. Where an offence under s. 411 read with s. 75 of the *Penal Code* appears to be deserving of a greater punishment than the Magistrate trying it can award, the best course for him to adopt is to commit the accused for trial to the Court of Session. *QUEEN-EMPRESS v. KHALAK*.

[I. L. R. 11 All. 393]

## (2) IMPRISONMENT:

## (a) GENERALLY.

8.—*Criminal Procedure Code*, s. 488—*Maintenance—Wife—Breach of order for monthly allowance—Warrant for levying arrears for several months—Imprisonment for allowance remaining unpaid after execution of warrant—Act I of 1868*, s. 2, cl. 18—“*Imprisonment*.”] Where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding, and arrears levied under a single warrant, the Magistrate acting under s. 488 of the *Criminal Procedure Code* has no power to pass a heavier sentence in default than one month's imprisonment, as if the warrant only related to a single breach of the order. *Per EDM, C. J.*—S. 488 contemplates that a separate warrant should issue for

## SENTENCE—continued.

## (2) IMPRISONMENT—concluded.

## (a) GENERALLY—concluded.

each separate monthly breach of the order. *Per* STRAIGHT, J.—The third paragraph of s. 488 ought to be strictly construed and as far possible, construed in favour of the subject. Under the section, a condition precedent to the infliction of a term of imprisonment is the issue of a warrant in respect of each breach of the order directing maintenance, and where, after distress has been issued, *nulla bona* is the return. The section contemplates one warrant and one punishment, and not a cumulative warrant and cumulative punishment. Also *Per* STRAIGHT, J.—With reference to s. 2, cl (18) of the General Clauses Act (of 1868), “imprisonment” in s. 488 of the Criminal Procedure Code may be either simple or rigorous. *Per* OLD-FIELD, J.—A claim for accumulated arrears of maintenance arising under several breaches of order may be dealt with in one proceeding, and arrears levied under a single warrant. *QUEEN-EMPRESS v. NARAIN*.

[I. L. R. 9 All. 240]

9—*Criminal Procedure Code*, 1882, s. 35—*Concurrent sentences*.] Under s. 35 of the Criminal Procedure Code, sentences of imprisonment cannot be passed so as to run concurrently. *QUEEN-EMPRESS v. WAZIR JAN*.

[I. L. R. 10 All. 58]

10—*Criminal Procedure Code*, s. 395—*Imprisonment in lieu of whipping*—*Infliction of fine in lieu of whipping*.] A Court has no power under s. 395 of the Criminal Procedure Code to revise its sentence of whipping by inflicting a fine. In cases where the sentence of whipping cannot be carried out, all that the Court can do is either to remit the whipping altogether, or to sentence the offender, in lieu of such whipping or of so much of the sentence of whipping as was not carried out, to imprisonment, &c. The word “imprisonment” in s. 395 of the Criminal Procedure Code means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine. *QUEEN-EMPRESS v. SHEODIN*.

[I. L. R. 11 All. 308]

## (b) IMPRISONMENT IN DEFAULT OF FINE.

11.—*Criminal Procedure Code*, s. 33—*Penal Code*, s. 65.] S. 33 of the Code of Criminal Procedure 1882, does not authorise a Magistrate to pass a sentence in default of payment of fine in excess of the term prescribed by s. 65 of the Indian Penal Code. *Reg. v. Muhammad Saib*, I. L. R. 1 Mad. 277, was overruled in 1881. *QUEEN-EMPRESS v. VENKATESAGADU*.

[I. L. R. 10 Mad. 165]

## ANONYMOUS CASE.

[I. L. R. 10 Mad. 166 note]

## SENTENCE—concluded.

## (3) SENTENCE AFTER PREVIOUS CONVICTION.

12.—*Penal Code*, Act XLV of 1860, ss. 75, 179, 511—*Attempt to commit an offence—Enhancement of sentence for previous conviction—Previous conviction*.] A person who has been convicted of the offence of theft (an offence punishable under Chapter XVII of the Penal Code) does not, on being convicted of an attempt to commit the offence of theft, become liable to the enhanced punishment allowed by s. 75 of the Penal Code. *QUEEN-EMPRESS v. SRICHARAN BAURI*.

[I. L. R. 14 Calc. 357]

## (4) WHIPPING.

13—*Criminal Procedure Code*, s. 395—*Imprisonment in lieu of whipping*—*Court not authorized to inflict fine in lieu of whipping*.] A Court has no power under s. 395 of the Criminal Procedure Code to revise its sentence of whipping by inflicting a fine. In cases where the sentence of whipping cannot be carried out, all that the Court can do is either to remit the whipping altogether, or to sentence the offender, in lieu of such whipping or of so much of the sentence of whipping as was not carried out, to imprisonment, &c. The word “imprisonment” in s. 395 of the Criminal Procedure Code means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine. *QUEEN-EMPRESS v. SHEODIN*.

[I. L. R. 11 All. 308]

## SERVICE OF PROCESS.

*See* COMPANY—WINDING UP—GENERAL CASES.

[I. L. R. 11 Bom. 241]

*See* FOREIGN JUDGMENT

[I. L. R. 11 Bom. 241]

## SERVICE OF SUMMONS

1.—*Army Act* of 1881, ss. 114, 151—*Civil Procedure Code*, s. 468.] In a suit against a soldier to recover a debt not amounting to £30: *Semble*—The Commanding Officer of the defendant is bound to cause the summons of the Small Cause Court to be served on him. *MAHOMED v. AGGAS*.

[I. L. R. 10 Mad. 319]

2.—*Madras Act III* of 1869, ss. 2, 3.] Where a summons to a witness, issued under Madras Act III of 1869, was shown to a person and taken back: *Held* that the summons had not been served. *IN RE KUPPAN*.

[I. L. R. 11 Mad. 137]

3—*Army Act* 1881, s. 144—*Sub-Conductor, Ordnance Department, is a soldier—Civil Procedure Code*, s. 468.] A Sub-Conductor of Ordnance on the Madras Establishment of Her Majesty's Indian

**SERVICE OF SUMMONS—concluded.**

Military Forces, holding a warrant from the Government of Madras, is a soldier within the meaning of s. 144 of the Army Act, 1881. In a suit to recover Rs. 183-7-0, a summons having been sent by the Court to the Commissary of Ordnance to be served on the defendant, his subordinate, the Commissary of Ordnance returned the summons unserved and referred to s. 141 of the Army Act, 1881, as his reason for such action: *Held*, that the Commissary of Ordnance was bound to serve the summons, under s. 468 of the Code of Civil Procedure, although the defendant might be entitled to the privilege given by s. 144 of the Army Act, 1881. **ABRAHAM v. HOLMES.**

[I L. R. 11 Mad. 475]

4.—*Civil Procedure Code, 1882, ss. 99A and 72—Application for fresh summons—Limitation*]. An application for a fresh summons to a defendant, the summons originally issued having been returned unserved, is within the period prescribed by s. 99A of the Civil Procedure Code (Act XIV of 1889), if made within one year from the date of the nazir's countersignature below the bailiff's endorsement of non-service the nazir being the proper officer of the Court to whom under s. 72 of the Code the summons is delivered for service, and who is to return it to the Court if unserved. **PARSOTAM VITHAL v. ABDUL REHMANBHAI.**

[I. L. R. 13 Bom. 500]

**SESSIONS JUDGE, JURISDICTION OF.***See OFFENCE RELATING TO DOCUMENTS.*

[I L. R. 12 Mad 54]

**SESSIONS JUDGE, POWER OF.**

—*Criminal Procedure Code s. 289—"No evidence"*—*Acquittal of accused without taking opinions of assessors.*] The words "there is no evidence" in s. 289 of the Code of Criminal Procedure 1882, cannot be extended to mean *no satisfactory, trustworthy, or conclusive evidence*; but the third paragraph of the section means that if at a certain stage of a Sessions trial the Court is satisfied that there is not on the record any evidence which, even if it were perfectly true, would amount to legal proof of the offence charged, then the Court has power, without consulting the assessors, to record a finding of not guilty. But where a Court so acts only because it considers the evidence for the prosecution unsatisfactory, untrustworthy, or inconclusive, it acts without jurisdiction, and its order discharging the accused is illegal. Even if not illegal for want of jurisdiction, such action is a serious irregularity, which may or perhaps must have caused a failure of justice within the meaning of s. 537 of the Code of Criminal Procedure. *In the matter of the Petition of Nairain Dass*, I. L. R. 1 All. 610, referred to. **QUEEN-EMPRESS v. MUNNA LAL**

[I. L. R. 10 All. 414]

**SESSIONS JUDGE, POWER OF—concl'd**

—*Sanction to prosecute by District Judge—Trial by same Judge as Sessions Judge—Criminal Procedure Code (Act X of 1882), ss. 195, 487—Penal Code, s. 196*]. A Sessions Judge is not debarred by s. 487 of the Criminal Procedure Code from trying a person for an offence punishable under s. 196 of the Penal Code, when he has, as District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure. *Madhub Chunder Mozumdar v. Norodeep Chunder Pandit* (I. L. R. 16 Calc. 121), overruled; *Empress v. D'Silva* (I. L. R. 6 Bom. 479), referred to. **QUEEN-EMPRESS v. SARAT CHANDRA RAKHIT.**

[I. L. R. 16 Calc. 766]

**SET-OFF.**

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|--------------------|-----|-----|
| 1. Set-off allowed | ... | 968 |
| 2. Cross-decrees   | ..  | 969 |

**(1) SET-OFF ALLOWED**

3.—*Subordinate Judge invested with Small Cause Judge's powers—Civil Procedure Code (Act XIV of 1882), s. 111—Set-off exceeding pecuniary jurisdiction of the Small Cause powers of the Subordinate Judge—Practice*]. In a suit brought by the plaintiff to recover Rs. 36-7-9 from the defendant under the Small Cause jurisdiction of a Subordinate Judge, the defendant claimed to set-off Rs. 72, which exceeded the pecuniary jurisdiction of the Judge as a Small Cause Judge. On reference to the High Court, *held*, that the set-off might be pleaded by the defendant. The Judge would exercise his Small Cause Court jurisdiction in trying the claim of the plaintiff and his ordinary jurisdiction in trying the set-off. **RAMPRATAP v. GANESH RANGNATH.**

[I. L. R. 12 Bom. 31]

2.—*Civil Procedure Code, ss. 111, 216—Suit for dissolution of partnership.*] A suit for dissolution of partnership in which the claim was valued at Rs. 2,000, with a prayer that such balance as might be found due to the plaintiff upon taking the partnership accounts, might be paid to him, is a suit for money within the meaning of s. 111 of the Code of Civil Procedure, and a plea of set-off may be raised in such a suit, and if in consequence of such plea the Court of First Instance decrees in favour of the defendant a sum above Rs. 5,000, then by reason of the provision in paragraph ii, s. 216 of the Code, an appeal from that decree will lie to the High Court and not to the District Court. **RAMJIWAN MAL v. CHAND MAL.**

[I L. R. 10 All. 587]

3.—*Cross-demand arising out of the same transaction—Civil Procedure Code (Act XIV of 1882), s. 111*]. When the defence raises a cross-demand which is found to arise out of the same transaction as, and is connected in its nature with, the plaintiff's suit, the defendant is entitled to have

## SET-OFF—continued.

## (1) SET-OFF ALLOWED—concluded.

an adjudication of it, although it may not amount to a set-off under s 111 of the Civil Procedure Code *Bhagbat Panda v. Bamdeb Panda* [I L R 11 Calc. 557] relied on, *Clark v. Ruthnaratnam Chetti* (2 Mad H. C 296), referred to. CHISHOLM v. GOPAL CHUNDER SURMA.

[I L R. 16 Calc 711]

## (2) CROSS-DECREES.

4.—*Civil Procedure Code, 1877, s. 246—Execution of cross-decrees—Power of Court executing decree—Bonâ fide purchaser—Presumption of validity of order for sale*]. •If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution, any more than into the correctness of the judgment upon which the execution issues. Notwithstanding anything in s 246 of the Code of Civil Procedure, he is not bound to inquire whether the judgment-debtor has a cross-decree of higher amount against the decree-holder any more than he is to inquire, in an ordinary case, whether the decree, under which execution has issued, has been satisfied or not. These are questions to be determined by the Court issuing execution. Where property sold in execution of a valid decree, under the order of a competent Court, was purchased *bonâ fide* and for full value. *Held*, that the mere existence of a cross-decree for a higher amount in favour of the judgment-debtor, without any question of fraud, would not support a suit by the latter against the purchaser to set aside the sale. *REWA MAHTON v. RAM KISHEN SINGH*.

[I L R. 14 Calc 18]

[L. R. 13 I. A. 106]

*MOTHURA MOHUN GHOSE MUNDUL v AKHOY KUMAR MITTER*.

[I. L. R. 15 Calc. 557]

5.—*Civil Procedure Code, ss. 246, 247, 411—Cross-decrees in same decree—Recovery by Govt. of Court-fees in pauper suit.* A plaintiff suing *in formâ pauperis* to recover property valued at Rs. 60,000 obtained a decree for Rs. 1,439. The Court, with reference to the provisions of s. 411 of the Civil Procedure Code, directed that the plaintiff should pay Rs. 1,196 as the amount of Court-fees which would have been paid by him if he had not been permitted to sue as a pauper. The Collector having applied under s. 411 to recover this amount by attachment of the Rs. 1,439 payable to the plaintiff, the defendant objected that (i) certain costs payable to her by the plaintiff under the same decree, and (ii) a sum of money payable to her by the plaintiff under a decree which she had obtained in a cross-suit in the same Court, should be set off against the Rs. 1,439 payable by her to him, with reference to ss. 246 and 247 of the Code, and that thus nothing would remain due by her which the Government could

## SET-OFF—continued.

## (2) CROSS-DECREES—continued.

recover. No application for execution was made by the plaintiff for his Rs. 1,439, or by the defendant for her costs. In appeal from an order allowing the Collector's application, it was contended that the "subject-matter of the suit" in s 411 of the Code meant the sum which the successful pauper-plaintiff is entitled to get as a result of his success in the suit; but that in the suit and the cross-suit taken together, the plaintiff ultimately stood to lose a small sum, the defendant being the holder of the larger sum awarded altogether: *Held* that the contention had no force, as execution had not been taken out by the plaintiff or the defendant or both, and it could not be said that the Government had been trying to execute the plaintiff's decree, or was a representative of the plaintiff as holder of the decretal order in his favour for Rs. 1,439, so as to bring into operation the special rules of ss. 246 and 247 of the Code between him and the defendant. *Held* also that the plaintiff was one who, in the sense of s 411, had succeeded in respect of part of the "subject-matter" of his suit, and on that part therefore a first charge was by law reserved and secured to the Government, which was justified in recovering it in these proceedings from the defendant, who was ordered by the decree to pay it in the same way as costs are ordinarily recoverable under the Code. *Held* that the decrees in the suit and the cross-suit not having reached a stage in which the provisions of ss 246 and 247 of the Code would come into play, no questions of set-off and consequent reduction or other modification of the "subject-matter" of the suit decreed against the defendant as payable by her to the plaintiff had arisen or could be entertained. *JANKI v. THE COLLECTOR OF ALLAHABAD*.

[I. L. R. 9 All. 64]

6.—*Civil Procedure Code (Act XII of 1832), ss. 233, 248 246—Execution of assigned decree—Set-off against assigned decree partly executed.* A B had obtained a decree against K and T. After the decree had been partially satisfied, A B assigned it to D. Prior to the date of the assignment, K and T had instituted a suit against A B and D, and ultimately obtained a decree against both of them. *Held*, that K and T were entitled to set-off their decree against the unexecuted portion of the decree which had been assigned to D. *KRISTO RAMANI DASSE v. KEDAR NATH CHAKRAVARTI*.

[I. L. R. 16 Calc. 619]

7.—*Civil Procedure Code, s. 246—Limitation*]. Under two decrees of the Sadr Diwani Adalat passed in 1864, A was entitled to two-thirds and B to one-third of certain immovable property, with mesne profits in proportion. Each obtained possession of the immovable property decreed to him. B appealed to the Privy Council from both decrees in respect of the two-thirds awarded to A. In April 1866 pending the appeal, A applied for an account of the mesne profits due to him after set-

## SET-OFF—concluded.

## (2) CROSS-DECREES—concluded.

ting off the mesne profits due to *B*, but as he failed to comply with a condition requiring him to give security for the amount claimed, in case the Privy Council should allow *B*'s appeal, the application was struck off. In January 1867 *B* applied for the mesne profits of the one-third decreed to him, and the Court found Rs. 18,700 to be the amount so due. but on application by *A*. stayed further execution pending the Privy Council's decision. In 1873 the Privy Council dismissed *B*'s appeal. In 1885 *A*, in execution of the Privy Council's decree, applied for Rs. 50,000 as mesne profits in respect of the two-thirds. *B* at the same time applied that the Rs. 18,000 declared in 1867 to be due to him in respect of the one-third might be set-off against the amount claimed by *A*. Held, that the question of the amount due to *A* up to the date when he acquired possession of the two-thirds and which had never yet been decided should be re-opened from the point at which it was left in 1866; that if this amount exceeded the Rs. 18,000 declared in 1867 to be due to *B*, satisfaction of *A*'s claim to that extent should be entered up and the balance recovered from *B*. and that this course if not strictly in accordance with the letter, was in accordance with the spirit of ss. 246, 247 of the Civil Procedure Code, and at all events should be allowed on principles of natural equity: Held also that until the amount due to *A* had been definitely ascertained in the execution department, *B*'s right to maintain his set-off did not arise; that the set-off was, therefore, not barred by limitation; that the order of January 1867 was equivalent to a decree for the amount declared thereby as due to *B*; that when the execution department had determined the amount due to *A*, that decision also would be a decree and that s. 246 of the Code could then be applied. MATADIN v. CHANDI DIN.

[I L. R. 10 All. 188]

## SETTLEMENT.

Col.

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## —, Construction of.

See HINDU LAW—GIFT—CONSTRUCTION OF GIFT, &amp;c.

[I. L. R. 12 Mad. 393]

## (1) MISCELLANEOUS CASES.

—Settlement of a Government Khas Mehal—Enhancement of rent—Regulation VII of 1822—Bengal Act III of 1878—Bengal Act VIII of 1879, ss. 10—14.] In order to make the enhanced rent, stated in a *jummabundi* settled under Reg. VII of 1822, binding upon a tenant, there must be either an assent to that enhancement, or else a compliance with the provisions of the rent law with reference to enhancement of rent in force at the time of such enhancement. *D'Silva v. Raj Coomar Dutt*, 16 W. R. 153; *Enayettollah Meah v. Nobo Coomar Sircar*, 20 W. R. 207; and

## SETTLEMENT—concluded.

## (1) MISCELLANEOUS CASES—concluded.

*Razooddeen Mahomed v. McAlpine*, 22 W. R. 540, followed. The rent of a Government khas mehal can only be enhanced by the same process as the rent on any private estate. *AKSHAYA KUMAR DUTT v. SHAMA CHARAN PATITANDA*.

[I. L. R. 16 Calc. 586]

## SETTLEMENT-OFFICER.

—Duty of Settlement Officer—Entries in *Wajib-ul-urz*.] A settlement-officer should not receive for entry in the *wajib-ul-urz* of a village a mere expression of the views of a proprietor, or enter it upon the records relating to the village, the *wajib-ul-urz* being intended to be the official record of local customs. *UMAN PARSHAD v. GANDHARP SINGH*.

[I. L. R. 15 Calc. 20]

[L. R. 14 I. A. 127]

## —, Suit to set aside order of.

See SONTAL PERGUNNAHS SETTLEMENT REGULATION (III OF 1872), ss. 24, 25.

[I. L. R. 15 Calc. 765]

## SHIP, LOSS OF

See CONTRACT—CONSTRUCTION OF CONTRACTS.

[I L. R. 13 Bom. 15]

## SHIPPING LAW.

—Contribution for general average, Liability for —Jettison—Ship stranded through negligence of master—Liability of owners of saved cargo and ship —Remedies of owners of jettisoned cargo.] The right of contribution in respect of jettisoned cargo is based on the danger to ship and cargo requiring sacrifice to which all must contribute. Such right does not belong to the wrong-doers whose acts have led to the jettison, or to those who are legally responsible for them. Where a ship is stranded through the negligence of her master and thereby ship and cargo are placed in a position of such imminent danger as to make it prudent and necessary to jettison part of the cargo in order to save the remainder and the ship. Held that innocent owners of the jettisoned cargo are entitled to general average: *secus* with regard to the owners of the ship unless their ordinary relations to the shippers have been varied by contract. The rules of maritime law relating to the rights and remedies resulting from a proper case of jettison are. (1) Each owner of jettisoned goods becomes a creditor of ship and cargo saved. (2) He has a direct claim against each of the owners of ship and cargo for a *pro rata* contribution towards his indemnity: which he can recover (a) by direct action; (b) by enforcing through the shipmaster who is his agent for that purpose a lien on

**SHIPPING LAW—concluded.**

each parcel of goods salvaged to answer its proportionate liability. *STRANG STEEL & Co. v. SCOTT & Co.*

[*L. R.* 16 *I. A.* 240  
[*I. L. R.* 17 *Calc.* 362]

**SLANDER**

See **RIGHT OF SUIT—WITNESS.**

[*I. L. R.* 15 *Calc.* 264  
[*I. L. R.* 10 *All.* 425]

See **WITNESS—CIVIL CASES—PRIVILEGES OF WITNESSES**

[*I. L. R.* 15 *Calc.* 264  
[*I. L. R.* 10 *All.* 425]

**SLAVERY.**

—*Spiritual slavery of disciple to guru—Act V of 1843—Agreement to become slave.* This was a suit brought in 1881 by the head of an adhinam for declarations that a *math* was subject to his control; that he was entitled to appoint a manager; that the present head of the *math* was not duly appointed and his nomination by his predecessor was invalid, and for delivery of the possession of the moveable and immoveable properties of the *math* to a nominee of the plaintiff. The claim extended also to religious establishments at Benares and elsewhere connected with the *math*. The *math* was founded by a member of the adhinam. Many previous heads of the *math* had agreed to be "slaves" of the head of the adhinam, but for over sixty years the head of the adhinam had exercised no management over the endowments belonging to the *math*; and in a suit (compromised) of the year 1854 the present pretensions of the adhinam had been denied *in toto*: *Held*, that the agreement of the head of the *math* to become the "slave" of his *guru* could have no legal operation since 1843, and that the adverse possession of the defendant from that year was fatal to any claim of the plaintiff under such agreement. *GIYANA SAMBANDHA PANDARA SANNADHI v. KANDASAMI TAMBIRAN.*

[*I. L. R.* 10 *Mad.* 375]

**SMALL CAUSE COURT, MOFUSSIL. Col.**

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See **APPEAL—ORDERS.**

[*I. L. R.* 11 *Mad.* 130]

See **DISTRICT JUDGE.**

[*I. L. R.* 11 *Mad.* 130]

**SMALL CAUSE COURT, MOFUSSIL—continued.**

See **SUBORDINATE JUDGE, JURISDICTION OF.**

[*I. L. R.* 12 *Bom.* 486]

**(1) JURISDICTION.****(a) ARMY ACT.**

1.—*Army Act of 1881, ss. 144, 151—Civil Procedure Code, s. 468—Jurisdiction of Small Cause Courts over soldiers.* A sued a soldier to recover a debt not amounting to £30: *Held*, that the suit was cognizable by a Court of Small Causes. *Semble*: The commanding officer of the defendant was bound to cause the summons of the Small Cause Court to be served on him. *MAHOMED v. AGGAS.*

[*I. L. R.* 10 *Mad.* 319]

**(b) CONTRACT.**

2.—*Contract Act (IX of 1872), ss. 69, 70—Small Cause Court Act (XI of 1865), s. 6—Putni rent—Implied contract.* The plaintiff, a purchaser in execution of a *putni* right, brought a suit in a Munsif's Court to recover from the defendant, a former holder of the *putni* right, a sum of money which she had been compelled to pay to the zemindar for rent which had accrued due prior to the date of her purchase. The Munsif gave the plaintiff a decree, which, however, on appeal to the District Judge, was reversed. On appeal to the High Court, *Held*, that, assuming the suit to lie independently of any express promise, it was one cognizable by a Court of Small Causes, and no appeal would therefore lie. *Rambha Chittan-geo v. Modhosooodun Paul Chowdhry*, *B. L. R. Sup. Vol. 675*; *7 W. R. 377*, distinguished. Cases falling within the provisions of ss. 69 and 70 of the Contract Act are cognizable by a Court of Small Causes under s. 6 of Act XI of 1865. *Nath Prasad v. Baij Nath*, *I. L. R. 3 All. 66*, approved. *KRISHNO KAMINI CHOWDHRI v. GOPI MOHUN GHOSE HAZRA.*

[*I. L. R.* 15 *Calc.* 652]

3.—*Civil Procedure Code, s. 586—Mofussil Small Cause Court Act (XI of 1865), s. 6—Suit against sons of Hindu debtor, on a bond executed by father, not cognizable by Small Cause Court—Hindu Law—Liability of son for debt of living father.* In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt: *Held* by the Full Bench that the suit as against the sons was not a suit of the nature cognizable in a Court of Small Causes within the meaning of s. 586 of the Code of Civil Procedure: *Held*, further, by the Divisional Bench that the decree against the sons was bad. *NARASINGA v. SUBBA.*

[*I. L. R.* 12 *Mad.* 139]



SMALL CAUSE COURT, MOFUSSIL—  
continued.

(1) JURISDICTION—continued

(b) CONTRACT—concluded

4.—*Provincial Small Cause Court Act, sch. II, art. 41—Civil Procedure Code, s. 586—Suit for contribution—Joint property—Suit relating to contract—Contract Act, s. 69.* Lands of which part belonged to the plaintiffs and part to the defendant were comprised in a patta which ran in the names of the plaintiffs and another. The defendant's share of the assessment fell into arrear and was collected from the plaintiffs, who now sued to recover Rs. 200 being the amount so paid together with interest. *Held*, the suit was of a nature cognizable by a Court of Small Causes, and therefore no second appeal lay. *Krishna Kamini Chowdhurani v. Gopi Mohun Ghose Hazra* (I. L. R. 15 Calc 652), followed. *SRINIVASA v. SIVAKOLUNDU*.

[I. L. R. 12 Mad 349]

(c) CONTRIBUTION.

5.—*Provincial Small Cause Court Act (IX of 1887), sch. II, Arts. 2, 41, 42, and 44—Suit for costs paid by one of two persons jointly liable.* *N C* granted a lease of three plots of land to *B S*. The heirs of the former lessee brought a suit against *N C* and *B S* to recover possession of the same three plots of land. The suit was decreed with costs; and, the costs, amounting to Rs. 80 and annas 5, were recovered from *B S* alone. Thereupon *B S* brought this suit against *N C* in the Court of Small Causes at Pubna for the recovery of that amount: *Held*, that the suit was one which did not come under arts. 2, 41, 42 or 44, of sch. II, Act IX of 1887, and was cognizable by the Small Cause Court. *BISVA NATH SHAH v. NABA KUMAR CHOWDHARY*.

[I. L. R. 15 Calc. 713]

(d) DAMAGES.

6.—*Suit for damages for personal injury—Actual pecuniary damage* The plaintiff, in a suit for damages laid at Rs 200, claimed Rs. 50 on account of medical expenses caused by an assault committed on him by the defendants, Rs. 50 as the costs of a criminal prosecution which he had brought against them, and Rs. 100 for injury to his reputation and feelings: *Held* that inasmuch as part of the claim related to alleged actual pecuniary damage resulting from an alleged personal injury, the whole suit was, with reference to s. 6, proviso (3), of the Mofussil Small Cause Courts Act (XI of 1865), of a nature cognizable by a Court of Small Causes, and that, under s. 586 of the Civil Procedure Code no second appeal in such suit would lie. *Gunga Narain Mehta v. Gudadhur Chowdhry*, 13 W. R. 434, referred to. *JIWA RAM SINGH v. BHOLA*.

[I. L. R. 10 All. 49]

SMALL CAUSE COURT, MOFUSSIL—  
continued.

(1) JURISDICTION—continued.

(c) MAINTENANCE.

7.—*Maintenance, Suit for arrears of—Fixed maintenance—Small Cause Courts (Provincial) Act (IX of 1887), sch. II, cl. 38.* A suit for arrears of fixed maintenance is a suit relating to maintenance within the meaning of that term as used in cl. 38 of sch. II of the Provincial Small Cause Courts Act (IX of 1887), and is therefore not cognizable by a Court of Small Causes. *AMRITOMOYE DASIA v. BHOGIRUTH CHUNDRA alias JOGESSUR SHADHOO*.

[I. L. R. 15 Calc. 164]

8.—*Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 38—Suit for maintenance based on a family arrangement.* A suit for maintenance based on a family arrangement is within the jurisdiction of a Mofussil Small Cause Court. *KOMU v. KRISHNA*.

[I. L. R. 11 Mad 134]

(f) MARRIAGE.

9.—*Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 35 cl. (g)—Suit for actual pecuniary damages for breach of contract of marriage—Jurisdiction.* A suit for actual pecuniary damages for breach of contract of marriage comes within cl. (g) of art. 35, sch. II of Act IX of 1887, and as such is excluded from the jurisdiction of the Small Cause Courts. *KALI SUNKER DASS v. KOYLASH CHUNDER DASS*.

[I. L. R. 15 Calc. 833]

(g) MORTGAGE.

10.—*Suit for enforcement of hypothecation against moveable property—Act XI of 1865, s. 6.* A suit by the assignee of a registered mortgage-bond hypothecating certain crops to enforce the hypothecation is not a Small Cause Court suit within the meaning of s. 6 of Act XI of 1865, in which a second appeal would be barred by s. 586 of the Civil Procedure Code. *Surajpal Singh v. Jaramgar*, I. L. R. 7 All. 855, followed. *Ram Gopal Shah v. Ram Gopal Shah*, 9 W. R. 136, and *Apparu Pillai v. Subraya Muppen*, 2 Mad. 474 referred to. *KALKA PRASAD v. CHANDAN SINGH*.

[I. L. R. 10 All. 20]

(h) MOVEABLE PROPERTY.

11.—*Madras Rent Recovery Act 1865—Suit to recover moveable property.* A suit to recover moveable property attached under colour of the Rent Recovery Act (Madras Act VIII of 1865) is cognizable by a Court of Small Causes constituted under Act XI of 1865. *DAYUD BEG v. KULLAPPA*.

[I. L. R. 11 Mad. 264]

SMALL CAUSE COURT, MOFUSSIL—  
*concluded.*(1) JURISDICTION—*concluded.*

## (i) PURCHASE-MONEY.

12.—*Civil Procedure Code, s. 315—Suit to recover purchase-money—Suit by purchaser at Court-sale when debtor had no saleable interest* [A suit brought, under s. 315 of the Code of Civil Procedure, by a purchaser at an execution-sale to recover the purchase-money, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, is not a suit of a nature cognizable by a Small Cause Court constituted under Act XI of 1865. *PACHAYAPPAN v. NARAYANA.* •

[I. L. R. 11 Mad. 269]

## (j) RENT.

13.—*Arrears of rent of homestead or bastu land, Suit for—Provincial Small Cause Courts Act (XI of 1887), sch. II, cls. 7 and 8* [A Mofussil Small Cause Court has no jurisdiction to entertain a suit for arrears of rent of homestead or bastu land under the provisions of the Provincial Small Cause Courts Act (IX of 1887). *UMA CHURN MANDAL v. BIJARI BEWAHL.*

[I. L. R. 15 Calc. 174]

## (k) TITLE, QUESTION OF.

14.—*Suit for arrears of malikana allowance—Act XI of 1865, s. 6* [A sold a share in immoveable property to M by a registered deed of sale which contained the following provision—“The said vendee is at liberty either to retain possession himself or to sell it to some one else, and he is to pay Rs. 25 of the Queen’s coin to me annually (as *malikana*), which he has agreed to pay.” M mortgaged the property to B, who obtained possession; and, after the mortgage, the annual payments provided for by the deed of sale ceased. The representatives of the vendor sued M and B to recover arrears of *malikana*, the amount sued for being less than Rs. 500. *Held*, upon a preliminary objection made with reference to s. 586 of the Civil Procedure Code, that the intention of the Legislature as expressed in s. 6 of the Mofussil Small Cause Courts Act (XI of 1865) was that suits directly and immediately involving questions of title to immoveable property should not be cognizable by the Small Cause Courts, that in the present suit such a question was directly involved, and that consequently s. 586 of the Code had no application, and a second appeal would lie. *Mohamed Karamut-ollah v. Abdool Majed*, 1 N. W. 205, and *Bhawan Singh v. Chatter Kuar*, Weekly Notes, All 1882, p. 111, referred to. *Preston Bezouji v. Abdool Rahman*, I. L. R. 5 Bom. 463, *Qutub Husain v. Abul Husain*, I. L. R. 4 All. 131, and *Kudaressur Mookerjee v. Gooroo Churn Mookerjee*, 2 C. L. R. 388, distinguished. *CHURAMAN v. BALLI.*

[I. L. R. 9 All. 591]

SMALL CAUSE COURT, PRESIDENCY  
TOWNS. *Col.*

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*See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, 1882, s. 622.*  
[I. L. R. 13 Bom. 642]

## (1) JURISDICTION.

## (a) GENERAL CASES

1.—*Leave to sue—Small Cause Court Presidency Towns Act (XV of 1882), s. 18—Discretion, Exercise of—Refusal of leave to sue—Jurisdiction—Defendant residing outside jurisdiction* [A tradesman in business in Calcutta sued his debtor, a resident at Lucknow, to recover a sum of Rs. 23 for goods sold in Calcutta and forwarded by the E. I. Ry. Co. for delivery at Lucknow. The plaintiff applied under s. 18 of Act XV of 1882 for leave to sue the defendant in the Calcutta Court of Small Causes. The Court refused to grant such leave, apparently on the ground that the defendant was living at a long distance from Calcutta, and that the suit was one for a small amount. *Held*, that, in refusing to grant such leave, the Judge of the Small Cause Court had not exercised the discretion vested in him under s. 18, and that the case was one in which the leave applied for should have been granted. *IN THE MATTER OF COLLETT v. ARMSTRONG.*

[I. L. R. 14 Calc. 526]

## (b) MAINTENANCE, SUIT FOR.

2.—*Presidency Small Cause Courts Act (XV of 1882), s. 18.* [Presidency Small Cause Courts, constituted under Act XV of 1882, are not debarred from entertaining suits for maintenance not based on contract or declaratory decree. *POKALA v. MURUGAPPA.*

[I. L. R. 10 Mad. 114]

## (c) TROVER.

3.—*Action for detinue and trover—Gift—Incomplete gift—Suit by executor to recover promissory notes on ground that the gift of them to defendant was incomplete—Small Cause Court Presidency Towns Act (XV of 1882), s. 18* [The plaintiff as executor of D sued the defendant in the Small Cause Court of Bombay to recover two Government promissory notes of the nominal value of Rs. 2,000, standing in the name of D. The defendant, who had been D’s servant, alleged that the notes had been given to him by D as a reward for past services. The Court held that there was evidence (though unsatisfactory) of a gift by D to the defendant. It was then contended, on behalf of the plaintiff, that assuming there was evidence of a gift, such gift was

## SMALL CAUSE COURT, PRESIDENCY TOWNS—continued.

## (1) JURISDICTION—concluded.

## (c) TROVER—concluded.

incomplete, inasmuch as the notes had not been endorsed to the defendant, and that the defendant was not entitled to any aid from the Court to perfect the gift. The Judge held that the Court of Small Causes had no power to decree the return of the notes or payment of their value, and that so far as the jurisdiction of that Court was concerned, the defendant had a right to retain the notes. *Held*, by the High Court, that the Court of Small Causes had jurisdiction to entertain the plaintiff's claim, on the ground that there was an incomplete gift of the notes to the defendant, and that it might on that ground pass a decree in favour of the plaintiff for the return of the notes or payment of the value. *KHURSEJI RUSTOMJI COLAH v. PESTONJI COW-ASJI BUCHA.*

[I. L. R. 12 Bom. 573]

## (2) PRACTICE AND PROCEDURE.

## (a) REFERENCE TO HIGH COURT.

4.—Costs—Practice—Costs of reference to High Court—Small Cause Court (Presidency Towns) (Act XV of 1882), s. 69—Civil Procedure Code (Act XIV of 1882), ss. 220, 617, 620] Under s. 620 of the Civil Procedure Code the costs of a reference to the High Court cannot be dealt with separately, but must be dealt with when awarding the costs of the suit. They are, however, in the discretion of the Court, and need not necessarily follow the event of the suit. *NICOL v. MATHOORA DASS DUMANI.*

[I. L. R. 15 Cal. 507]

## (b) RE-HEARING.

5.—Practice—Presidency Small Cause Courts Act (XV of 1882), ss. 38 and 71—Re-hearing, application for—Compliance with requirements of Act subsequently to application for re-hearing—Rule of High Court No. 208—Limitation Act 1877, s. 5.] An application to the High Court for a re-hearing under s. 38 of the Presidency Small Cause Courts Act (XV of 1882) must be in writing. A decree was passed against the petitioner by the Court of Small Causes on the 9th December 1887. On the 16th December Counsel on his behalf was instructed to apply to the High Court under s. 38 of Act XV of 1882, for a re-hearing of the suit. The Court was then engaged in hearing appeals; but, in order to prevent the petitioner's application from being barred by limitation under the provisions of the section which requires the application to be made within eight days, their Lordships before rising allowed the application to be then formally made, but adjourned the hearing to a subsequent day. When the case came on it appeared (1) that the petition had not been signed and declared until the 17th December 1887 (*i.e.*, the day after the application had been made

## SMALL CAUSE COURT, PRESIDENCY TOWNS—concluded.

## (2) PRACTICE AND PROCEDURE—concluded.

## (b) RE-HEARING—concluded.

in Court); (2) that the affidavit in support of the application, as required by s. 38, had not been filed until two days after the application in Court; and (3) that the Court-fees, which by s. 71 of Act XV of 1882 should be paid prior to the application, had not been paid until the 20th December 1887, *i.e.*, four days after the application. *Held*, that the application for a re-hearing must be rejected. The application, although nominally made on the 16th December, was only provisionally received, and every objection to its reception which could have been taken on that day could be taken at the hearing. The subsequent compliance by the petitioner with the requirements of the Act could not place him in a better position than he occupied when the application was made. *IN RE JAKISSONDAS PURSHOTAMDAS.*

[I. L. R. 12 Bom. 408]

6.—Presidency Small Cause Courts Act, s. 38—Re-hearing—Case in which order for re-hearing granted on ground that decision of Small Cause Court was against weight of evidence—Practice] On an application for a re-hearing by the High Court, under s. 38 of Act XV of 1882, of a suit already heard and decided by a Judge of the Small Cause Court, *held* by the High Court that the evidence being of a very conflicting character, and not such as to justify a distinct opinion that the Judge of the Small Cause Court was wrong in his decision, the application for a re-hearing should be refused. S. 38 of Act XV of 1882 does not authorize the High Court to grant an order for a re-hearing where that Court merely feels that the evidence is doubtful without forming any opinion as to whether the conclusion arrived at by the Small Cause Court is a wrong one. The section requires that there should be such an opinion before granting the order, and such opinion should be a distinct opinion, and not merely what is termed an inclination of opinion. *HASSANBHOY VISRAM v. BRITISH INDIA STEAM NAVIGATION COMPANY.*

[I. L. R. 12 Bom. 579]

## SOLDIER.

Army Act, 1881, s. 144—Sub-Conductor, Ordnance Department—Service of Summons—Civil Procedure Code, s. 468.] A Sub-Conductor of Ordnance on the Madras Establishment of Her Majesty's Indian Military Forces, holding a warrant from the Government of Madras, is a soldier within the meaning of s. 144 of the Army Act, 1881. In a suit to recover Rs. 183-7-0, a summons having been sent by the Court to the Commissary of Ordnance to be served on the defendant, his subordinate, the Commissary of Ordnance returned the summons unserved and referred to s. 144 of the Army Act, 1881, and his

**SOLDIER—concluded.**

reason, for such action. *Held*, that the Commissary of Ordnance was bound to serve the summons under s. 468 of the Code of Civil Procedure, although the defendant might be entitled to the privilege given by s. 144 of the Army Act 1881. **ABRAHAM v. HOLMES.**

[I. L. R. 11 Mad 475]

**SONTHAL PERGUNNAHS SETTLEMENT REGULATION (III of 1872).**

—, ss. 24, (25.—*Suit to set aside order of Settlement-officer—Non-publication of record of rights—Onus of proof.*) In a suit instituted in January 1887 by a plaintiff to set aside a settlement made under Reg. III of 1872, and to recover *khus* possession of a *mouzah*, alleging that the defendant held the land as *chakran*, and that the services for which he held them had ceased, the defendant pleaded that the tenure was *dur-mokurari*, that the lands had been settled as such in June 1877, and that the suit was consequently barred by the special limitation provided by s. 25 of the Regulation. The plaintiff sought to set aside the settlement on the ground of the non-publication of the record of rights and the fraud of the defendant, and both the lower Courts found that the record of rights had not been published by its being posted conspicuously in the village as required by s. 24. On second appeal it was contended on behalf of the defendant that such publication was not essential, but that it was open to the Settlement-officer to publish the record in such manner as might be convenient: *Held*, that posting the record conspicuously in the village is an essential part of the publication, and that the suit was not barred by limitation. It was further contended that the onus of proving the tenure to be *dur-mokurari*, which had been thrown on the defendant, had been wrongly so thrown on him, as the suit was substantially one to set aside a decree: *Held* that the onus of proving the validity and propriety of the settlement proceedings upon which he relied had been properly thrown on the defendant. **NADIAR CHAND SINGH v. CHUNDER SIKHUR SADHU.**

[I. L. R. 15 Calc. 765]

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See PRIVY COUNCIL, PRACTICE OF—  
QUESTIONS OF FACT

[I. L. R. 15 Calc. 753]

**SPECIAL OR SECOND APPEAL—contd.****(1) ORDERS SUBJECT TO APPEAL.**

1.—*Civil Procedure Code*, 1882, ss. 561, 584—*Appeal from portion of decree disallowing objection.*] A preliminary objection taken by a respondent that no second appeal lies from so much of the decree of a Subordinate Judge as disallowed objections filed by the appellant under s. 561 of the Code of Civil Procedure was held to be without weight. **GANAPATI v. SITHARAMA.**

[I. L. R. 10 Mad. 292]

2.—*Madras Forest Act*, s. 10—*Decision as to title to land, appeal to High Court from decision of District Court on appeal.*] An appeal lies to the High Court from a decision of a District Court passed under s. 10 of the Madras Forest Act 1882, on appeal from the decision of a Forest Settlement-officer. **KAMARAJU v. THE SECRETARY OF STATE FOR INDIA.**

[I. L. R. 11 Mad. 309]

3.—*Civil Procedure Code*, ss. 521, 522, and 582—*Arbitration—Revocation of submission—Appellate decree in accordance with award.*] By reason of s. 582 of the Civil Procedure Code, where a Court of First Instance wrongly sets aside an arbitration award and passes a decree against the terms thereof, and a Court of first appeal, holding that the award was not open to objection upon the grounds mentioned in s. 521, passes a decree strictly in accordance with the award, such appellate decree is entitled to the same finality as the first Court's decree would have been under the last paragraph of s. 522, and cannot be made the subject of second appeal. **Pureshnath Dey v. Nobin Chunder Dutt**, 12 W. R. 93, and **Rughoobher Dyal v. Mauna Koer**, 12 C. L. R. 564, dissented from **NAURANG SINGH v. SADAPAL SINGH.**

[I. L. R. 10 All. 8]

4.—*Order reviewing and setting aside order rejecting objection to execution of decree—Civil Procedure Code*, s. 629.] When a Munsif sets aside on review an order rejecting an objection to the execution of a certain decree, and the District Court on appeal refused to interfere: *Held* that no second appeal lay to the High Court. **PAPAYA v. CHELAMAYYA.**

[I. L. R. 12 Mad. 125]

5.—*Superintendence of High Court—Bengal Tenancy Act (VIII of 1885)*, ss. 104, cl. 2, 105, 106, 108—*Rule 33 of the Rules made under the Act—Jurisdiction—Record of right—Civil Procedure Code (Act XIV of 1882)*, ss. 108, 622—*Order of Special Judge as to settlement of rents.*] The High Court has no jurisdiction either to entertain a second appeal from, or to interfere under s. 622 of the Code of Civil Procedure with, an order of a Special Judge in regard to settlement of rents. **SHEWBARAT KOER v. NIRPAT ROY.**

[I. L. R. 16 Calc. 596]

SPECIAL OR SECOND APPEAL—*contd.*(1) ORDERS SUBJECT TO APPEAL—*continued*

6.—*Civil Procedure Code*, 1882, s. 629—*Order on application to review—Appeal from decree as amended—Second appeal—Practitioner.* A second appeal lies against an order of a lower Appellate Court passed under s. 629 of the Civil Procedure Code (Act XIV of 1882) where the appeal to the lower Appellate Court has been, not from the order allowing a review, but from the original decretal order itself as amended by the original Court on the application for review. *Than Singh v. Chandan Singh*, I. L. R. 11 Cal. 296, distinguished. *Semle*—The words of s. 629, "an order of the Court for rejecting the application shall be final," *prima facie* apply to the Court which has passed the original decree, but in spirit they would seem properly to apply also to an order of an Appellate Court. *BALA NATHA v. BHIYA NATHA*.

(I. L. R. 13 Bom 496)

7.—*Civil Procedure Code*, ss. 584, 629—*Order on appeal affirming order granting application for review of judgment* [No second appeal lies to the High Court under s. 581 of the Civil Procedure Code from an order dismissing an appeal under s. 629 from an order granting an application for review of judgment. *GOPAL DAS v. ALAF KHAN*.

(I. L. R. 11 All. 388)

8.—*Rent-suit—Bengal Act VIII of 1869*, s. 102—*Bengal Tenancy Act (VIII of 1885)*, s. 153—*General Clauses Act (I of 1868)*, s. 6 [The word "proceedings" in s. 6 of Act I of 1868, as applied to a suit, means the suit as an entirety, that is, down to the final decree. A second appeal, therefore, to the High Court, on a question of the amount due as rent, will not lie when the suit was instituted previously to the passing of Act VIII of 1885, although the judgment in the suit was delivered, and the first appeal therefrom heard, subsequently to the passing of that Act. *Hurrosundari Devi v. Bhogohari Das Munji*, I. L. R. 13 Cal. 86, approved. *SATGHURI v. MUJIDAN*.

(I. L. R. 15 Cal. 107)

9.—*Bengal Tenancy Act (VIII of 1885)*, s. 153—*Appeal in rent-suit—Appeal from order of District Judge.* In certain rent-suits, the amount claimed being under Rs. 100, the question was raised as to whether the plaintiff was entitled to the whole 16 annas of the rent or only to a 10 annas share thereof. Upon this point the first Court gave the plaintiff decrees for the full amount claimed, holding that the question was *res judicata*. Upon appeal the District Judge held that the question was not *res judicata*, and remanded the suits for trial on the merits. The plaintiff preferred a second appeal to the High Court: *Held* that, having regard to the provisions of s. 153 of the Bengal Tenancy Act no appeal lay, as the question was not one relating to title to land or to some interest in land as between

SPECIAL OR SECOND APPEAL—*contd.*(1) ORDERS SUBJECT TO APPEAL—*concluded.*

*parties having conflicting claims thereto, nor was it "a question of the amount of rent annually payable by a tenant," these words in the section meaning the total amount of rent annually payable in respect of a holding and not the amount of rent which may be payable to any particular co-sharer in the property. PRASANNA KUMAR BANERJEE v. SRINATH DAS.*

(I. L. R. 15 Cal. 231)

10.—*Bengal Tenancy Act (VIII of 1885)*, s. 153—*Cesses, Suit for—Bengal Act (IX of 1880)*, s. 47—*Appeal in cases under Rs. 100.* A suit to recover cesses for an amount not exceeding Rs. 100 falls under the provisions of s. 153 of Act VIII of 1885 with respect to appeals. *MOHESH CHUNDER CHUTTOPADHYA v. UMATARA DEBY*

(I. L. R. 16 Cal. 638)

## (2) SMALL CAUSE COURT SUITS.

## (a) GENERAL CASES.

11.—*Civil Procedure Code*, s. 586—*Frame of suit.* For the purpose of determining whether a second appeal lies or is prohibited by s. 586 of the Civil Procedure Code, what must be looked at is not the shape in which the case comes up to the High Court, but the shape in which the suit was originally instituted in the Court of First Instance. *KIAM-UD-DIN v. RAJMO*.

(I. L. R. 11 All. 13)

12.—*Civil Procedure Code*, s. 586—*Orders in execution of decrees in Small Cause suits.* No second appeal lies from an order passed in execution of a decree in a suit of the nature cognizable by a Small Cause Court where the subject-matter of the suit does not exceed Rs. 500. *AITHALA v. SUBBANNA*.

(I. L. R. 12 Mad. 116)

## (b) CONTRACT.

13.—*Contract Act (IX of 1872)*, ss. 69, 70—*Small Cause Court Act (XI of 1865)*, s. 6—*Putni rent—Implied contract.* The plaintiff, a purchaser in execution of a *putni* right, brought a suit in a Munsif's Court to recover from the defendant, a former holder of the *putni* right, a sum of money which she had been compelled to pay to the zemindar for rent which had accrued due prior to the date of her purchase. The Munsif gave the plaintiff a decree, which, however, on appeal to the District Judge, was reversed. On appeal to the High Court, *held*, that, assuming the suit to lie independently of any express promise, it was one cognizable by a Court of Small Causes, and no appeal would therefore lie. *Rambur Chittangeo v. Modhoooodun Paul Chowdhury*, B. L. R. Sup. Vol., 675; 7 W. R. 377, distinguished. Cases falling within the

SPECIAL OR SECOND APPEAL—*contd.*(2) SMALL CAUSE COURT SUITS—*continued.*(b) CONTRACT—*concluded.*

provisions of ss. 69 and 70 of the Contract Act are cognizable by a Court of Small Cause under s. 6 of Act XI of 1865. *Nath Prasad v. Bai Nath* I L R 3 All. 66 approved. *KRISHNO KAMINI CHOWDHURANI v. GOPI MOHUN GHOSE HAZRA.*

[I L R. 15 Cal. 652]

14—*Mofussil Small Cause Court Act, s. 6—Civil Procedure Code, s. 586—Suit against sons of Hindu debtor, on a bond executed by father, not cognizable by Small Cause Court—Hindu Law—Liability of son for debt of living father.* In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt. *Held*, by the Full Bench that the suit as against the sons was not a suit of the nature cognizable in a Court of Small Causes within the meaning of s. 586 of the Code of Civil Procedure. *Held* further, by the Divisional Bench that the decree against the sons was bad. *NARASINGHAR SUBBA.*

[I L R. 12 Mad. 139]

15—*Civil Procedure Code, s. 586—Provincial Small Cause Court Act, sch. II, art. 41—Suit relating to contract—Contract Act, s. 69—Suit for contribution—Joint property.* Lands of which part belonged to the plaintiffs and part to the defendant were comprised in a *patta* which ran in the names of the plaintiffs and another. The defendant's share of the assessment fell into arrears and was collected from the plaintiffs who now sued to recover Rs. 200 being the amount so paid together with interest. *Held*, the suit was of a nature cognizable by a Court of Small Causes, and therefore no second appeal lay. *Krishno Kamini Chowdhurani v. Gopi Mohun Ghose Hazra* (I L R. 15 Cal. 652), followed. *SRINIVASA v. SIVA KOLUNDU.*

[I L R. 12 Mad. 349]

## (c) DAMAGES

16—*Suit for damages for personal injury—Actual pecuniary damage.* The plaintiff, in a suit for damages laid at Rs. 200, claimed Rs. 50 on account of medical expenses caused by an assault committed on him by the defendants. Rs. 50 as the costs of a criminal prosecution which he had brought against them, and Rs. 100 for injury to his reputation and feelings. *Held* that inasmuch as part of the claim related to alleged actual pecuniary damage resulting from an alleged personal injury, the whole suit was, with reference to s. 6, proviso (3), of the Mofussil Small Cause Courts Act (XI of 1865), of the nature cognizable by a Court of Small Causes, and that, under s. 586 of the Civil Procedure Code, no second appeal in such suit would lie. *Ganga Narain Maitro v. Gudadhur Chowdhry*, 13 W R. 431, referred to. *JIWA RAM SINGH v. BHOLA.*

[I L R. 10 All. 49]

SPECIAL OR SECOND APPEAL—*contd.*(2) SMALL CAUSE COURT SUITS—*concluded.*

## (d) MORTGAGE.

17.—*Suit for enforcement of hypothecation against moveable property—Act XI of 1865, s. 6.* A suit by the assignee of a registered mortgage-bond hypothecating certain crops to enforce the hypothecation is not a Small Cause Court suit within the meaning of s. 6 of Act XI of 1865, in which a second appeal would be barred by s. 586 of the Civil Procedure Code. *Sarajpal Singh v. Jarranger*, I L R. 7 All. 855, followed. *Ram Gopal Shah v. Ram Gopal Shah* 9 W. R. 136, and *Apparu Pillai v. Subarye Muppen*, 2 Mad. 47, referred to. *KALKA v. PRASAD CHANDAN SINGH*

[I L R. 10 All. 20]

## (e) TITLE, QUESTION OF

18.—*Suit for arrears of malikana allowance—Act XI of 1865, s. 6.* S sold a share in immovable property to M by a registered deed of sale which contained the following provision—"The said vendee is at liberty either to retain possession himself or to sell it to some one else, and he is to pay Rs. 25 of the Queen's coin to me annually (as *malikana*), which he had agreed to pay." M mortgaged the property to B, who obtained possession and, after the mortgage, the annual payments provided for by the deed of sale ceased. The representatives of the vendor sued M and B to recover arrears of *malikana*, the amount sued for being less than Rs. 500. *Held*, upon a preliminary objection made with reference to s. 586 of the Civil Procedure Code, that the intention of the Legislature as expressed in s. 6 of the Mofussil Small Cause Courts Act (XI of 1865) was that suits directly and immediately involving questions of title to immovable property should not be cognizable by the Small Cause Courts; that in the present suit such a question was directly involved; and that consequently s. 586 of the Code had no application, and a second appeal would lie. *Mahomed Karamutollah v. Abdool Mayed*, 1 N. W. 205, and *Bhawan Singh v. Chattar Kuar*, Weekly Notes, All. 1882, p. 114, referred to. *Pestonji Bezant v. Abdool Rahiman*, I L R. 5 Bom. 463, *Qutub Husain v. Abdul Husain*, I L R. 4 All. 134, and *Kadaressur Mookerjee v. Gooroo Churn Mookerjee*, 2 C. L. R. 388, distinguished. *CHURAMAN v. BALLI.*

[I L R. 9 All. 591]

## (3) GROUNDS OF APPEAL.

## (a) QUESTIONS OF FACT.

19—*Civil Procedure Code, s. 584—Powers of High Court on second appeal.* On second appeal by a landlord against a decree of a District Judge, who stated in his judgment that "though the tenant admitted the execution of the *muckalka*, it was not shown that he dispensed with the *patta*," no objection was taken in the memorandum of appeal that the *muckalka*, which contained a statement that no *patta* was necessary, had been neglected or misconstrued. The High

SPECIAL OR SECOND APPEAL—*contd.*(3) GROUNDS OF APPEAL—*concluded.*(a) QUESTIONS OF FACT—*concluded.*

Court ordered that the Judge be asked to take the postscript into his consideration and submit a revised finding. *NARAYANA v. MUNI.*

[I. L. R. 10 Mad. 363]

20.—*Practice—Finding of facts—Interference with finding of facts on second appeal.*] As a general rule, the High Court will not interfere with the finding of facts by the lower Appellate Court on second appeal, save on some very special ground; for instance, where such a finding of facts as appears to be necessary under the peculiar circumstances of the case, has not been satisfactorily arrived at. *GOLUCK NATH alias RAKHAL DAS CHUTTOPADHYA v. KIRTI CHUNDER HALDAR.*

[I. L. R. 16 Calc. 645]

## (4) OTHER ERRORS OF LAW OR PROCEDURE

## (a) PARTIES.

21.—*Unappealed order—Civil Procedure Code, 1882, s. 591—Order making person respondent*] S. 591 of the Code enables the Court, when dealing with an appeal from a decree, to deal with any question which may arise as to any error, defect, or irregularity in any order affecting the decision of the case, though an appeal from such order might have been and has not been preferred. *Googlee Sahoo v. Premalal Sahoo*, I. L. R. 7 Calc. 148, referred to. During the pendency of an appeal, the plaintiff respondent died, and, on the application of the appellant, the name of *H* was entered on the record as respondent, in place of the deceased. Subsequently *K* applied to be substituted as respondent, alleging that he and not *H* was the legal representative of the plaintiff. The Court passed an order making *K* a joint respondent with *H*. To this *H* objected, but he did not appeal from the order. Ultimately the Court dismissed the appeal, and passed a decree that the money claimed in the suit was payable to the two respondents: *Held* that, on appeal from the decree of the Court below, *H* was entitled to object to the order adding *K* as a respondent, though he had not appealed from the order itself. *HAR NARAIN SINGH v. KHARAG SINGH.*

[I. L. R. 9 All. 447]

## (b) PROCEDURE IN SPECIAL APPEAL.

22.—*New point—Discretion of Court.*] On second appeal the appellant should not be allowed to raise an entirely new point if it is one for the right determination of which it is necessary to go into evidence which has not been produced in the lower Courts, or unless it is a pure point of law going to the question of the jurisdiction of the lower Courts and capable of being determined without the consideration of any evidence other than that on the record, and even if it falls within the above exception, it is purely discre-

SPECIAL OR SECOND APPEAL—*contd.*(5) PROCEDURE IN SPECIAL APPEAL—*contd.*

tionary with the Court whether to consider it or not. *FAKIR CHAND AHIKARI v. ANANDA CHUNDER BHATTACHARJI.*

[I. L. R. 14 Calc. 586]

23.—*Objection that mesne profits ought to have been settled in execution and that no suit lies—Suit for recovery of mesne profits from person who has taken possession under a decree which is subsequently reversed on appeal—Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 244.*] A landlord sued his tenant for arrears of rent, and obtained a decree for a certain amount and a declaration that if the amount were not paid within fifteen days the tenant should be ejected under s. 52, Act VIII of 1869. The amount was not paid, and the landlord executed the decree and obtained possession. The tenant appealed and succeeded in getting the decree set aside, and the amount found due from him for arrears by the first Court was reduced, and a decree made directing that if the reduced amount were not paid within fifteen days he should be ejected. He paid the amount found due by the Appellate Court within the fifteen days and recovered possession of his holding. He then brought a suit in the Munsif's Court to recover mesne profits from his landlord for the time he was in possession after the execution of the first Court's decree. It was contended on second appeal that the suit would not lie as the matter might and should have been determined in the execution department under s. 244 of the Civil Procedure Code. *Held*, that as the suit was instituted in the Munsif's Court, and the Munsif under the circumstances of the case was the officer who, in the first instance, would have had to determine the matter in the execution department, there was at most only an error of procedure and no exercise of jurisdiction by the Munsif, which he did not possess, and that upon the authority of the decision in *Purmessure Pershad Narain Singh v. Jankee Koer*, 19 W. R. 90, this could not be made a ground of objection on appeal. *Held* also that, the point being one that was not raised in the pleadings or before either of the lower Courts, and being a point which went exclusively to the jurisdiction of the Court, it could not be raised on second appeal. *AZIZ-UDDIN HOSSEIN v. RAMANUGRA ROY.*

[I. L. R. 14 Calc. 605]

24.—*Objection to parties—Non-joinder of parties.*] *Held* by MUTHUSAMI AYYAR and BRANDT, JJ. (KERNAN, J. dissenting) that the objection as to non-joinder of parties is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal. *MOIDIN KUTTI v. KRISHNAN.*

[I. L. R. 10 Mad. 322]

25.—*Question of limitation.*] Where the question of limitation was raised for the first time in



SPECIAL OR SECOND APPEAL—*contd.*(5) PROCEDURE IN SPECIAL APPEAL—*contd.*

second appeal, *held* that it could not be decided in favour of the plaintiff. *SHIBAPA v. DOD NAGAYA.*

[I. L. R. 11 Bom. 114]

26.—*Civil Procedure Code*, ss. 565, 566, 587—*Second appeal—Determination of issues of fact by High Court.*] *Held* by the Full Bench that ss. 587 of the Civil Procedure Code does not make ss. 565 and 566 applicable to second appeals, so as to enable the High Court, in cases where the lower Appellate Court has omitted to frame or try any issue or to determine any essential question of fact, to itself determine the same upon the evidence on the record, but the High Court in such cases must remit issues for trial to the lower Appellate Court. *Balkishen v. Jasoda Kuar*, I. L. R. 7 All. 765, and *Drookshen v. Bansal*, I. L. R. 8 All. 172. overruled on this point. *GIRDHARI LAL v. CRAWFORD.*

[I. L. R. 9 All. 147]

27.—*Practice—Remand by lower Appellate Court under Civil Procedure Code*, s. 556—*Objections under s. 567 raised for the first time in second appeal by plaintiffs*] Objections which might have been but were not made under s. 567 of the Civil Procedure Code in a lower Appellate Court to the findings on remand of the Court of First Instance, cannot be raised for the first time as grounds of second appeal from the lower Appellate Court's decree. *MUHAMMAD ABDUL HAI v. SHEO BISHAL RAI.*

[I. L. R. 10 All. 28]

28.—*Filing one appeal from four separate decrees—Amendment of appeal.*] In execution of a decree in a District Munsif's Court, certain property having been sold, a balance, after satisfying the decree, remained in favour of the judgment-debtor X. After the date of sale, but before the whole of the purchase-money had been paid into Court, X applied to the Court by petition, praying that the amount due to him might be paid to A, to whom, he alleged, he had assigned it. Before any order was made on this petition, B, C, D, and E, in execution of separate decrees against X, attached the sum in Court. The District Munsif ordered that B, C, D, and E should be paid before A. A brought a suit against B, C, D, and E in another District Munsif's Court for a declaration that he was entitled to the money and to set aside the said order. The Munsif set aside the order and declared the plaintiff to be entitled to the amount. B, C, D, and E severally appealed against this decree, and the District Court passed a decree in each appeal, dismissing A's suit. A presented one second appeal, making B, C, D, and E parties thereto, against the four decrees of the District Court: *Held* that A was bound to file a separate appeal against each of the decrees passed by the District Court; he was, how-

SPECIAL OR SECOND APPEAL—*contd.*(5) PROCEDURE IN SPECIAL APPEAL—*contd.*

ever, allowed by the Court to amend his second appeal and file three more second appeals. *CHATHU v. KUNHAMED.*

[I. L. R. 11 Mad. 280]

29.—*Practice—Change of pleading in appeal.*] The plaintiff, alleging himself to be joint in estate with A, his grand-uncle, sued to set aside an absolute gift of the house in suit made by A in favour of his wife, as also the subsequent sale of the house by the wife to the defendant. The lower Appellate Court finding that A was separate in estate from plaintiff and the sole and exclusive owner of the house, held the gift to the wife and the sale by her to defendant valid and dismissed the suit. On second appeal the plaintiff contended that he was the heir of the donee, and that under the deed of gift she had no power to alienate. *Held*, that the case put forward in second appeal being totally different from that which was originally put forward and tried, the appeal should be dismissed. *KANHIA v. MAHIN LAL.*

[I. L. R. 10 All. 495]

30.—*Omission to examine witnesses—Second appeal, objection on, on the ground of such omission.*] A Subordinate Judge after examining some only of the plaintiff's witnesses was of opinion that there was no necessity for further evidence, and passed a decree for the plaintiffs. Ten witnesses whom the plaintiffs had summoned were not examined. The defendant appealed to the District Judge. At the hearing of the appeal the plaintiffs did not inform the Judge that some of their witnesses had not been examined, nor did he become otherwise aware of the fact. He reversed the lower Court's decree, being of opinion, on appeal, that the plaintiffs' evidence had not proved their case. The plaintiffs appealed to the High Court, and contended that the decree of the lower Appellate Court should be set aside, in order that the excluded evidence might be taken. *Held*, that there was no sufficient reason, on second appeal, to set aside the decree. The plaintiffs ought to have brought the facts to the notice of the lower Appellate Court, and not having done so, they could not on second appeal take the objection in order to have a chance of a second trial. *GULAM v. BADRUDIN.*

[I. L. R. 13 Bom. 336]

31.—*Objection to suit on ground of want of certificate—Suit under Dekkan Agriculturists Relief Act.*] An objection to a suit under the Dekkan Agriculturists Relief Act on the ground that a proper certificate had not been obtained, could, it was held, be taken for the first time in second appeal, as it was an objection affecting the jurisdiction of the Courts below. *NYAMTULA v. NANA-VALAD FARIDSHA.*

[I. L. R. 13 Bom. 424]

**SPECIAL OR SECOND APPEAL—concl.****(5) PROCEDURE IN SPECIAL APPEAL—concluded.**

32.—*Change in nature of suit on second appeal—Failure of proof of case as first stated in pleadings* ] Plaintiffs being members of a joint Hindu family alleging division, and a sale to them by other members of their share in the family property more than 12 years before suit, sued to eject a more recent purchaser. The plaintiffs failed to prove division as alleged. One of the members of the family who was in possession of the property to which the sale-deed related did not join in executing it. *Held* that the plaintiffs having failed to prove division as alleged were not entitled in second appeal to have their suit treated as a suit for partition. **MUTTUSAMI v. RAMAKRISHNA.**

[I. L. R. 12 Mad 292]

33.—*Civil Procedure Code, 1882, ss. 584, 585—Questioning decision of lower Appellate Court on question of fact* ] Under ss. 584 and 585 of the Civil Procedure Code 1882, an appellant must not be allowed to question, in second appeal, the finding of the first Appellate Court upon a matter of fact. **PERTAB CHUNDER GHOSE v. MOHENDRA PURKAIT.**

[L. R. 16 I A. 235]

[I. L. R. 17 Calc. 291]

**SPECIAL JUDGE, ORDER OF.**

*See* SPECIAL OR SECOND APPEAL—ORDERS SUBJECT TO APPEAL.

[I. L. R. 16 Calc 596]

*See* SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622.

[I. L. R. 16 Calc. 596]

**SPECIFIC PERFORMANCE.**

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*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.

[I. L. R. 10 All 615]

*See* LANDLORD AND TENANT—EJECTMENT—GENERALLY.

[I. L. R. 10 All 615]

*See* LIMITATION ACT 1877, ART. 113.

[I. L. R. 10 All. 27]

*See* MANAGEMENT OF ESTATE BY COURT.

[I. L. R. 15 Calc. 253]

**SPECIFIC PERFORMANCE—continued.**

*See* MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION.

[I. L. R. 12 Mad. 505]

*See* REGISTRATION ACT 1877, s. 19.

[I. L. R. 12 Mad. 505]

*See* VENDOR AND PURCHASER—PURCHASE OF MORTGAGED PROPERTY.

[I. L. R. 12 Mad. 505]

**(1) GENERAL CASES.**

1.—*Practice—Liberty to apply—Relief after judgment—Damages—Review—Alternative relief.* ] On the 27th April 1886, a plaintiff brought a suit praying for specific performance of a contract, or in the alternative for damages; and on the 21th November 1886, obtained therein a decree for specific performance with the usual liberty to apply. On the 6th December 1886, the plaintiff discovered that it was out of the defendant's power to specifically perform his contract, and he, thereupon, on the 13th April 1887, applied to the Court which had granted the decree for re-hearing of the suit on the question of damages, asking that, in lieu of the decree for specific performance, a decree for damages, when assessed, might be entered up. *Held*, that he was entitled to ask for such relief. **PEARISUNDARI DASSEE v. HARI CHARAN MOZUMDAR CHOWDHURY.**

[I. L. R. 15 Calc. 211]

**(2) SPECIFIC PERFORMANCE ALLOWED.**

2.—*Contract partly made under disability—Ratification of contract when disability ceased—Chota Nagpore Encumbered Estates Act (VI of 1876 and I of 1884)* ] The respondent being subject to Act VI of 1876, and thereby placed under legal disability, contracted to lease and mortgage his ancestral zemindari to the appellant. Thereafter his estate was, whether rightly or wrongly, ordered to be released, and the respondent being then *sui juris* carried on the transaction, retaining the benefit of the appellants' payments, and exacting from him the fulfilment of his stipulations: *Held* that the respondent was bound by the contract though its terms were to be ascertained by what passed when he was disabled from contracting. *Held* further that a suit for specific performance was the appellants' proper remedy. Even if the contract was against the policy of the Act the order of release was made with jurisdiction, was not open to review and enabled the respondent to ratify the contract. **GREGSON v. ADITYA DEB.**

[L. R. 16 I A. 221]

[I. L. R. 17 Calc. 223]

**(3) SPECIFIC PERFORMANCE NOT ALLOWED.**

3.—*Act I of 1887 (Specific Relief Act)* ] Upon a contract for the sale of the proprietary right in lands the intending purchaser, insisting on a right to compel the vendor to give an absolute warranty

## SPECIFIC PERFORMANCE—continued.

(3) SPECIFIC PERFORMANCE NOT ALLOWED  
—continued.

of the title, withheld payment of the purchase-money beyond the time fixed. He also sued for specific performance of the contract, requiring a guarantee from the vendor, until it appeared that the judgment of the Appellate Court was about to be given against him on the ground that he was not entitled to what he claimed. *Held*, that certain reported cases where, apparently, the plaintiff had been willing to submit to have the agreement which was actually proved performed, were different from this; and that the decree dismissing the suit ought to stand. Here the plaintiff, insisting upon having that which he had no right to have, had delayed performing his part of the agreement on that account. **BINDESHRI PRASAD v. JAIRAM GIR.**

[I. L. R 9 All. 705]

[L. R. 14 I. A. 173]

4.—*Suit by vendee against vendor—Delay of vendee in completing—Rescission of contract by vendee—Time of the essence of the contract—Extension of the time stipulated for—Effect of such extension—Conditional waiver of performance within stipulated time—Notice to complete—Unreasonable notice.* On the 26th February 1886, the defendant purchased a house from C for Rs. 4,500 and paid C a considerable portion of the purchase-money. Before the transaction was completed, and the conveyance executed, the defendant, on the 23rd June 1886, by an agreement in writing, of that date, agreed to sell the house to the plaintiff at an advanced price of Rs. 4,800. The defendant was anxious that the sale should be completed in a short time, as the draft of the conveyance by C to himself had been prepared, though not finally approved, and the house was in bad repair and in a somewhat dangerous condition. He had applied to the Municipality for leave to repair the house, and the monsoon season had begun. Ultimately it was agreed between him and the plaintiff that the plaintiff should complete the purchase within twelve days from the date of the agreement (23rd June 1886), and this was duly inserted in the agreement. During the twelve days the plaintiff took no steps to have his conveyance prepared, but asked the defendant for a month's time to complete, saying that he had not the money with him. After some hesitation the defendant extended the time to the 10th August. On the 21st July at latest, the drafts of the conveyance from C to the defendant were formally and finally approved, and the defendant was anxious to complete the sale to the plaintiff. On the 23rd July he wrote to the plaintiff, reminding him that the time to complete would expire on the 9th or 10th of August, and requesting him to be prepared then to complete the purchase; otherwise he would consider the agreement of the 23rd June to be null and void, and would himself begin to repair the house. The plaintiff sent no reply to this letter, but at an interview with the

W., D.

## SPECIFIC PERFORMANCE—continued

(3) SPECIFIC PERFORMANCE NOT ALLOWED  
—continued.

defendant told him that he was considering the matter. He, however, took no steps in the matter beyond getting a draft conveyance prepared. The deed of conveyance by C to the defendant was ready for execution on the 23rd August. Matters remained in this state until September. On the 7th September the defendant through his solicitors served a notice on the plaintiff, requiring him to carry out the agreement of the 23rd June and giving him notice, that, in default of compliance within four days he would consider the agreement at an end. The four days having expired without the plaintiff sending a reply or taking any steps to complete, the defendant considered his contract with the plaintiff to be at an end, and on the 13th September he completed his purchase from C without reference to the plaintiff. If the plaintiff had been ready to complete the purchase, the conveyance to him by the defendant and the conveyance by C to the defendant would have been executed simultaneously. Immediately after taking the conveyance from C the defendant began to repair the house. When the repairs were almost complete, the plaintiff on the 5th October 1886, sent a notice to the defendant requiring him to specifically perform the agreement of the 23rd June 1886. The defendant refused, and the plaintiff filed this suit for specific performance. *Held*, on the evidence that the delay in completing the purchase was the delay of the plaintiff, and not of the defendant. *Held*, also, that, having regard to the circumstances under which the contract with the plaintiff was made and to the nature of the property, the time stipulated for the completion of the purchase was of the essence of the contract, and that the extension of time granted at the plaintiff's request to the 10th August operated only as a waiver to the extent of substituting the extended time for the original time, and did not destroy the essentiality of the time. *Barclay v. Messenger*, 43 L. J. Ch. 449. The defendant's letter of the 24th July was but a timely warning to the plaintiff, that the contract would not be kept in suspense after the extended time had expired. The plaintiff though thus warned took no steps to complete, and was not, therefore, in a position to enforce performance from the defendant after the 10th August had gone by. It was contended for the plaintiff that the letter of the 7th September, written by the defendant's solicitors, treated the contract as then still subsisting and purported to put an end to it if not completed within four days, that the time so allowed was unreasonable; that the defendant, in fact, by that letter waived the plaintiff's previous default, and gave the plaintiff a fresh starting point: *Held*, that such was not the effect of the letter. The letter was only a qualified and conditional waiver of the performance within the stipulated time, the condition being that the plaintiff should complete within four days. That condition not having been complied with the waiver could not be relied on. *Barclay v. Messenger*, 43 L. J. Ch. 449, and *Stewart v. Smith*

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SPECIFIC PERFORMANCE—*concluded.*(3) SPECIFIC PERFORMANCE NOT ALLOWED  
—*concluded.*

6 Hare 222 *Quere*—Whether under all the circumstances of the case, and assuming time not to have been originally of the essence of the contract, the four days' time limited by that letter was unreasonable. *FAKIR MAHOMED v. ABDULLA.*

[I. L. R. 12 Bom. 658]

## SPECIFIC RELIEF ACT (I OF 1877).

1.—s. 9.—*Possessory suit—Constructive possession by receipt of rents*] The mere discontinuance of payment of rent by tenants does not constitute a dispossession within the meaning of s. 9 of the Specific Relief Act. The object of that section is to provide a speedy remedy for that class of cases where a person in physical possession of property is forcibly dispossessed from it against his will and consent. IN THE MATTER OF THE PETITION OF TARINI MOHUN MOZUMDAR *TARINI MOHUN MOZUMDAR v. GUNGA PROSAD CHUCKERBUTTY alias TINCOWRIE CHUCKERBUTTY.*

[I. L. R. 14 Cal. 649]

2.—s. 9.—*Immoveable property—Right of fishery—Possession—Dispossession.*] The plaintiffs were fishermen belonging to the village of V. They claimed in this suit for themselves and the other fishermen of their village the exclusive right of fishing in the Nagothna Creek between high and low-water marks, within certain limits set forth in the plaint, and, under s. 9 of the Specific Relief Act I of 1877, they sought to recover possession of that right from the defendants, who, they alleged, had dispossessed them within six months before this suit was filed. The Subordinate Judge held that they had established their right, and made an order directing that possession should be restored to them. The defendant then applied to the High Court under its extraordinary jurisdiction, contending that the order made by the first Court was beyond its jurisdiction, the right of fishing not being immoveable property within the meaning of that section: *Held*, that the first Court did not act without jurisdiction the right claimed coming within the denomination, of immoveable property. *BHUNDAL PANDA v. PANDOL POS PATIL.*

[I. L. R. 12 Bom. 221]

1.—s. 21.—*Agreement to refer to arbitration—Refusal to perform agreement.*] In a suit against a brother-in-law for maintenance the defendant alleged that, after the plaintiff had left his house, an agreement had been made between them to refer their dispute to arbitration, that the agreement of reference had been actually signed, but that, on the day fixed by the arbitrators for making their award, the plaintiff had given notice to them not to make an award, and accordingly they had not done so. The defendant contended that, by reason of this agreement, the plaintiff's

SPECIFIC RELIEF ACT (I OF 1877)—  
*continued.*

suit was barred by s. 21 of the Specific Relief Act I of 1877. The alleged agreement to refer was in the following terms :—“ To D M and D D. We, the undersigned two persons, give in writing to you as follows :—We used to reside and act in the house together in peace and harmony. Lately, a few days ago, in consequence of a disagreement amongst the women, V resided separately. Upon persuasion having been used towards her, V again resides in the house together with the rest so now all are residing in the house in peace and harmony. If any occasion should arise, and if any disagreement should take place amongst the women, in order to find a remedy for that, we, the undersigned two persons, give in writing to you as follows :—As to whatever award or settlement you two persons together will make, in accordance therewith, we agree to receive or pay. As to that, we are truly to act on our true religious faith; and we have written and delivered this writing of our free will and pleasure. The same is agreed to and approved of by our heirs and representatives, all; the 11th *Jyesth Tadya Sambat* 1939, the day of the event, Friday, the 1st June 1883. And as to this, you are truly to make and deliver a settlement within fifteen days' time.” *Held*, that the plaintiff's suit was not barred. The agreement did not indicate what was the subject-matter to be referred, and there was no evidence to show that the plaintiff's claim to maintenance had been laid before the arbitrator or that the plaintiff had refused to perform her agreement to refer in reference to that claim. Nor was there any evidence to show the time at which the plaintiff withdrew from the arbitration—whether before or after the time allowed to the arbitrators to make and publish their award, viz. fifteen days. If the latter, her withdrawal could not in any view of the section, be held to be a refusal on her part to perform her agreement to refer. Even if the plaintiff's withdrawal was unjustifiable, it appeared that the defendant had taken no steps under s. 523 of the Civil Procedure Code (Act XIV of 1882), to have the agreement filed in Court, and thus render her withdrawal of no effect. There was nothing to show that the defendant did not acquiesce in it. *Quere*, whether the above agreement was not void by reason of uncertainty. *Quere*, whether the actual submission of a subject in dispute to named arbitrators, followed by the attempt of one of the parties to such submission to withdraw from or to prevent an award being made upon the submission, falls within the concluding paragraph of s. 21 of the Specific Relief Act I of 1877. *ADHIBAI v. CURSANDAS NATHU.*

[I. L. R. 11 Bom. 199]

2.—s. 21.—*Arbitration—Agreement to refer—Order under s. 506, Civil Procedure Code, to refer matters in dispute in action then pending—Order under s. 373, pending the reference granting plaintiff permission to withdraw with liberty to bring fresh suit.*] The wording of s. 21 of the Specific

**SPECIFIC RELIEF ACT (I OF 1887)—**  
*continued.*

Relief Act (I of 1877) is wide enough to cover contracts to refer any matter which can legally be referred to arbitration, and one of such matters is a suit which is proceeding in Court. The parties to a suit, while it was pending, agreed to refer the matters in difference between them to arbitration and for this purpose applied to the Court for an order of reference under s 506 of the Civil Procedure Code. The application was granted, arbitrators were appointed, and it was ordered that they should make their award within one week. Before the week had expired, and before any award had been made, one of the parties made an *ex-parte* application under s. 373 of the Code for leave to withdraw from the suit with liberty to bring a fresh suit in respect of the same subject-matter. The application was granted, the suit struck off, and a fresh suit instituted in pursuance of the permission thus given by the Court. In defence to this suit it was pleaded that the suit was barred by s. 21 of the Specific Relief Act (I of 1877): *Held* that the Court in the former proceedings had no power to revoke the order of reference prior to award except as provided by s. 510 of the Code, that consequently the Court's order under s. 373 was *ultra vires* if involving such revocation, or, if not involving it, left the order of reference still in force; that in either alternative the suit was barred by s. 21 of the Specific Relief Act; and that it was immaterial that the period within which the award was to be made expired before the bringing of the second action. *Per* TYRRELL, J., that the suit was barred by the second clause of s. 373, the Court having had no jurisdiction to pass the order under that section, or, having referred the suit to arbitration, to restore the suit to its file and treat it as awaiting the Court's decision. *SHEOAMBER v. DEODAT.*

[I. L. R. 9 All 168]

—, s. 23, and s. 27 cl. (c).—*Contract to take shares* [S. 23, cl. (h), and s. 27 cl. (c) of the Specific Relief Act I of 1877, do not apply to contracts to take shares; and only embody the English law as to cases where a company has taken the benefit of a contract, but refuses to carry it into effect. *IMPERIAL ICE MANUFACTURING COMPANY v. MUNCHERSHAW BARJORJI WADIA.*

[I. L. R. 13 Bom 415]

—, s. 27.

*See* s. 23.

[I. L. R. 13 Bom. 415]

—, s. 31.

*See* DEED—RECTIFICATION.

[I. L. R. 14 Calc. 308]

—, s. 39.

*See* RIGHT OF SUIT—INTEREST TO SUPPORT RIGHT.

[I. L. R. 9 All. 439]

**SPECIFIC RELIEF ACT (I OF 1887)—**  
*concluded.*

—, s. 42.

*See* APPELLATE COURT—OTHER ERRORS AFFECTING MERITS OF SUIT.

[I. L. R. 9 All. 622]

*See* CASES UNDER DECLARATORY DECREE, SUIT FOR.*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.

[I. L. R. 11 All. 224]

*See* ONUS PROBANDI—PARTITION.

[I. L. R. 16 Calc. 117]

*See* PARTITION—MISCELLANEOUS CASES.

[I. L. R. 16 Calc. 117]

—, s. 54.

*See* INJUNCTION—SPECIAL CASES—OBSTRUCTION TO RIGHTS OF PROPERTY.

[I. L. R. 13 Bom. 252, 674]

*See* PRESCRIPTION—EASEMENTS—LIGHT AND AIR.

[I. L. R. 13 Bom. 252, 674]

**“SPIRITUOUS LIQUOR.”***See* CANTONMENTS ACT 1880, s. 14.

[I. L. R. 15 Calc. 452]

**STAMP ACT (I OF 1879)**

—, s. 2, cl (13)—*Specified property* [An agreement was made between certain persons to transfer the future surplus profits of their respective trades to a trustee in order that the trustee should hold the fund so to be created on certain trusts declared in the agreement: *Held* that the fund intended to be created under the agreement was not ‘specified property’ within the meaning of s. 2, cl (13) of the Stamp Act. REFERENCE UNDER STAMP ACT, s. 46.

[I. L. R. 11 Mad. 216]

1.—s. 3, cl (4) b.—*Bond* [A executed a document, by which he promised to pay on demand Rs 16 to B. The writer of the document signed the document as writer, for the purpose of attesting A's signature. *Held* that the document was liable to stamp-duty as a bond. REFERENCE UNDER STAMP ACT, s. 46.

[I. L. R. 10 Mad. 158]

2.—s. 3, cl. (4) c. and cl (13)—*Bond—Mortgage*—*Stamp Act 1879, ss. 7, 26, and sch. I, arts. 13, 44.* [A grower of sugarcane executed a deed whereby he borrowed a sum of Rs. 25 as ‘earnest money,’ and covenanted to deliver to the lender on a certain date 21 maunds of *rab* (unrefined sugar)]

STAMP ACT (I OF 1879), s. 3—*continued*.

upon which he was to receive a profit of 9 annas per maund over and above a price to be thereafter fixed at a meeting of growers. He further covenanted as follows:—"If the supply of the *rab* be less than the fixed quantity, and the money still remains due, then the said money thus due, including the profits, shall be paid at the rate of Re. 1 per maund; that in case of my not supplying the *rab* at all, or selling it at some other place, I will pay the whole amount at once, including the said profits." As collateral security he hypothecated the produce of a field of sugarcane, the value of which was not stated: *Held* by the Full Bench that the instrument was a "mortgage-deed" within the meaning of s. 3 (13) and No 44 (b) of sch. I of the Stamp Act (I of 1879). *Held* by STUART, C. J., STRAIGHT, J., and BRODHURST, J., that it was also a "bond" within the meaning of s. 3, cl. (4) (c) and art 13 of sch. I, and, with reference to the provisions of s. 7, was chargeable with stamp-duty solely as a bond under art. 13, the contract being a single one: *Held* by the Full Bench that the proper stamp-duty payable on the instrument was four annas: *Held* by STUART, C. J., and STRAIGHT, J., that in estimating the stamp-duty payable on the instrument, the amount stipulated to be paid by way of penalty in case of breach of the covenant to deliver the *rab* must be taken into account. *Reference by Board of Revenue, N.-W. P.* I. L. R. 2 All. 654, doubted, and *Gisborne v. Subal Bowri*, I. L. R. 3 Calo. 284, referred to by STRAIGHT, J. *Per* STUART, C. J., that for the purpose of estimating the stamp-duty, the amount secured by the instrument was Rs. 25, the amount borrowed, plus Rs. 11-3, the amount to be paid to the borrower on the 21 maunds at 9 annas per maund, and that the additional profit, *i.e.*, the price fixed at the meeting of growers, not having been ascertainable at the time of execution, fell within the provisions of s. 26 of the Stamp Act, and could not have the effect of adding to the stamp-duty. *Per* OLDFIELD, J., that the amount secured or limited to be ultimately recoverable under the instrument, was Rs. 25, the amount borrowed, plus Rs. 21, the sum recoverable at Re. 1 per maund, in the event of the borrower's non-delivery of the 21 maunds; and stamp-duty was payable on this amount. *IN THE MATTER OF GAJRAJ SINGH*

[I. L. R. 9 All. 585]

1.—s. 3, cl. (10).—*Duly stamped—Document issued without endorsement required by rules passed and published under ss. 55 and 57.* The omission of a stamp vendor to endorse on a stamped paper the particulars required by rule (9) of the revised rules published under ss. 55 and 57 of the Indian Stamp Act, 1879, by the Government of Madras, with the approval of the Governor-General in Council, does not render a document "not duly stamped" within the meaning of s. 3 (10) of the Stamp Act, 1879. *REFERENCE UNDER STAMP ACT, s. 46.*

[I. L. R. 11 Mad. 377]

STAMP ACT (I OF 1879)—*continued*,

2.—s. 3, cl. 3.—*Instrument professing to effect a partition ultra vires of the executors—Instrument of partition.* Persons incorrectly purporting to be co-owners of certain property agreed to divide it in severalty by written documents: *Held* that the arrangement fell within the definition of "instrument of partition" in the Stamp Act, 1879. *REFERENCE UNDER STAMP ACT, 1879.*

[I. L. R. 12 Mad. 198]

—, s. 3, cl. 3.

*See* s. 3, CL. 4.

[I. L. R. 9 All. 585]

—, s. 3, cl. 13.—*Mortgage—Indemnity bond* [An agreement entered into by the Secretary of State and a salt contractor recited that the contractor had deposited certain promissory notes to secure the fulfilment of the contract and provided that the promissory notes should be returned on the due fulfilment of the contract: *Held* that the agreement was a mortgage as defined by the Stamp Act. *REFERENCE UNDER STAMP ACT, s. 46.*

[I. L. R. 11 Mad. 39]

—, s. 6.—*Endorsement of consent of relative and co-sharer on deed of conveyance—Document completing transaction.* The document marked A was a document on a three-rupee stamp paper executed by H to one V, purporting to convey to him certain immovable property absolutely, for the consideration of Rs. 275. On the same deed of sale H, the undivided nephew of the executant, endorsed his consent to the sale: *Held* that the endorsement of consent and the conveyance were several instruments employed to complete a transaction within the contemplation of s. 6 of the Stamp Act I of 1879, and the consent ought to have been written on a separate stamp paper of the value of one rupee. *IN THE MATTER OF HANMAPA.*

[I. L. R. 13 Bom. 281]

—, s. 7.

*See* s. 3, CL. 4.

[I. L. R. 9 All. 585]

*See* SCH. I, ART. 44.

[I. L. R. 9 All. 585]

—, s. 11 and ss. 61, 62.—*Instrument requiring to be stamped before or at time of execution—Non-cancellation of adhesive stamp—Sanction to prosecution* [The first paragraph of s. 11 of the General Stamp Act (I of 1879) applies to cases in which the instruments chargeable with duty may be stamped after execution. A bill for the monthly salary of a Government official was sent to the treasury for payment, when it was discovered that the one-anna receipt stamp affixed thereto was not cancelled, and a prosecution was thereupon instituted by the Collector against

STAMP ACT (I OF 1879), s 11—*continued*.

the official in question, who had executed the instrument, under s. 62 of the General Stamp Act. The accused was convicted under that section by the Deputy Magistrate, and the District Magistrate on appeal, holding that, upon the evidence, the conviction should have been for abetment and not for the principal offence, altered the finding accordingly to a conviction under s 109 of the Penal Code, read with ss. 11 and 62 of the General Stamp Act: *Held* that the receipt to the salary bill in question was an instrument which was required to be stamped before or at the time of execution, and was not of the kind contemplated by the first paragraph of s. 11 of the General Stamp Act; that consequently there was no abetment of any offence under ss. 11 and 62 of the Act; that the offence which appeared to have been committed, was one under the second paragraph of s. 61; but that, no sanction having been given by the Collector under s. 69 for a prosecution under s. 61, it was not advisable to interfere further than by setting aside the conviction and sentence. *QUEEN-EMPRESS v. RAHAT ALI KHAN.*

[I. L. R. 9 All. 210]

—, s. 16

*See* s. 34.

[I. L. R. 13 Bom. 484]

—, s. 26.

*See* s. 3, CL. 4.

[I. L. R. 9 All. 585]

*See* SCH I, ART. 44.

[I. L. R. 9 All. 585]

—, s. 31.

*See* s. 51.

[I. L. R. 11 Mad. 37]

—, s. 34.—*Suit on an unstamped promissory note—Evidence Act (I of 1872), ss 65, cl. (b), and 91.]* The plaintiff sued to recover from the defendant the balance of a debt due on an unstamped note passed to him by the defendant for the consideration of Rs. 38. The note recited that the defendant had received the amount, and would repay it after three months from the date of its execution. The defendant admitted, by his written statement, execution of the note and the receipt of Rs. 37 in the shape of paddy, but alleged that he had paid off the debt. He also contended that the note being unstamped could not be admitted in evidence. The plaintiff contended that the note was a bond, and could be admitted on payment of the stamp-duty and the penalty, under s. 34 of the Stamp Act I of 1879, which he offered to pay. The Subordinate Judge was of opinion that the note in question was a promissory note, but the defendant's admis-

STAMP ACT (I OF 1879), s 34—*continued*.

sion of the consideration enabled the plaintiff to sue, although the note itself was inadmissible. On reference to the High Court, *held*, per JAR-DINE, J., that the document sued on was a promissory note, and that the suit being brought on it as the original cause of action, the admission of its contents by the defendant did not avail the plaintiff, the document itself being inadmissible for want of a stamp. *Held* per BIRDWOOD, J., that the plaintiff could not recover irrespectively of the promissory note, as he did not seek to prove the consideration otherwise than by the note, which was inadmissible in evidence. The admission contained in the defendant's written statement did not amount to an admission of the claim as for money lent. The case was one in which no secondary evidence under s. 65, cl. (b), of Act I of 1872 was admissible, the primary evidence, the document itself being forthcoming. The plaintiff not having offered any independent evidence of the advance alleged by him, and the defendant not having admitted by his written statement that any money was lent to him, as alleged by the plaintiff, but having set up an entirely different transaction, in respect of which he admitted no remaining liability, the plaintiff's suit should be rejected. *DAMODAR JAGANNATH v. ATMARAM BABAJI.*

[I. L. R. 12 Bom. 443]

2.—s. 34.—*Admission of documents in evidence—Unstamped promissory note admitted as a bond on payment of stamp-duty and penalty—Subsequent rejection too late.]* The plaintiff sued to recover the amount due on three *khatas*. The defendant objected that the *khatas* were not duly stamped. The Subordinate Judge held that the instruments were bonds, and as such admitted them in evidence on payment of the proper stamp-duty and penalty under s. 34, proviso I, of the Stamp Act (I of 1879). At a subsequent stage of the same suit, his successor in office was of opinion that the *khatas* in question were promissory notes; that as such they could be stamped only at the date of their execution, and that they had been illegally admitted in evidence under s 34, proviso I. He accordingly dismissed the suit. On appeal, the District Judge agreed with the Subordinate Judge that the instruments sued on were promissory notes but held that after they had once been admitted in evidence on payment of the stamp-duty and penalty, the question of their admissibility could not be subsequently raised in the suit under proviso III to s 34 of the Stamp Act. He, therefore, reversed the decree of the Subordinate Judge, and remanded the case for trial on the merits. Against this order of remand, defendants appealed to the High Court: *Held*, that the promissory notes having been once admitted in evidence could not afterwards be rejected, on the ground of their not being duly stamped. *DEVACHAND v. HIRACHAND KAMARAJI.*

[I. L. R. 13 Bom. 449]



## STAMP ACT (I OF 1879)—continued.

3—s. 34.—*Inadmissibility of stamped document stamped after execution—Document not duly stamped.* A receipt (dated 1887) stamped subsequently to execution, but before production in Court, was tendered in evidence: *Held* that the document was inadmissible. S. 34 of Act I of 1879 requires instruments chargeable with duty to be 'duly stamped,' which in this case meant 'stamped before or at the time of execution,' as laid down by s. 16 of the Act. *JETHIBAI v. RAM-CHANDRA NAROTTAM.*

[I. L. R. 13 Bom. 484]

4.—s. 34.—*Instrument admitted as duly stamped—Appellate Court's power to question the admission—Bombay Regulation XVIII of 1827, s. 10* Where a Court of First Instance has admitted a document in evidence as duly stamped, s. 34, cl. 3 of the Stamp Act (I of 1879) precludes the Appellate Court from questioning the admission of such document. If the Appellate Court considers the document to be insufficiently stamped, it can only proceed under s. 50 of the Act. S. 34 of Act I of 1879 applies to all instruments whenever executed, and must therefore be held to override the special provision of s. 10 of Bombay Reg. XVIII of 1827, according to which no instrument requiring a stamp thereunder was valid unless duly stamped. *GURUPADAPA BIN IRAPA v. NARO VITHAL KULKARNI.*

[I. L. R. 13 Bom. 493]

5—s. 34.—*Document proposing to borrow on certain conditions—Promissory note—Proposal—Contract Act IX of 1872, s. 4* A letter containing a request to borrow a certain sum of money, promising that the same should be repaid with interest on a certain day, is not liable to stamp-duty. It is not a promissory note, but a mere proposal under s. 4 of the Contract Act IX of 1872. *DHONDBAT NARHARBHAT v. ATMARAM MORESHVAR.*

[I. L. R. 13 Bom. 669]

—, s. 37.

See s. 63.

[I. L. R. 12 Mad. 231]

—, s. 39.—*Deed of Release—Endorsement on Conveyance—Payment of deficient duty.* A deed of release was endorsed on a deed of conveyance for Rs. 100. The conveyance bore an impressed stamp for one rupee, but the endorsement was unstamped: *Held* that the conveyance was valid, and that the release could be validated on payment of the deficient stamp-duty and the penalty under s. 39 of the Stamp Act. REFERENCE UNDER STAMP ACT, s. 46.

[I. L. R. 11 Mad. 40]

—, s. 40.

See s. 63.

[I. L. R. 12 Mad. 231.]

## STAMP ACT (I OF 1879)—continued.

—, s. 49.—*Power of Reference to High Court* A bail-bond was executed to a District Munsif, who expressed no doubt as to the amount of duty to be paid and made no application to have the case referred. The District Judge referred the case to the High Court: *Held* that the District Judge was not authorized to make the reference. REFERENCE UNDER STAMP ACT, s. 49.

[I. L. R. 11 Mad. 38]

—, s. 51. and ss. 3, 31.—*Allowance for spoiled stamps.* Allowance for spoiled stamps may be made under s. 51 of the Stamp Act when a stamped instrument has been endorsed by the Collector under s. 31. REFERENCE UNDER STAMP ACT, s. 46.

[I. L. R. 11 Mad. 37]

—, ss. 55, 57.

See s. 3, CL. 10.

[I. L. R. 11 Mad. 377]

—, s. 61

See s. 11.

[I. L. R. 9 All. 210]

—, s. 61 and Sch. 2, arts. 52 and 58.—*Acknowledgment of receipt of cheque by letter, not stamped* M acknowledged receipt of a cheque for Rs. 100 by letter. The letter was not stamped: *Held* that M was properly convicted under s. 61 of the Stamp Act, 1879. *QUEEN-EMPRESS v. MUTTIRULANDI.*

[I. L. R. 11 Mad. 329]

—, s. 62.

See s. 11.

[I. L. R. 9 All. 210]

—, s. 63, and ss. 37(b) 40, 61.—*Prosecution for attempt to defraud Government by understating the value of property in a partition-deed.* A District Judge impounded a partition-deed produced before him and forwarded it to the Collector under s. 35 of the Stamp Act 1879, being of opinion that the executant of the deed had committed an offence under s. 63. The Collector under s. 69 sanctioned the prosecution of the executant who was convicted by the Magistrate of an offence under s. 63 of the Act. On appeal the Sessions Court acquitted him on the ground that the Collector had not complied with s. 37 (b) or s. 40 of the Act: *Held* that the acquittal was wrong. *Empress v. Dwarkanath Chowdhry* (I. L. R. 2 Calc. 399); *Empress v. Soddanund Mahanty* (I. L. R. 8 Calo. 259); *Empress v. Janki* (I. L. R. 7 Bom. 82), considered. *QUEEN-EMPRESS v. VENKATRAYADU.*

[I. L. R. 12 Mad. 231]

—, Sch. I, art. 1.

See COURT FEES ACT 1870, SCH. I, CL. 8.

[I. L. R. 11 Bom. 526]

## STAMP ACT (I OF 1879) —continued.

—, Sch. I, cl. 1.—*Acknowledgment—Balance-Sheet.—Nikash.*] A *nikash*, or balance-sheet made out and signed by a *gomastah* of a business showing a balance due by him to the owner of the business, is not an acknowledgment of a debt within the meaning of cl. 1, sch. I of the Stamp Act, and is admissible in evidence without being stamped. *Brojo Gobind Shaha v. Goluck Chunder Shaha*, I. L. R. 9 Cal. 127, followed. NUND KUMAR SHAHA v. SHURNOMOYE DASI.

[I. L. R. 15 Cal. 162]

—, Sch. I, art. 5.—*Document—Agreement to pay*] A document was executed in these terms: "This document, a hand-note, is executed by me for the purpose of purchasing a *ghor*. I take from you Rs. 7. I will pay interest on the sum at a half-anna per rupee per mensem. Having received the Rs. 7 in cash, this hand-note is executed: *Held* that the document was not a promissory note nor a bond, but was an agreement to pay, and as such was chargeable with duty under cl. 5, sch. I of the Stamp Act. *Ferrier v. Ram Kulpa Ghose*, 23 W. R. 403, referred to. *MURARI MOHUN ROY v. KHETTER NATH MULLICK*.

[I. L. R. 15 Cal. 150]

—, Sch. I and sch. II, cl. 2 (a).—*Agreement to rent pasture ground—General Clauses Act (I of 1868), s. 2—Growing grass—Lease—Immoveable property.*] By a rent-note dated the 28th July 1885, the executant *B* agreed to take for five months from the executee *H* a certain pasture ground attached to the military cantonment at Poona. The note recited that *B* was to graze thirteen she-buffaloes, at Rs. 1-10 per head, on the pasture ground for a consideration of Rs. 21-2-0 to be paid to *H* by two instalments: in default of payment of one instalment, the whole amount was to become payable at once. It further recited that in case the date remained unpaid beyond the fixed period, *B* was to pay on the amount interest at the rate of two per cent. per month. The Collector of Poona was of opinion that the rent-note in question was a lease and sufficiently stamped with four annas. The Inspector-General of Registration held the document to be an agreement falling under art. 5, cl. (c), sch. I of the Stamp Act and chargeable with a stamp-duty of eight annas. On reference by the Commissioner to the High Court. *Held per* BIRDWOOD and PARSONS, JJ., (NANABHAI HARIDAS, J., dissenting) that the rent-note in question was an agreement, and as such chargeable with a stamp-duty of eight annas under cl. (c) of art. 5, sch. I of the Stamp Act I of 1879: *Held per* NANABHAI HARIDAS, J., that the instrument was a lease and sufficiently stamped with four annas, growing grass being immoveable property within the definition of s. 2 of the General Clauses Act (I of 1868). Should, however, growing grass be not regarded as immoveable property, the instrument was an agreement for or relating to the sale of goods, the price being fixed with

## STAMP ACT (I OF 1879), Sch. I.—contd.

reference to the quantity to be consumed by the cattle, and, as such, was exempt from stamp-duty under sch. II, art. (a) of the Stamp Act IN RE HORMASJI IRANI.

[I. L. R. 13 Bom. 87]

—, Sch. I, art. 13

See s. 3, CL. 4.

[I. L. R. 9 All. 585]

See SCH. I, ART. 44.

[I. L. R. 9 All. 585]

—*Security-bond for costs of appeal—Court Fees Act (VII of 1870), sch. II, No. 6.*] *Held* by the Full Bench that where a bond is given under the orders of a Court as security by one party for the costs of another, it is subject to two duties —(a) an *ad valorem* stamp under the Stamp Act, art. 13, sch. I (b) a Court-fee of eight annas under the Court Fees Act, art. 6, sch. II. KULWANTA v. MAHABIR PRASAD.

[I. L. R. 10 All. 16]

—, Sch. I, art. II and art. 19.—*Cheque—Bill of Exchange—Admissibility in evidence—Post-dated cheque—Stamp Act, 1879, s. 67—Penalty.*] In determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, the document itself as it stands, and not any collateral circumstances which may be shown in evidence, must be looked at. *Bull v. O'Sullivan*. L. R. 62 B. 209; *Gatty v. Fry*, L. R. 2 Ex. D. 265, and *Chandra Kant Mookerjee v. Kartik Charan Charle*, 5 B. L. R. 103, referred to. Where a cheque bearing a stamp of one anna was dated the 25th September, and the evidence showed it to have been actually drawn on the 8th September, and therefore to have been post-dated, it was contended that the cheque was really a bill of exchange payable 17 days after date, and therefore inadmissible in evidence as being insufficiently stamped. *Held*, in a suit, to recover the amount of the cheque on its being dishonoured, that it was admissible in evidence. RAMEN CHETTY v. MAHOMED GHHOUSE.

[I. L. R. 16 Cal. 432]

—, Sch. I, art. 25.

See SCH. I, ART. 36

[I. L. R. 12 Mad. 89]

—, Sch. I, art. 25 and art. 5.—*Declaration of trust—Agreement.*] An agreement was made between certain persons to transfer the future surplus profits of their respective trades to a trustee, in order that the trustee should hold the fund so to be created on certain trusts declared in the agreement: *Held* that the agreement was liable to stamp-duty as a declaration of trust under the Indian Stamp Act, 1879, sch. I, art. 25, and as an agreement under art. 5 (c) REFERENCE UNDER STAMP ACT, s. 46

[I. L. R. 11 Mad. 216]

STAMP ACT (I OF 1879)—*continued.*

—, Sch. I, art. 36, and art. 25.—*Declaration of trust—Gift.*] Where a donee was directed in an instrument of gift of certain land to maintain the donor out of the profits of the land: *Held* that the instrument was liable to stamp-duty as a gift and not as declaration of trust. REFERENCE UNDER STAMP ACT, s. 46.

[I. L. R. 12 Mad. 89]

1.—Sch. I, art. 38.—*Deed acknowledging former adoption and investing the person adopted with powers of a son.*] A, who was a childless Hindu widow, acknowledged the fact of the adoption of B by a deed which recited that she having been childless had asked the father of the executee to give the executee in adoption, and he having consented, the executee was adopted with due ceremonies on the 1st August 1887. It further recited that the original name of the executee was changed, and the executee was thenceforth to bear the changed name, and to get all the powers which usually vested in a son. The Commissioner, C. D., feeling doubt as to whether it could be treated as a deed of adoption, referred it for the opinion of the High Court. *Held*, that the document was distinct from an adoption-deed or authority to adopt so as to be liable to stamp-duty under Act I of 1879, art. 38, sch. I, and that it was not liable to any stamp-duty. IN THE MATTER OF AMBAL.

[I. L. R. 13 Bom 280]

2.—Sch. I, art. 38.—*Deed confirming adoption.*] A document was written on a ten-rupee stamp paper executed by the executant M to one D, whereby M after reciting the fact of his having adopted D, constituted him the heir to his interest in the undivided family property, and declared him to be the sole owner thereof as the executant's adopted son. On the same document C the mother of D and his father P endorsed separately their consent to the adoption: *Held*, that the document was not an instrument conferring an authority to adopt and, therefore, not chargeable under art. 38 of sch. I of Act I of 1879 or under any other article. The endorsements, therefore, were not chargeable with any stamp-duty. IN THE MATTER OF HANMAPA.

[I. L. R. 13 Bom. 281]

—, Sch. I, art. 44.—*Bond—Mortgage—Stamp Act 1879, s. 3, cl. 4 (c) and 13, ss. 7, 26, sch. I, art. 13.*] A grower of sugarcane executed a deed whereby he borrowed a sum of Rs. 25 as "earnest money," and covenanted to deliver to the lender on a certain date 21 maunds of *rab* (unrefined sugar), upon which he was to receive a profit of 9 annas per maund over and above a price to be thereafter fixed at a meeting of growers. He further covenanted as follows:—"If the supply of the *rab* be less than the fixed quantity, and the money still remains due, then the said money thus due,

STAMP ACT (I OF 1879), Sch. I, art. 44—*continued.*

including the profits, shall be paid at the rate of Re. 1 per maund; that in case of my not supplying the *rab* at all, or selling it at some other place, I will pay the whole amount at once, including the said profits." As collateral security he hypothecated the produce of a field of sugarcane, the value of which was not stated: *Held* by the Full Bench that the instrument was a "mortgage-deed" within the meaning of s. 3 (13) and art. 44 (b) of sch. I of the Stamp Act (I of 1879): *Held* by STUART, C. J., STRAIGHT, J., and BRODHURST, J.; that it was also a "bond" within the meaning of s. 3 (4) (c) and art. 13, of sch. I, and, with reference to the provisions of s. 7, was chargeable with stamp-duty solely as a bond under art. 13, the contract being a single one: *Held* by the Full Bench that the proper stamp-duty payable on the instrument was four annas: *Held* by STUART, C. J., and STRAIGHT, J., that in estimating the stamp-duty payable on the instrument, the amount stipulated to be paid by way of penalty in case of breach of the covenant to deliver the *rab* must not be taken into account: *Reference by Board of Revenue, N.-W. P.*, I. L. R. 2 All. 654, doubted, and *Gishorne v. Subal Bowri*, I. L. R. 8 Cal. 284, referred to by STRAIGHT, J. *Per* STUART, C. J., that, for the purpose of estimating the stamp-duty, the amount secured by the instrument was Rs. 25, the amount borrowed, plus Rs. 11-3, the amount to be paid to the borrower on the 21 maunds at 9 annas per maund, and that the additional profit, i.e., the price fixed at the meeting of growers, not having been ascertainable at the time of execution, fell within the provisions of s. 26 of the Stamp Act, and could not have the effect of adding to the stamp-duty. *Per* OLDFIELD, J., that the amount secured or limited to be ultimately recoverable under the instrument, was Rs. 25, the amount borrowed, plus Rs. 21, the sum recoverable at Re. 1 per maund in the event of the borrower's non-delivery of the 21 maunds; and stamp-duty was payable on this amount. IN THE MATTER OF GAJRAJ SINGH.

[I. L. R. 9 All. 585]

—, Sch. I, art. 52.

See s. 61.

[I. L. R. 11 Mad. 329]

—, Sch. I, art. 52.—*Tax—Receipt for money paid as taxes—Municipality, receipt by, for house-tax exceeding twenty rupees.*] A receipt by a Municipality acknowledging payment of house-tax exceeding twenty rupees, requires a receipt stamp under sch. I, art. 52 of Act I of 1879. IN RE KARACHI MUNICIPALITY.

[I. L. R. 12 Bom. 103]

—, Sch. I, art. 58.

See s. 61.

[I. L. R. 11 Mad. 329]

STAMP ACT (I OF 1879)—*concluded.*

—, Sch. II, 1 (b)—*Affidavit.*] S being desirous of obtaining copies of certain records in a suit in the Court of the Subordinate Judge of Sirsi appeared before the nazir and clerk of that Court, and made an affidavit to the effect that she was the heir and legal representative of one of the defendants in that suit, and needed the copies for the purpose of producing them in a suit filed against her in the Court at Karwar. The affidavit, together with a duly stamped application, was presented by her pleader to the District Judge, who, being of opinion that the affidavit should be on a stamped paper, referred the case to the High Court: *Held*, that the affidavit was exempt from stamp-duty, under schedule II, 1 (b) of the Stamp Act I of 1879. IN RE THE APPLICATION OF SHESHAMMA.

[I. L. R. 12 Bom. 276]

—, Sch. II, cl. 2 (a).

See SCH. I, ART. 5.

[I. L. R. 13 Bom. 87]

—, Sch. II, cl. 2 (a)—*Agreement for, or relating to, the sale of goods.*] By an agreement in writing the vendor agreed to sell, and the purchaser to buy, certain salt for a price to be paid at a future date. The salt was to be at purchaser's risk from the date of the execution of the agreement, and, if not removed within a certain time, to revert to, and become the property of, the vendor: *Held*, that this document was exempt from duty under sch. II cl. 2 (a), of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, s. 46.

[I. L. R. 10 Mad. 27]

1.—Sch II, art. 15 (a).—*Receipt—Endorsement of payment of mortgage-deed.*] An endorsement of a mortgage, acknowledging the receipt of the sum thereby secured is exempt from stamp-duty under sch. II, art. 15 (a), of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, s. 46.

[I. L. R. 10 Mad. 64]

2.—Sch. II, art. 15.—*Receipt given by Secretary of Club to a member for Club bill.*] Where a receipt in writing is given by the Secretary or other Manager of a club to a member acknowledging a payment above Rs. 20 on account of a club bill, it is liable to stamp-duty. REFERENCE UNDER STAMP ACT, s. 46.

[I. L. R. 10 Mad. 85]

## STATUTE.

—, 12 Hen. VIII, c 34.

See LANDLORD AND TENANT—FORFEITURE—BREACH OF CONDITIONS.

[I. L. R. 14 Calc. 176]

STATUTE—*continued.*

—, 13 Eliz c. 5.

See DEBTOR AND CREDITOR.

[I. L. R. 11 Bom. 666]

[I. L. R. 13 Bom. 434]

—, 2 and 3 Will., IV, c. 71.

See PRESCRIPTION—EASEMENTS—LIGHT AND AIR.

[I. L. R. 14 Calc. 839]

—, 15 and 16 Vict. c. 82, s. 41.

See PATENT.

[I. L. R. 9 All. 191]

[I. L. R. 13 I. A. 134]

—, 17 and 18 Vict., c. 104.

See MERCHANT SHIPPING ACT, 1854.

—, 21 and 22 Vict., c. 27 (Lord Cairns' Act).

See INJUNCTION—SPECIAL CASES—OBSTRUCTION TO RIGHTS OF PROPERTY.

[I. L. R. 13 Bom. 252]

—, 21 and 22 Vict., c. 106, s. 65.

See PARTIES—PARTIES TO SUITS—GOVERNMENT.

[I. L. R. 14 Calc. 256]

—, 24 and 25 Vict., c. 67, s. 22.

See HIGH COURT, JURISDICTION OF—HIGH COURT, N.-W. P.

[I. L. R. 11 All. 490]

See STATUTES, CONSTRUCTION OF.

[I. L. R. 11 All. 490]

—, 24 and 24 Vict., c. 104, s. 7.

See HIGH COURT, CONSTITUTION OF—HIGH COURT, N.-W. P.

[I. L. R. 9 All. 625]

—, 24 and 25 Vict., c. 104, s. 15.

See CASES UNDER SUPERINTENDENCE OF HIGH COURT—CHARTER ACT, s. 15.

—, 28 and 29 Vict., c. 17 (Preamble).

See HIGH COURT, JURISDICTION OF—HIGH COURT, N.-W. P.

[I. L. R. 11 All. 490]

See STATUTES, CONSTRUCTION OF.

[I. L. R. 11 All. 490]

STATUTE—*concluded.*

—, 32 and 33 Vict., c. 98, s. 1

See HIGH COURT, JURISDICTION OF—  
HIGH COURT, N.-W. P.

[I. L. R. 11 All. 490]

See STATUTES, CONSTRUCTION OF.

[I. L. R. 11 All. 490]

## STATUTES, CONSTRUCTION OF.

See BENGAL TENANCY ACT, s. 174.

[I. L. R. 14 Calc. 636]

See CERTIFICATE OF ADMINISTRATION—  
CERTIFICATE UNDER BOMBAY REG.  
VIII OF 1827.

[I. L. R. 13 Bom. 37]

1.—*Madras Municipal Act (I of 1884)—Inaccuracy in Act.* Where in an Act of the Legislature the context discloses a manifest inaccuracy, the sound rule of construction is to eliminate the inaccuracy, and to execute the true intention of the Legislature. *JENNINGS v. PRESIDENT, MUNICIPAL COMMISSION, MADRAS.*

[I. L. R. 11 Mad. 253]

2.—*Bombay Municipal (Act III of 1872) s. 195—Act for public benefit.* Where an Act gives power to a Municipality or Corporation for the public benefit, a more liberal construction should be given to it than where powers are to be exercised merely for private gain or other advantage. *OLLIVANT v. RAHIMTULA NUR MAHOMED.*

[I. L. R. 12 Bom. 474]

3.—*Letters Patent High Court, cl. 12* Every statute is to be interpreted and applied so far as its language admits, so as not to be inconsistent with the comity of nations or with the established rules of international law. All legislation is, *prima facie*, territorial. It binds all subjects of the Crown, but only such subjects of other countries as have brought themselves within the allegiance of the Sovereign. *KESSOWJI DAMODAR JAIRAM v. KHMJI JAIRAM*

[I. L. R. 12 Bom. 507]

4.—*Act XIII of 1859, Preamble and s. 2.* Where the enacting sections of a statute are clear, the terms of the preamble cannot be called in aid to restrict their operation or to cut them down. *QUEEN-EMPRESS v. INDARJIT.*

[I. L. R. 11 All. 262]

5.—*Statute 24 and 25 Vict., c. 67, s. 22—Legislative power of the Governor-General in Council—“Indian territories now under the dominion of Her Majesty”—“Said territories.”—28 and 29 Vict., c. 17, preamble—32 and 33 Vict., c. 98, s. 1.* The Governor-General in Council has power to make laws

STATUTES, CONSTRUCTION OF—  
*concluded.*

and regulations binding on all persons within the Indian territories under the dominion of Her Majesty, no matter when such territories were acquired. His legislative powers are not limited to those territories which, at the date when the Indian Councils Act (24 and 25 Vict., c. 67) received the royal assent (*i.e.*, the 1st August 1861), were under the dominion of Her Majesty. In the preamble to the 28 and 29 Vict., c. 17, and in s. 1 of the 32 and 33 Vict., c. 98, Parliament has placed this construction upon s. 22 of the Indian Councils Act. Even if that construction was erroneous, it has been so declared by Parliament as to make its adoption obligatory. Though a mistaken opinion of the Legislature concerning the law does not make the law yet it may be so declared as to operate in future. *The Postmaster-General of the United States v. Early*, Curtis' Rep. U. S., p. 86, referred to. It must be presumed that the laws and regulations of the Governor-General in Council are known to Parliament. *Empress v. Burah*, I. L. R. 3 Calc. 143; I. L. R. 4 Calc. 183, referred to. *ABDULLA v. MOHAN GIR.*

[I. L. R. 11 All. 490]

## STAY OF EXECUTION.

See CASES UNDER EXECUTION OF DECREE  
—STAY OF EXECUTION.

## STAY OF PROCEEDINGS.

*Procedure—Venue—Right of plaintiff to choose place of trial—Civil Procedure Code (Act XIV of 1882), ss. 27 and 53.* The plaintiff brought this suit in the High Court at Bombay against the defendant for defamation alleged to be contained in a notice that appeared in the *Bombay Gazette* on the 9th April 1888. The defendant was the Chairman of the Hinganghat Mill Company. The plaintiff had been for some years secretary and manager of that Company. In April 1888, he was dismissed from his appointment and shortly afterwards he filed a suit (No. 1 of 1888) in the Court of the Deputy Commissioner at Wardha, in the Central Provinces (which was the Court of the district in which Hinganghat is situated), for wrongful dismissal. The present suit was filed in July 1888. The defendant took out a summons calling on the plaintiff to show cause why the suit should not be stayed, and the plaintiff returned to the plaintiff, in order that, if he thought proper, it might be presented in the Court at Wardha. The defendant relied on the following points:—(1) that neither he nor the plaintiff resided or carried on business at Bombay; (2) that all the defendant's witnesses resided at Wardha; (3) that the other suit (No. 1 of 1883) was pending at Wardha, and that the decree of that suit would decide the present case also: *Held*, that the plaintiff was entitled to sue in Bombay. *GEFFERT v. RUCKCHAND MOHIA.*

[I. L. R. 13 Bom. 178]

## STOLEN PROPERTY.

Col.

1. Offences relating to ... 1013
2. Disposal of, by the Court ... 1013

## (1) OFFENCES RELATING TO.

1.—*Res nullius*.—Bull set at large in accordance with Hindu religious usage.—Penal Code, ss. 410, 411.] A Hindu who, upon the death of a relative, dedicates or lets loose a bull, in accordance with Hindu religious usage, as a pious act for the benefit of the soul of the deceased, thereby surrenders and abandons all proprietary rights in the animal, which thereafter is not "property," which is capable of being made the subject of dishonest receipt or possession within the meaning of ss. 410 and 411 of the Penal Code. *Queen Empress v. Bandhu*, I. L. R. 8 All. 51, and *Queen-Empress v. Jamura*, Weekly Notes, All. 1884, p. 87, referred to. *QUEEN-EMPRESS v. NIHAL*.

[I. L. R. 9 All. 348]

See *QUEEN-EMPRESS v. IMAM ALI*

[I. L. R. 10 All. 150]

and *ROMESH CHUNDER SANNYAL v. HIRU MONDAL*.

[I. L. R. 17 Calc. 852]

2.—*Receiving stolen property*.—*Evidence*.—Penal Code (Act XLV of 1860), s. 411.] To constitute the offence of receiving stolen property there must be some proof that some person other than the accused had possession of the property, before the accused got possession of it. *ISHAN MUCHI v. QUEEN-EMPRESS*.

[I. L. R. 15 Calc. 511]

3.—Penal Code, ss. 403, 429.—Bull dedicated to an idol.] A bull dedicated to an idol and allowed to roam at large is not *fera bestia*, and therefore *res nullius*, but *prima facie*, the trustee of the temple, where the idol is worshipped, has the rights and liabilities attaching to its ownership. Such an animal can therefore be the subject of theft and criminal misappropriation. *QUEEN-EMPRESS v. NALLA*.

[I. L. R. 11 Mad. 145]

## (2) DISPOSAL OF, BY THE COURT.

4.—Criminal Procedure Code, 1882, s. 517.—Order as to property as to which offence has been committed.—Discharge of accused.] On the dismissal of a charge against certain persons of criminal misappropriation of an elephant, the Magistrate under s. 517 of the Criminal Procedure Code ordered the elephant to be given to the Executive Engineer of the district, holding that it was the property of Government. Held, that the dismissal of the charge being in fact a finding that no offence had been committed in respect of the elephant, the Magistrate's order was illegal and must be set aside. In setting it aside the High Court held, however, following *In re Annapurna Bai*, I. L. R. 1 Bom. 630, that they had no power to order restitution of the elephant. IN THE MATTER OF THE PETITION OF BASUDEB SURMA GOSAIN. *BASUDEB SURMA GOSAIN v. NAZIRUDDIN*

[I. L. R. 14 Calc. 834]

## STOLEN PROPERTY—concluded

## (2) DISPOSAL OF, BY THE COURT—concluded.

5.—Criminal Procedure Code, s. 517.—Disposal of calf, not in esse at time of theft.] R's cow having been stolen the thief after a lapse of a year and a half was convicted. Six months after the theft, V innocently purchased the cow, which while in his possession had calf. The Magistrate, under s. 517 of the Code of Criminal Procedure, ordered that the cow and calf should be delivered up by V to R; Held, that, as the calf was not even in embryo at the date of the theft, the order to deliver up the calf was illegal. *IN RE VERNEDE*

[I. L. R. 10 Mad. 25]

## SUBORDINATE JUDGE, JURISDICTION OF.

1.—Malicious prosecution.—Suit against a mamlatdar for malicious prosecution undertaken by him at the instance of his superior officer, to clear his character.—Subordinate Judge power of, to try such suit.] The defendant, who was a mamlatdar, was required by his superior officer to clear his character from certain charges of bribery which had been brought against him in an anonymous letter, and he accordingly prosecuted the plaintiffs whom he suspected of having written the letter. The plaintiffs were convicted and sentenced by a Magistrate; but, on appeal, were acquitted by the Sessions Judge. The plaintiffs thereupon brought this suit in a Subordinate Judge's Court to recover damages from the defendant for malicious prosecution. The jurisdiction of the Subordinate Judge to try the suit being questioned, he referred the case to the High Court; Held, that the Subordinate Judge had jurisdiction to try the suit. The defendant was sued in his individual, and not in his official, capacity; and the fact that he was a mamlatdar when he prosecuted the plaintiffs, could not affect the character in which he was sued. *BANKAT HARGOVIND v. NARAYAN VAMAN DEVBHANKAR*

[I. L. R. 11 Bom. 370]

2.—Subordinate Judge invested with Small Cause Judge's powers.—Civil Procedure Code (Act XIV of 1882) s. 111.—Set-off exceeding pecuniary jurisdiction of the Small Cause powers of the Subordinate Judge.—Practice.] In a suit brought by the plaintiff to recover Rs. 36-7-9 from the defendant, under the Small Cause jurisdiction of a Subordinate Judge, the defendant claimed to set-off Rs. 72, which exceeded the pecuniary jurisdiction of the Judge as a Small Cause Judge. On reference to the High Court, held that the set-off might be pleaded by the defendant. The Judge would exercise his Small Cause Court jurisdiction in trying the claim of the plaintiff, and his ordinary jurisdiction in trying the set-off. *RAMPRATAP v. GANESH RANGNATH*

[I. L. R. 12 Bom. 31]

3.—Act XIV of 1869, ss. 23 and 24.—Subordinate Judge appointed to assist another Subordinate Judge, powers of.] Where a Subordinate Judge is deputed, under s. 23 of Act XIV of 1869, to assist another Subordinate Judge, the

SUBORDINATE JUDGE, JURISDICTION OF—*continued.*

assistance by the Judge so deputed can only be afforded within the limits of his jurisdiction as fixed by s. 24 of the Act, and cannot be invoked, except in matters within his competence. The plaintiff having obtained a decree against the defendant in a suit in which the subject-matter of the suit and the amount of the decree exceeded Rs. 5,000 in the Court of a Subordinate Judge of the First Class, presented it in that Court for execution. The Subordinate Judge transferred it for execution to the Second Class Subordinate Judge who had been appointed, under Act XIV of 1869, to assist him, and whose jurisdiction extended to Rs. 5,000 only. The Second Class Subordinate Judge ordered execution to issue. The defendant appealed, and this order was reversed. The plaintiff appealed to the High Court and raised, for the first time, an objection that the Second Class Subordinate Judge had no jurisdiction to entertain the application for execution. The defendant contended that this objection was taken too late on second appeal: *Held*, that the Second Class Subordinate Judge had no jurisdiction to entertain and deal with the plaintiff's application for execution, and that the plaintiff's objection should be allowed. An objection to the jurisdiction, the validity of which is patent on the face of the proceedings, can be taken at any stage of the proceedings. **SIDHESHWAR PANDIT v. HARIHAR PANDIT.**

[I. L. R. 12 Bom. 155]

4.—*Appeal—Suit cognizable by a Court of Small Causes Act XI of 1865, ss. 2, 6, 12, 21—Bombay Civil Courts Act XIV of 1869, s. 28—Subordinate Judge invested with Small Cause powers—Final decision.* The plaintiff sued to recover Rs. 5 as damages for the wrongful removal of a tree. The suit was filed in the Court of a Second Class Subordinate Judge, who was invested, under Act XIV of 1869, s. 28, with the jurisdiction of a Judge of a Court of Small Causes. The case, which was in itself of the nature of a Small Cause, was however, tried as an ordinary suit according to the rules of the Civil Procedure Code. The Subordinate Judge rejected the plaintiff's claim. An appeal was made to the District Court, which reversed the Subordinate Judge's decree, and awarded the claim: *Held*, that the suit having really been a Small Cause, no appeal lay to the District Court, though the Subordinate Judge did not use the procedure of Act XI of 1865. Having the Small Cause Court jurisdiction, the Subordinate Judge must be taken to have dealt with the case under that jurisdiction, even if he was not quite alive to it at the time. A suit taken cognizance of under ss. 2, 6 or 12 of the Mofussil Small Cause Court Act (XI of 1865), does not cease to be a suit tried under the Act, because of some divergence from its summary procedure. A surplussage of form and elaborateness does not change the character of the decision for the purpose of its finality. Section 28 of the Bombay Civil Courts Act (XIV of 1869) does not, when jurisdiction is given under it, necessarily

SUBORDINATE JUDGE, JURISDICTION OF—*continued.*

divide the Court into two separate Courts, but still it creates an additional and distinct jurisdiction. Since Act IX of 1887 came into force, the Court is to be regarded as two Courts in such cases. **PITAMBER VAJIRSHET v. DHONDU NAVLAPA.**

[I. L. R. 12 Bom. 486]

5.—*Malicious prosecution—Prosecution when official—Bombay Civil Courts Act (XIV of 1869), s. 32—Bombay Act X of 1876, s. 15—Prosecution instituted by order of superior officer.* An officer of Government who prosecutes for an injury personal to himself, is not generally acting in his official capacity as prosecutor. If any particular class of interests is placed specifically under his tutelage, with a direction to guard them by the appropriate legal proceedings, suits instituted in the fulfilment of the duty thus assigned to the functionary are of course instituted in his official capacity. A similar remark applies to criminal proceedings. A prosecution by a functionary is official when in carrying it on he is discharging a duty expressly or impliedly assigned to him by law. If the duty of prosecuting in any particular case is not assigned to an officer as such, the consent or the order of his superior will not make the act an official one which in its nature is not so, as lying outside his official functions. The defendant was a forest officer in the service of Government. He prosecuted a certain person for theft in the Magistrate's Court at Sirsi. The accused was defended by the plaintiff, who was a pleader. During the hearing of the case the defendant in open Court made use of certain expressions towards the plaintiff, which it was alleged were defamatory, and were calculated to lower him in the estimation of the public, to injure his reputation, and to mar his professional prospects. The plaintiff sent him a notice claiming Rs. 4,500 as damages for the injury done to him by the defendant. The defendant thereupon lodged a complaint before the Divisional Magistrate at Sirsi, charging the plaintiff, under s. 189 of the Penal Code with holding out a threat, &c., to a public servant for the purpose of inducing him to refrain from doing his duty as such public servant. The Magistrate dismissed the charge, and the plaintiff then filed the present suit against the defendant for malicious prosecution. The defendant pleaded that in lodging the complaint against the defendant he had acted in his official capacity and under the orders of his superior officer with reasonable and probable cause and not maliciously; that the suit was brought with reference to an act done by him in his official capacity as forest officer, and that, therefore, the Court of the Subordinate Judge had no jurisdiction. The Subordinate Judge held that he had no jurisdiction, being of opinion that the defendant had prosecuted the plaintiff in his character as a public servant, and that, therefore, the present suit against the defendant was one in which an officer of Government in his official capacity was a defendant, and as such was cognizable by



# SUBORDINATE JUDGE, JURISDICTION OF—concluded.

the District Judge only, under s. 32 of the Bombay Civil Courts Act (XIV of 1869). He, therefore, dismissed the suit. On appeal, the Acting District Judge was also of opinion that the Subordinate Judge had no jurisdiction; but he held that the Subordinate Judge was wrong in dismissing the suit, instead of returning the plaint for presentation to the District Court. He therefore reversed the decree of the Subordinate Judge, and referred the plaintiff to the District Judge. On appeal by the plaintiff. *Held* by the High Court, that the defendant was sued as a private person for an alleged wrong to the plaintiff, and that the suit was rightly brought in the Court of the Subordinate Judge. The order appealed from was, therefore, reversed, and the District Judge was directed to dispose of the appeal on its merits. *GOPI MAHABLESVAR BHAT v. SHESO MANJU.*

[I. L. R. 12 Bom 358]

# SUBSCRIPTION.

See RIGHT OF SUIT—SUBSCRIPTION.

[I. L. R. 14 Calc. 64]

# SUCCESSION ACT (X OF 1865.)

See CONVERTS.

[I. L. R. 10 Mad. 69]

—, s. 50.

See WILL—ATTESTATION.

[I. L. R. 16 Calc. 19]

—, s. 16.—*Hindu Wills Act (XXI of 1870), ss. 2, 3—Lapsed legacy—Lapse of gift to testator's lineal descendant—Probate and Administration Act (V of 1881), s. 131.* A testator, by his will, dated the 22nd April 1878, gave a legacy of Rs. 5,000 to his son's daughter *J*, to be paid to her out of a certain sum owing to the testator by the Rajah of Bettia. The testator died on the 2nd February 1881, and *J* in October 1879; the money due by the Rajah of Bettia was realized on the 7th December 1884. *J* left an only child *B* who was born before the death of the testator. *B* sued to recover the legacy left to her mother; the defence was that the legacy had lapsed: *Held*, that *J* was, in point of law, within the meaning of s. 96 of the Succession Act, a person in existence at the death of the testator, because a lineal descendant of her's survived the testator. *JITU LAL MAHATA v BINDA BIBI*

[I. L. R. 16 Calc. 549]

—, s. 128.—*Legacy to person appointed executor—Rebuttal of presumption—Parol evidence—Hindu Wills Act (XXI of 1870), s. 2.* The language of s. 128 of the Succession Act is peremptory and leaves no room for a presumption, and it is not left to the Court to decide whether the legacy is given to the person in his character as executor

# SUCCESSION ACT (X OF 1865)—concluded.

or not. The rule as to the admissibility of parol evidence to rebut the presumption, which may possibly upon the decisions obtain in England, has no force in this country where such evidence is inadmissible. *PROSONO COOMAR GHOSE v. ADMINISTRATOR-GENERAL OF BENGAL.*

[I. L. R. 15 Calc 83]

—, s. 179.

See PARTIES—PARTIES TO SUITS—EXECUTORS.

[I. L. R. 12 Bom. 621]

—, s. 179.

See PROBATE—EFFECT OF PROBATE.

[I. L. R. 12 Bom. 621]

—, s. 187.

See PROBATE—EFFECT OF PROBATE.

[I. L. R. 14 Calc. 37]

—, ss. 256, 257.

See ADMINISTRATION BOND.

[I. L. R. 10 All. 29]

# SUDRAS—

See HINDU LAW—MARRIAGE—VALIDITY OR OTHERWISE OF MARRIAGE.

[I. L. R. 15 Calc. 708]

See HINDU LAW—PARTITION—RIGHT TO PARTITION—ILLEGITIMATE CHILDREN.

[I. L. R. 12 Mad. 401]

# SUNDERBUND ESTATE—

See BENGAL ACT VII OF 1868, s. 1.

[I. L. R. 14 Calc. 440]

See SALE FOR ARREARS OF REVENUE—INCUMBRANCES.

[I. L. R. 11 Calc. 440]

# SUMMARY TRIALS.

—*Criminal Procedure Code. s. 260.—Complaint including charge not summarily triable—Summary jurisdiction not necessarily ousted thereby.* The mere circumstance of a complaint charging an accused person with offences not summarily triable along with other offences so triable would not necessarily oust the summary jurisdiction of a Magistrate under s. 260 of the Criminal Procedure Code. Whether a complaint affords sufficient grounds for a summary trial or requires a trial according to the ordinary procedure, must be left in a great measure to the discretion of the Magistrate, exercised with due care according to judicial methods with reference to the circumstances of each case. *Ramchunder Chatterjee v.*

**SUMMARY TRIALS—concluded.**

*Kunhye Laha*, 25 W. R. Cr. 19; *Chuncker Seekor Sookul v. Dhurm Nath Tewaree*, 1 C. L. R. 431; *Bepotoollah v. Najim Sheikh*, 2 C. L. R. 474; and *Empress v. Abdool Karim*, 1. L. R. 4 Calc. 18, referred to. *QUEEN-EMPRESS v. JAGJIWAN*.

[I. L. R. 10 All. 55]

—*Criminal Procedure Code*, s. 260—*Act XIII of 1859, s. 2.* Offences under s. 2 of Act XIII of 1859 are triable summarily under s. 260 of the *Criminal Procedure Code*. *QUEEN-EMPRESS v. INDARJIT*.

[I. L. R. 11 All. 262]

—*Magistrate Power of, to try case summarily—Criminal Procedure Code (Act X of 1882), s. 260.* A complainant applied to a Magistrate for process against certain persons under ss. 447, 446, 448 and 449 of the Penal Code. The Magistrate having perused the petition of the complainant and examined him on oath, issued summonses against the persons named under those sections. The complainant was not himself an eye-witness of the occurrence, and merely stated in his petition and evidence what he had been told by his servants. Subsequently, before the accused appeared, the Magistrate examined an eye-witness, and issued a fresh summons under s. 447 only, and then proceeded to try the case summarily and convicted one of the accused. It was contended that he had no power so to try and dispose of the case: *Held*, that the Magistrate had power to try the case summarily. When a Magistrate ascertains that the facts which are alleged to have taken place disclose only an offence triable summarily, he can dispose of such case summarily, and the mere fact that a complainant enumerates sections of the Penal Code relating to offences not triable summarily does not affect the jurisdiction of the Magistrate, unless the facts of which he really complains disclose such offences. *GOLAP PANDEY v. BODDAM*.

[I. L. R. 16 Calc. 715]

**SUPERINTENDENCE OF HIGH COURT.**

Col.

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|--|------|
| 1. Charter Act 24 and 25 Vict., c 104, s. 15 | 1019 |
| (a) Civil cases                              | ...  |
| (b) Criminal cases                           | ...  |
| 2. Civil Procedure Code, s 622               | 1020 |

(1) CHARTER ACT 24 AND 25 VICT.,  
c. 104, s. 15.

(a) CIVIL CASES.

1.—*Revision of judicial proceeding—Jurisdiction of High Court—Civil Procedure Code, s. 622.* *Held* by EDGE, C. J., and OLDFIELD and BRODHURST, JJ., that under s. 15 of 24 and 25 Vict., c 104, it is competent to the High Court, in the exercise of its power of superintendence, to direct a Subordinate Court to do its duty, or to abstain from taking action in matters of which it has no cognizance; but the High Court is not competent in the exercise of this authority, to interfere with and

**SUPERINTENDENCE OF HIGH COURT.**

—continued.

(1) CHARTER ACT 24 AND 25 VICT.,  
c. 104, s. 15—concluded

(d) CIVIL CASES—concluded.

set right the orders of a Subordinate Court on the ground that the order of the Subordinate Court has proceeded on an error of law or an error of fact. The High Court's power to direct a Subordinate Judge to do his duty is not limited to cases in which such Judge declines to hear or determine a suit or application within his jurisdiction: *Held* by STRAIGHT and TYRRELL, JJ., that the word "superintendence" used in s. 15 of the Charter Act contemplated and now includes powers of a judicial or quasi judicial character, apart from those conferred on the Court by s. 622 of the Civil Procedure Code; but that the last mentioned provision may properly be accepted as indicating the extent to which the Court should ordinarily interfere with the findings of such subordinate tribunals as are invested with exclusive jurisdiction to try and determine all questions of law and fact arising in suits within their exclusive cognizance, and in which their decisions are declared by law to be final. *Ty Ram v. Harsukh*, 1. L. R. 1 All. 101; *Girdhari Singh v. Hardeo Narain Singh*, L. R. 3 I. A. 230, and *In the matter of the petition of Mathra Parshad*, 1. L. R. 1 All. 296, referred to. The judgment of PETHERAM, C. J., in *Badami Kuar v. Dina Rai*, 1. L. R. 8 All. 111, explained. *MUHAMMAD SULEMAN KHAN v. FATIMA*.

[I. L. R. 9 All. 104]

(b) CRIMINAL CASES.

2.—*Criminal Procedure Code (Act X of 1882), s. 144—Order to abstain from certain act.* A Deputy Commissioner passed an order under s. 144 of the Code of Criminal Procedure, prohibiting a person from collecting any rent or attempting to collect rent, either herself or through any of her officers or servants, from the ryots of two specified pergunnahs; and also from effecting any sale or putting in hand any transaction with regard to standing trees or collected timbers in an estate, or erecting any *adda* or *kuchari* in such pergunnahs for a period of two months. Upon an application to set aside such order: *Held*, that the High Court had jurisdiction, under s. 15 of the Charter Act, to set it aside if it were made without jurisdiction. *ABAYESWARI DEBI v. SIDHESWARI DEBI*.

[I. L. R. 16 Calc. 80]

(2) CIVIL PROCEDURE CODE, s. 622.

3.—*Discretion of Court exercised with jurisdiction.* Section 622 of the Code is one of very limited operation; and where a lower Court has jurisdiction to decide a question of law or fact, the High Court has no power to interfere on revision with the decision on those questions. *Amir Hassan Khan v. Sheo Baksh Singh*, 1. L. R. 11 Calc. 6, followed. *KRISHNA MOHINI DOSSEE v. KEDARNATH CHUCKERBUTTY*.

[I. L. R. 15 Calc. 446]

# SUPERINTENDENCE OF HIGH COURT

—continued.

## (2) CIVIL PROCEDURE CODE, s. 622—contd.

4.—*Decision by competent Court.*] A decision by the judgment of a competent Court, whether right or wrong, which by law is final and without appeal, where the Court has not acted in the exercise of its jurisdiction illegally, or with material irregularity, cannot be set aside under s. 622 of the Civil Procedure Code. MUHAMMAD YUSUF KHAN v. ABDUL RAHMAN KHAN.

[I. L. R. 16 Calc. 749

[L. R. 16 I A 104

5.—*Bengal Tenancy Act (VIII of 1885), s. 174—Deposit, Nature of—Jurisdiction—Application under s. 622 of the Civil Procedure Code*] The deposit under s. 174 of the Tenancy Act must be of such a nature as to be at once payable to the parties, and a Court has no power to set aside a sale under that section unless the judgment-debtor has complied strictly with its provisions. Where, therefore, the Court accepted a deposit partly of cash and partly of a Government Promissory Note, and notwithstanding the objection of the auction-purchaser, gave the judgment-debtor the benefit of s. 174 and set aside the sale, the High Court set aside such order under s. 622 of the Civil Procedure Code. RAHIM BUX v. NUNDO LAL GOSSAMI.

[I. L. R. 14 Calc. 321

6.—*Revision of interlocutory order when appeal lies from final decree—Power of High Court.*] There is nothing in s. 622 of the Code which prevents the High Court from setting aside an interlocutory order if made without jurisdiction. The word "case" in that section is wide enough to include such an order, and the words "records of any case" include so much of the proceedings in any suit as relate to an interlocutory order. Omrao Mirza v. Jones, 12 C. L. R. 148; Harsaran Singh v. Muhammad Raza, I L. R. 4 All. 91; Chatter Singh v. Lekhraj Singh, I. L. R. 5 All. 293; Farid Ahmad v. Dulari Bibi, I L. R. 5 All. 233, dissented from. DHAPE v. RAM PERSHAD.

[I. L. R. 14 Calc. 768

7.—*Error of law—Application to bring decree into conformity with judgment.*] A Small Cause Court rejected an application made under s. 206 of the Code of Civil Procedure to bring a decree into conformity with the judgment on the ground that a former application had been dismissed for default and the petitioner was bound to apply within one month from the date of dismissal and was now too late. On an application to the High Court under s. 622 of the Code set aside this order. Held that the High Court could not interfere. JIVRAJI v. PRAGJI.

[I. L. R. 10 Mad. 51

8.—*Order made without jurisdiction under Act XIX of 1841, ss. 3 and 4.*] Where a District Court purporting to act under s. 4 of Act XIX of 1841

# SUPERINTENDENCE OF HIGH COURT

—continued.

## (2) CIVIL PROCEDURE CODE, s. 622—contd.

directed an inventory of the estate of a deceased person to be taken without conforming to the requirements of s. 3 of that Act, the High Court set aside the order under s. 622 of the Code of Civil Procedure as made without jurisdiction. ABDUL RAHIMAN v. KUTTI AHMED.

[I. L. R. 10 Mad. 68

9.—*Act XX of 1863, s. 18—Order refusing permission to sue*] An order passed under s. 18 of Act XX of 1863, refusing leave to sue, is not appealable, nor, if the Judge has exercised his discretion liable to revision under s. 622 of the Code of Civil Procedure. IN RE VENKATESWARA.

[I. L. R. 10 Mad. 98

See ANONYMOUS CASE.

[I. L. R. 10 Mad. 98 note

10.—*Revision—Illegality in exercise of jurisdiction—Judge's duty to decide secundum allegata et probata.*] The plaintiffs sued upon two bonds executed by the defendant in their father's favour, one for Rs. 200 and the other for Rs. 99-15 annas. The defendant in his written statement, as well as in his deposition, admitted execution of the bonds in question, but pleaded non-receipt of the consideration. The Subordinate Judge held that the bond for Rs. 200 was not proved, but awarded the claim upon the other bond. On appeal, one of the issues raised by the Assistant Judge was—were the bonds in suit proved? He held that the plaintiffs had failed to prove execution of the bonds, and dismissed the claim *in toto*. On an application to the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1882): Held, reversing the decision of the lower Court, that the defendant having admitted execution of the bonds in question, the Assistant Judge acted illegally in the exercise of his jurisdiction in raising the question of the execution. The first rule of adjudication is that a Judge shall decide *secundum allegata et probata*. The only question that could be tried in the present case was non-receipt of consideration. GORAKH BABAJI v. VITHAL NARAYAN JOSHI.

[I. L. R. 11 Bom. 435

11.—*High Court's power of revision—Res judicata—Jurisdiction, meaning of the term.*] The plaintiff sued the defendant to recover arrears of an annual allowance to which the plaintiff claimed to be entitled under a *sanad* dated 1846. The defendant in his defence raised certain points, most of which he had raised in a previous suit brought against him by the plaintiff for the recovery of arrears of the same allowance, and which in that suit had been decided against him. The lower Court held that the decision in the former suit operated as *res judicata*, and refused to allow the defendant to put forward any new matter which might and ought to have been

## SUPERINTENDENCE OF HIGH COURT

—continued

(2) CIVIL PROCEDURE CODE, s. 622—*contd.*

urged as a defence in the former suit. A decree was made in favour of the plaintiff. The defendant applied to the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1882). *Held*, following *Hari Bhikaji v. Nard Vishwanath*, I.L.R. 9 Bom. 432, that the decision, even though wrong, of a question of *res judicata* was not a failure, or a cause of failure, to exercise jurisdiction and did not warrant the interference of the High Court under s. 622 of the Civil Procedure Code. *AMRITRAV KRISHNA DESHPANDE v. BAL-KRISHNA GANESH AMRAPURKAR*.

[I. L. R. 11 Bom. 488]

12.—*Passing Decree unsupported by proof—High Court's powers of revision—Bailment—Negligence.* A Judge has no jurisdiction to pass, in a contested suit, a decree adverse to the defendant where there is no evidence or admission before him to support the decree, and where the burden of proof is not or has not continued to be upon the defendant. If he passes such a decree, it is liable to be set aside in revision under s. 622 of the Civil Procedure Code. *Moulvi Muhammad v. Syed Husain*, I. L. R. 3 All. 203, and *Harnam Tewari v. Sakina Bibi*, I. L. R. 3 All. 417, referred to. S hired a horse from W, and while it was in his custody it died from rupture of the diaphragm, which was proved to have been caused by over-exertion on a full stomach. In a suit by W against S to recover the value of the horse, the defendant gave evidence to the effect that the horse became restive and plunged about, that he might then have touched it with his riding cane, that it shortly afterwards again became excited, bolted for two miles and at last fell down and died. This evidence was not contradicted on any point, nor was any other evidence offered as to how the horse came to run away. There was evidence that the horse was a quiet one, that, for some time previously it had done hardly any work, that it was fed immediately before it was let out for hire, and that rupture of the diaphragm was a likely result of the horse running away while its stomach was distended with food. The Court of First Instance held that the defendant was bound to prove that he had taken such care of the horse as a man of ordinary prudence would under similar circumstances have taken of his own property, that he must have used his whip freely, or done something else which caused the horse to bolt, and that in so doing he had acted without reasonable care, and had thus caused the animal's death. The Court accordingly decreed the claim: *Held* by *EDGE, C. J.*, that if the burden of proof was originally upon the defendant, it was shifted by the explanation which he gave and which was neither contradicted nor *prima facie* improbable; and that the decree of the lower Court, being unsupported by any proof, and based on speculation and assumption, was one which that Court had no jurisdiction to pass, and should consequently be set aside in revision under

## SUPERINTENDENCE OF HIGH COURT

—continued.

(2) CIVIL PROCEDURE CODE, s. 622—*contd.*

s. 622 of the Civil Procedure Code. *Per BRODHURST, J.*, that as the decree was not only unsupported by proof, but opposed to the evidence on the record, the lower Court had "acted in the exercise of its jurisdiction illegally," within the meaning of s. 622. *Collins v Bennett*, 46 New York Rep.; *Byrne v. Boodle*, 2 H. and C. 722; *Gee v. The Metropolitan Railway Company*, L. R. 8 Q. B. 161; *Scott v The London Dock Company*, 3 H. & C. 596; *Manzoni v. Douglas*, 6 Q. B. D. 145; *Cotton v. Wood*, 8 C. B. N. S. 569; *Dacey v. The London and South Western Railway Company*, 12 Q. B. D. 76; and *Hammack v. White*, 11 C. B. N. S. 588, referred to. *SHIELDS v. WILKINSON*.

[I. L. R. 9 All. 398]

13.—*Dismissal of suit without considering merits on technical ground—Suit by sole partner for partnership debt.* A Court of Small Causes, without considering the merits, dismissed a suit brought by a sole surviving partner to recover a partnership debt, on the ground that the plaintiff was not competent to maintain the suit without joining the representatives of the deceased partner as co-plaintiffs. *Held* that it was the Judge's duty to hear and determine the suit, which was brought by the person legally entitled to bring it alone in his Court, and in declining to entertain it on the merits, he had failed to exercise his jurisdiction, and had acted with material irregularity, within the meaning of s. 622 of the Civil Procedure Code. *Muhammad Suleman Khan v. Fatima*, I. L. R. 9 All. 104; and *Dhan Singh v. Basant Singh*, I. L. R. 8 All. 579, referred to. A suit should not be dismissed on merely technical grounds when the merits are proved, and on injustice by surprise or otherwise will be done. *GOBIND PRASAD v. CHANDAR SEKHAR*.

[I. L. R. 9 All. 486]

14.—*Bengal Tenancy Act (VIII of 1885), s. 188—Suit for rent—Co-sharers, Suit by—Joint undivided estate—Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 622.* A District Judge, in deciding a rent-suit, held that s. 188 of the Bengal Tenancy Act prohibited the Court from entertaining the suit in the form in which it had been framed, and therefore dismissed the suit. *Held*, on an application under s. 622 of the Civil Procedure Code to have the judgment of the District Judge set aside, that the District Judge had acted in the exercise of his jurisdiction illegally, inasmuch as s. 188 had no application to the case, and that his decision must be set aside. *Prem Chand Nushur v. Mokshoda Debi*, I. L. R. 14 Calc. 201; and *Umesh Chunder Roy v. Nushur Mullick*, I. L. R. 14 Calc. 203 (note), followed; *Amir Hassan Khan v. Sheo Bahsh Singh*, I. L. R. 11 Calc. 6; *L. R. 11 I. A. 237*, distinguished. *JUGOBUNDHU PATTUCK v. JADU GHOSE ALKUSHI*.

[I. L. R. 15 Calc. 47]

# SUPERINTENDENCE OF HIGH COURT

—continued.

## (2) CIVIL PROCEDURE CODE, s. 622—contd.

15.—*Civil Procedure Code, 1882, s. 516—Material irregularity—Omission to give notice of Proceedings.* A District Munsif passed a decree in the terms of an award without giving notice of the filing of the award under s. 516 of the Code of Civil Procedure. *Held*, that the District Munsif acted with material irregularity within the meaning of s. 622 of the Code of Civil Procedure. **RANGASAMI v. MUTTUSAMI.**

[I. L. R. 11 Mad. 144

16.—*Court acting without jurisdiction—Suit for rent entertained by Small Cause Court under erroneous impression it was due under a contract.* A Small Cause Court, which had jurisdiction under Act XI of 1865 to entertain suits for rent only where the claim was founded on contract, erroneously assumed that a sub-tenant, by entering on land with notice that his lessor was bound to pay rent to the landlord, became liable by an implied contract to pay the rent to the landlord, and passed a decree against the sub-tenant for the rent in arrears: *Held* that, under s. 622 of the Code of Civil Procedure, the High Court had power to set aside the decree. **AMIR HUSSAN KHAN v. SHEO BUKSH SING, I L. R. 11 Cal. 6, discussed and explained. MANISHA ERADI v. SIYALI KOYA**

[I L. R. 11 Mad. 220

17.—*Error of law—Material irregularity—Personal decree against minors for debt of deceased Hindu father.* In a suit to recover a debt incurred by the deceased father of a Hindu family, the District Judge gave a personal decree against the sons of the debtor, of whom two were minors: *Held* that under s. 622 of the Code of Civil Procedure, the decree against the minors should be reversed, but that the Court has no power to revise the decree against the other defendants. **BHASHYAM v. JAYARAM.**

[I. L. R. 11 Mad. 303

18.—*Civil Procedure Code, s. 373—Leave given by District Court on appeal to withdraw suit—Material irregularity.* A District Munsif having dismissed a suit, plaintiff appealed to the District Court, and, at the same time, applied to the Court to allow him to withdraw his suit with permission to bring a fresh suit on the same cause of action. The District Court granted the application without assigning any reasons for its order. *Held*, under s. 622 of the Code of Civil Procedure that the District Court had acted with material irregularity. **TIRUPATI v. MUTTA.**

[I. L. R. 11 Mad. 322

19.—*Immoveable property—Right of fishery—Possession—Dispossession—Specific Relief Act I of 1877, s. 9—Civil Procedure Code (Act XIV of 1882), ss. 30 and 622—Objection under s. 30 where suit is under s. 9 of Specific Relief Act.* The plaintiffs were fishermen belonging to the village

W., D.

# SUPERINTENDENCE OF HIGH COURT

—continued.

## (2) CIVIL PROCEDURE CODE, s. 622—contd.

of N. They claimed in this suit for themselves and the other fishermen of their village the exclusive right of fishing in the Nagothna Creek between high and low-water marks, within certain limits set forth in the plaint, and under s. 9 of the Specific Relief Act I of 1877, they sought to recover possession of that right from the defendants, who, they alleged, had dispossessed them within six months before this suit was filed. The Subordinate Judge held that they had established their right, and made an order directing that possession should be restored to them. The defendants then applied to the High Court under its extraordinary jurisdiction, contending that the order made by the first Court was beyond its jurisdiction, the right of fishing not being immoveable property within the meaning of that section. *Held*, that the first Court did not act without jurisdiction, the right claimed coming within the denomination of immoveable property. It was contended by the defendants that the plaintiffs, who claimed on behalf of other fishermen of the village, should have proceeded under s. 30 of the Civil Procedure Code (Act XIV of 1882). *Held*, that the objection was a good one; but, inasmuch as it was still open to the defendants to establish their right by a regular suit, the irregularity in the present suit was not such as to call for the exercise of the powers of the High Court under s. 622 of the Civil Procedure Code. **BHUNDAL PANDA v. PANDOL POS PATIL.**

[I. L. R. 12 Bom. 221

20.—*Jurisdiction, presumption of—Maxim, omnia presumuntur rite et solemniter esse acta—Civil Procedure Code, ss. 103, 283, 647.* The consideration of an objection under s. 278 of the Civil Procedure Code, having first been entertained and adjourned by an additional Subordinate Judge, subsequently came before the Subordinate Judge, who struck off the case for default. No order under s. 25 transferring the case to the Subordinate Judge was on the record, nor was it otherwise shown how he obtained jurisdiction to deal with it. *Held* that the High Court, in the exercise of its revisional powers under s. 622 of the Code, should not presume that the Subordinate Judge had taken up the case without jurisdiction; that the proper remedy of the petitioner was an application under s. 103, read with s. 647, or a suit under s. 283, and that the High Court should not interfere in revision. **SHEO PRASAD SINGH v. KASTURA KUAR.**

[I. L. R. 10 All. 119

21.—*Limitation—High Court's revisional powers—Material irregularity.* On the 29th November 1886 this suit was filed on a bond dated the 29th November 1881, payable in two years. The Subordinate Judge dismissed it as time-barred, being of opinion that the cause of action had accrued on the 28th November 1883. Against

# SUPERINTENDENCE OF HIGH COURT —continued.

## (2) CIVIL PROCEDURE CODE, s. 622—*contd.*

this decision the plaintiff applied to the High Court under s. 622 of the Code of Civil Procedure (Act XIV of 1882). *Held*, reversing the decision of the Subordinate Judge, that the suit was not barred by time, the cause of action having accrued on the 29th November 1883.—that is, the day of the month corresponding with the day on which the bond was dated: *Held*, further, that the decision of the Subordinate Judge being palpably wrong and illegal, the High Court had jurisdiction to exercise its revisional powers under s. 622 of the Code of Civil Procedure (Act XIV of 1882). Where a Court, with a full and correct apprehension of the questions which it is necessary for it to decide in any case, errs, in law or in fact, in its decision of any such questions with which it has jurisdiction to deal, its errors can only be corrected in due course of appeal; and where no appeal is permissible, there is no remedy under s. 622 of the Code or under the provisions of s. 15 of Statute 24 and 25 Vic., c. 104, whatever remedy there may be, in the Bombay Presidency, under cl. 2 of s. 5 of Reg II of 1827. But it is otherwise in any case where the Court, having a mistaken and wrong apprehension of the questions at issue, proceeds to determine an issue, which does not really arise in the case, and bases its decision of the case on its determination of that issue. If it does so, it acts with material irregularity in the exercise of its jurisdiction. **VENKUBAI v. LAKSHMAN VENKOB KHOT.**

[I. L. R. 12 Bom. 617]

22.—*Orders in pauper suit—Civil Procedure Code, s. 407.* \*All orders passed under s. 407 of the Code of Civil Procedure are not excluded from the exercise of the revisional powers of the High Court under s. 622 of the Code. *Chatterpal Singh v. Raja Ram*, I. L. R. 7 All. 661, notwithstanding. In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence; it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision, and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order. **MUHAMMAD HUSAIN v. AJUDHIA PRASAD.**

[I. L. R. 10 All. 467]

23.—*Civil Procedure Code, ss. 494, 588—Appeal against order for issue of notice under s. 494—Revision by High Court of an order purporting to be made on appeal from such an order.* A petition praying for a temporary injunction in a suit was presented by the plaintiff in a Subordinate Court. The Judge refused to pass orders on it without hearing the defendants, and ordered notice to issue to them. The plaintiff appealed to the District Judge who granted the injunction prayed for: *Held*, that no appeal lay from the

# SUPERINTENDENCE OF HIGH COURT —continued.

## (2) CIVIL PROCEDURE CODE, s. 622—*contd.*

Subordinate Court and that the District Judge had purported to exercise a jurisdiction not vested in him by law. **LUIS v. LUIS.**

[I. L. R. 12 Mad. 186]

24.—*Arbitration—Award—Application to file award, objection to—Decree on award, finality of—Private arbitration—Revisional powers of High Court—Jurisdiction—Civil Procedure Code (Act XIV of 1882), ss. 520, 521, 525, 526 and 622.* Certain disputes between parties were referred under a written agreement to an arbitrator, who, in due course, made his award. The plaintiff then applied to the Subordinate Judge to have the award filed in Court under the provisions of s. 525 of the Code of Civil Procedure. The defendants came in and objected to the award on the following amongst other grounds: (1) That the value of the property in suit was Rs. 500 only, and therefore that the application should have been made in the Munsif's Court and not in that of the Subordinate Judge. (2) That the agreement of submission was vague and indefinite, and did not clearly set out the matters in dispute. The Subordinate Judge overruled the objection without taking any evidence, and directed the award to be filed and a decree to be passed thereon. The plaintiff appealed. The defendants contended that no appeal lay, and that if it did it lay to the District Judge and not to the High Court: *Held*, that, assuming that on a proceeding under ss. 525 and 526, the Court has power to consider such objections as are mentioned in ss. 520 and 521, the above objections did not fall under either section, but that the Subordinate Judge, before entertaining the application, was bound to satisfy himself that he had jurisdiction to entertain it, and for that purpose to take evidence regarding the value of the property; and that even if no appeal lay, the High Court could interfere under its revisional powers, because the Subordinate Judge had acted in the exercise of his jurisdiction illegally in assuming jurisdiction without taking such evidence. **BINDESSURI PERSHAD SINGH v. JANKEE PERSHAD SINGH.**

[I. L. R. 16 Calc. 482]

25.—*Bengal Tenancy Act (VIII of 1885) ss. 104, cl. 2, 105, 106, 108—Rule 33 of the rules made under the Act—Jurisdiction—Record of right—Civil Procedure Code (Act XIV of 1882), ss. 108, 622—Order of Special Judge as to settlement of rents.* The High Court has no jurisdiction either to entertain a second appeal from, or to interfere under s. 622 of the Code of Civil Procedure with, an order of a Special Judge in regard to settlement of rents. **SHEWBARAT KOER v. NIRPAT ROY.**

[I. L. R. 16 Calc. 596]

SUPERINTENDENCE OF HIGH COURT  
—continued.(2) CIVIL PROCEDURE CODE, s. 622—*contd.*

26.—*Act XIX of 1841, ss. 2, 3, 5, 15—Order of District Court on petition by Court of Wards* [ On a petition presented by the Agent of the Court of Wards a District Court made an order which purported to have been made under Act XIX of 1841, s. 5. The conditions prescribed by ss. 3 and 4 were not shown to exist. *Held*, the order of the District Court was illegal, and was subject to revision under s. 622 of the Code of Civil Procedure. *PAPAMMA v. COLLECTOR OF GODAVARI.*

[I. L. R. 12 Mad. 341]

27.—*Material irregularity—Small Cause Court, Motion for new trial of case in* [ The defendant contracted to sell to the plaintiffs a quantity of rapeseed, April-May delivery. On the 23rd of April the defendant endorsed over to the plaintiffs a delivery order for the seed given him by *L. M. & Co.*, which plaintiffs presented to *L. M. & Co.* On the 26th April and on three or four subsequent occasions, *L. M. & Co.* refused to deliver, on the ground that they had till the 31st May for delivery. On the 15th May, *L. M. & Co.* failed, and then, but not before, plaintiffs informed the defendant that they had not had delivery from *L. M. & Co.*, and demanded it of him. The defendant failing to deliver, the plaintiffs sued for damages as of the 31st May. The learned Judge of the Small Cause Court, on this statement of facts, and before evidence was gone into, ruled that the damages were assessable as of the 25th April, on which day it was admitted the market rate was as high or higher than the contract rate. The plaintiffs on this ruling, without going into their case further, accepted judgment for nominal damages, and took out a rule for a new trial, on the ground that the Judge was in error in assigning the 25th April, and not the 31st May, as the date which ruled the question of damages. On the argument of the rule the Full Court decided against the plaintiffs, not on this point, which they did not decide one way or the other, but on another point altogether, *viz.*, that the plaintiffs ought to have given defendant notice of *L. M. & Co.*'s refusal to give delivery on the 25th April, and not having done so, could not call on the defendant to deliver. The plaintiffs now moved the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1882), to set aside the order of the Full Court of the Small Cause Court as one which at that stage of the proceedings that Court had no right to make. *Held*, that in making the order in question under the circumstances of the case, and the state of the record, the Full Court had acted with material irregularity within the meaning of s. 622 of the Civil Procedure Code, and that the case must be remanded to be dealt with according to law. *RALLI v. PARMANAND JEWRAJ.*

[I. L. R. 13 Bom. 642]

SUPERINTENDENCE OF HIGH COURT  
—concluded.(2) CIVIL PROCEDURE CODE, s. 622—*concl'd.*

28.—*Civil Procedure Code, s. 263—Order on appeal affirming order granting application for review of judgment.* [ The High Court will not, in the exercise of its revisional powers under s. 622 of the Code, interfere with an order dismissing an appeal from an order under s. 629, inasmuch as there is a remedy by way of appeal from the final decree at the re-hearing. *GOPAL DAS v. ALAF KHAN.*

[I. L. R. 11 All. 383]

## SURETY.

Col.

- |                            |     |      |
|----------------------------|-----|------|
| 1. Liability of surety     | ... | 1030 |
| 2. Enforcement of security | ... | 1030 |

See HINDU LAW—DEBTS.

[I. L. R. 11 Mad. 373]

See GUARANTEE.

[I. L. R. 10 All. 531]

## (1) LIABILITY OF SURETY.

1.—*Civil Procedure Code, 1882, s. 336—Surety, Liability of—Execution-proceedings* [ The liability of a surety under s. 336 of the Civil Procedure Code ceases when the proceedings taken in execution of a decree wherein the security was furnished comes to an end. *LALJI SAHAY v. ODOYA SUNDERI MITRA.*

[I. L. R. 14 Calc. 757]

2.—*Judgment-debtor applying to be declared an insolvent—Civil Procedure Code, ss. 336, 341* [ *S* on the 16th January 1886 obtained a decree for a certain sum of money against *C*. In execution of that decree *C* was arrested on the 28th January, and upon his being brought before the Court he expressed his intention of applying to be declared an insolvent under the provisions of Chapter XX of the Code of Civil Procedure, and he was thereupon released upon furnishing security, under the provisions of s. 336 of the Code. *K* became surety for *C* and executed a bond undertaking to produce *C* at any time when the Court should direct him so to do, and in default of so producing him to pay the amount of the decree, and standing security for *C*'s applying to be declared insolvent. On the 19th February *C* filed his petition to be declared an insolvent before the District Judge under s. 341 of the Code, and on the 15th May 1886, his petition was dismissed owing to his non-appearance. *S* thereupon applied for execution of the decree against *K*. *Held*, that *K* was released from his obligation under the bond executed. *KOYLASH CHANDRA SHAHA v. CHRISTOPHORIDI.*

[I. L. R. 15 Calc. 171]

## (2) ENFORCEMENT OF SECURITY

3.—*Civil Procedure Code 1889, s. 336—Surety, Liability of—Execution-proceedings* [ The liability of a surety under s. 336 of the Civil Procedure



SURETY—*continued.*(2) ENFORCEMENT OF SECURITY—*continued.*

Code ceases when the proceeding taken in execution of a decree wherein the security was furnished comes to an end. *D*, a judgment-debtor, was committed to jail on the 8th August 1884, and he applied under s. 336 of the Civil Procedure Code to be released. On the 16th of November 1884, *B* and *C* stood security for him under the provisions of s. 336 of the Civil Procedure Code that he would appear when called on, and that he would within one month apply under s. 344 to be declared an insolvent, and *D* was thereupon released. Instead of applying under s. 344 to be declared an insolvent he applied to have the decree, which had been obtained *ex-parte*, set aside. This application was disallowed, and the decree-holder was directed to take further steps. On the 21st of February 1885, the application for execution of the decree was struck off. The decree-holder on the 20th of July made a fresh application to execute the decree against the sureties, unless they should produce the judgment-debtor in Court: *Held*, that the power reserved to the Court, under s. 336 of the Civil Procedure Code, to realise the security in execution of the decree, could not be exercised when the execution-proceedings wherein the security was furnished was no longer in existence. **LALJI SAHOY v ODOYA SUNDERI MITRA.**

[I. L. R. 14 Calc 757]

4.—*Execution of decree against Surety—Surety for costs of appeal—Separate suit—Summary Procedure—Civil Procedure Code, 1882, ss. 253, 519.* S. 253 of the Civil Procedure Code is not applicable to a surety who has become security in an Appellate Court. A security-bond, therefore, executed by a surety on behalf of an appellant for the costs of an appeal under s. 549 of the Code, cannot be summarily enforced against the surety in the execution-proceedings: the remedy is by separate suit. *Bans Bahadur Singh v. Mughla Begum*, I. L. R. 2 All. 604, dissented from; *Radha Pershad Singh v. Phuljuri Koor*, I. L. R. 12 Calc. 402, followed. **KALI CHARUN SINGH v. BALGOBIND SINGH.**

[I. L. R. 15 Calc. 497]

5.—*Right of surety to appeal—Extent of their liability—Attachment before judgment—Security under s. 484 of Civil Procedure Code (XIV of 1882)—Decree—Stay of execution by Appellate Court—Fresh security under s. 545 of Civil Procedure Code (XIV of 1882)—Liability of original sureties.* A surety against whom a decree is sought to be enforced under s. 253 of the Code of Civil Procedure (Act XIV of 1882) has a right of appealing against an order made in the execution-proceedings. *A* and *B* became sureties under s. 484 of the Code of Civil Procedure (Act XIV of 1882), for the production of property attached before judgment by the Court of First Instance. Under their surety-bonds they were bound, in default, "to pay to the said Court such

SURETY—*continued.*(2) ENFORCEMENT OF SECURITY—*continued.*

sum as the said Court may adjudge against the said defendant." The Court of First Instance passed a decree in the plaintiff's favour for Rs. 229-14-0. Against this decree both parties appealed to the District Court. In that Court the defendant obtained an order for stay of execution of the original decree on his furnishing security, under s. 545, "for the due performance of such decree or order as may ultimately be binding on him." He accordingly gave fresh security. The Appellate Court passed a decree in plaintiff's favour for Rs. 800 and costs. Thereupon the decree-holder sought to enforce the appellate decree against the sureties *A* and *B* under s. 253 of the Civil Procedure Code. The sureties contended, first, that the original decree having merged in the appellate decree, they were not liable at all under their bond, which related only to the decree of the Court of First Instance; secondly, that they were responsible only for so much as was by the original decree adjudged against the defendant; and, thirdly, that their original liability had been extinguished by reason of execution having been stayed without their assent by the Appellate Court on defendant's furnishing a fresh security: *Held*, that the liability of the sureties could not properly be extended beyond the amount, including costs, awarded to the plaintiff by the Court of First Instance. That and no other sum was such "as the said Court may adjudge against the said defendant." The security given to the Court of First Instance was for the satisfaction of its decree—not the possible decree of a higher Court. If an appeal was made, it was left to the Appellate Court to regulate the terms on which it would take security for the execution of its own decree: *Held*, also, that so soon as the decree of the Court of First Instance was made, the liability of the sureties was fully incurred, and they were severally bound to place at the disposal of the said Court, when required, the property specified in their bond, or, in default, to pay such sum as the said Court should adjudge against the defendant. This liability having been incurred, was not extinguished by the fact that an appeal had been brought against the decree. If the amount adjudged by the decree was reduced in appeal, their liability would be diminished to a like extent; or, if the decree was reversed, their liability would be reduced to nothing, but their liability did not cease, because the decree of the first Court merged in that of the Appellate Court. **SULEMAN v. SHIVRAM BHIKAJI.**

[I. L. R. 12 Bom. 71]

6.—*Civil Procedure Code, ss. 253 and 583—Stay of execution of decree appealed against on giving security—Surety for fulfilment of appellate decree—His liability—Mode of enforcing it—Execution-proceedings—Separate suit.* Under Act VIII of 1859 and the supplemental Act XXIII of 1861 the ordinary mode of enforcing payment by a surety was by summary process in execution, not

**SURETY—concluded****(2) ENFORCEMENT OF SECURITY—concluded.**

by means of a separate suit. This was so equally whether the security had been taken in the course of the original suit or of the appeal. The present Code of Civil Procedure (Act XIV of 1882) makes no alteration in the law on this subject. Reading s. 253 with s. 583 of Act XIV of 1882, it is clear that the Court has the power to proceed against a person who has become a surety under s. 546, for the fulfilment of the decree in appeal in the same way as against a surety who has become liable under s. 253 to satisfy a decree of a Court of First Instance. The words "in an original suit" in s. 253 may be treated as a superfluous expression. *VENKAPA NAIK v. BASLINGAPA*

[I. L. R. 12 Bom. 411]

7.—*Security for costs—Security bond, Enforcement of, by execution—Civil Procedure Code (Act XIV of 1882), s. 549—Act VII of 1880, s. 46—General Clauses Act (I of 1868), s. 6*]. On the 9th June 1888 a decree-holder applied for leave to execute his decree (which was one for costs) against a person who had become security for the costs of an appeal which had been dismissed with costs; this application was refused, on the ground that the law, as it then stood, did not authorize such an application, the remedy of the decree-holder being by regular suit against the surety. Subsequently to the passing of Act VII of 1888 the decree-holder made a fresh application for such execution under s. 46 of that Act. The Court, after referring to s. 6 of the General Clauses Act, rejected the application, on the ground that proceedings against the surety had been commenced before Act VII of 1888 had come into force: *Held*, on appeal, that the application should have been allowed. *ABDUL WAHAB v. FAREED-DOONNISSA*.

[I. L. R. 16 Calc 323]

**SURRENDER OF LEASE.**

*See LANDLORD AND TENANT—SURRENDER.*

[I. L. R. 14 Calc. 109]

**SURVIVORSHIP.**

*See CONVERTS.*

[I. L. R. 10 Mad. 69]

**TALUQDAR.**

*See BOMBAY ACT VI OF 1862, s. 12.*

[I. L. R. 11 Bom 78, 551]

*See GUARDIAN—DUTIES AND POWERS OF GUARDIANS.*

[I. L. R. 11 Bom 551]

**TANK, RIGHT OF REPAIRING.**

*See INJUNCTION—SPECIAL CASES—OBSTRUCTION TO RIGHTS OF PROPERTY.*

[I. L. R. 12 Mad. 241]

**"TAR"**

*See CANTONMENTS ACT (III OF 1880), s. 14.*

[I. L. R. 15 Calc. 452]

**TAX, MONEY PAID FOR.**

*See STAMP ACT 1879, SCH. I, ART. 52.*

[I. L. R. 12 Bom. 103]

**TAX ON BUILDINGS.**

*See MADRAS MUNICIPAL ACT 1878, s. 123.*

[I. L. R. 10 Mad. 38]

**TENANCY IN COMMON.**

*See HINDU LAW—WILL—CONSTRUCTION OF WILLS—SPECIAL CASES OF CONSTRUCTION—JOINT TENANCY.*

[I. L. R. 11 Bom. 69, 573]

**THEFT.**

*See STOLEN PROPERTY—OFFENCES RELATING TO.*

[I. L. R. 11 Mad. 145]

[I. L. R. 9 Ail. 348]

1.—*Penal Code, ss. 24, 378—Theft of joint property by co-parceners.*] Theft of joint property may be committed by a co-parcener if he takes it from joint possession and converts such possession into separate possession. *QUEEN-EMPRESS v. PONNURANGAM.*

[I. L. R. 10 Mad. 186]

2.—*Penal Code, ss. 22, 378, 379—Movable property*] A dug up and immediately carried away without any authority or right several cart-loads of earth, part of unassessed lands of a village: *Held*, that A was not guilty of theft. *QUEEN-EMPRESS v. KOTAYYA.*

[I. L. R. 10 Mad. 255]

3.—*Fishery—Fishing in tank connected with a running stream—Criminal trespass—Penal Code, ss. 379, 447.*] Accused were charged with having taken fish from a tank belonging to the complainant and convicted of theft and criminal trespass under ss. 379 and 447 of the Penal Code. It was found that the tank in question was not enclosed on all sides, and was dependent on the overflow of a neighbouring channel which was connected with flowing streams for its supply of fish; that the fish were not reared and preserved in the tank, and that the occurrence complained of took place at a time when the floods were high and the tank was connected with the streams, so that the fish could leave it at pleasure: *Held*, that the fish were *feræ naturæ* and not in "the possession of" the complainant, and consequently no offence had been committed. *Held*, further, that had the fish been taken at a time when they were restrained of their natural liberty, and were liable to be taken at the pleasure of the

**THEFT—concluded.**

owner of the tank, the conviction would have been upheld. *In the matter of the petition of Madhab Hari*. I. L. R. 15 Calc. 390, distinguished. *MAYA RAM SURMA v. NICHALA KATANI*.

[I. L. R. 15 Calc. 402]

4—*Infringement of exclusive right of fishery in public river—Criminal misappropriation—Mischief—Criminal trespass—Unlawful assembly—Penal Code, ss. 143, 378, 403, 426 and 447* ] Fish in a public river cannot be said to be property in the possession of the person who may have the fishery right, and the infringement of that right is not *theft* under s. 378 of the Indian Penal Code. The accused were charged with unlawfully taking fish along with some eleven others in a public river, the right of fishing in which had been let out by Government to the complainant, and the lower Court, amongst other offences, convicted them of theft, criminal misappropriation, mischief, criminal trespass, and unlawful assembly: *Held*, that the conviction was wrong and that no offence had been committed. *BHAGIRAM DOME v. ABAR DOME*.

[I. L. R. 15 Calc. 388]

IN THE MATTER OF THE PETITION OF MADHAB HARI.

[I. L. R. 15 Calc. 390 note]

*Contra.*—*MODHOO MUNDLE v. UMESH PARNI*.

[I. L. R. 15 Calc. 392 note]

**TITLE.** Col.

1. Evidence and proof of title ... 1036

**—, Evidence of**

*See* ONUS PROBANDI—POSSESSION AND PROOF OF TITLE

[I. L. R. 11 Bom. 216]

*See* CASES UNDER POSSESSION—EVIDENCE OF TITLE.

**—, Question of.**

*See* BENGAL RENT ACT 1869, s. 27.

[I. L. R. 14 Calc. 624]

*See* BENGAL TENANCY ACT, SCH. III, ART. 3

[I. L. R. 16 Calc. 741]

*See* EVIDENCE—CIVIL CASES—MAPS.

[I. L. R. 16 Calc. 186]

*See* POSSESSION, ORDER OF CRIMINAL COURT AS TO—DECISION OF MAGISTRATE AS TO POSSESSION.

[I. L. R. 14 Calc. 169]

*See* SMALL CAUSE COURT MOFUSSIL JURISDICTION—QUESTION OF TITLE.

**TITLE—continued.****(1) EVIDENCE AND PROOF OF TITLE.**

1.—*Resumption Chittas.* ] Government resumption *chittas*, in the absence of the resumption proceedings, are not conclusive evidence of title as against third persons. *Ram Chunder Rao v. Bunssee Dhur Naik*, I. L. R. 9 Calc. 711, followed. *DWARKA NATH MISSEER v. TARITA MOYI DABIA*.

[I. L. R. 14 Calc. 120]

2.—*Precumption arising from possession—Issue as to identity of land reformed on a site formerly submerged.* ] In a suit for the possession of a *chur*, formerly carried away and afterwards reformed upon its former site, the issue was whether the land belonged to the plaintiffs or to the defendants. This issue was found in favor of the plaintiffs by the first Court; and the Appellate Court, finding that the plaintiffs had been in possession for more than twelve years, concluded that, at all events, they had a title by adverse possession. On an appeal, the High Court considered that the latter decision was not upon the issue raised, the plaintiff's claim being founded on an original title to the site of the *chur*—a title denied by the defendants; and remanded the suit for judgment on this issue, whereupon the Appellate Court maintained the judgment of the first Court in favour of the plaintiffs, finding on the evidence that the land belonged to the plaintiffs. Upon a second appeal the High Court reversed the decree of the Appellate Court, and dismissed the suit, on the ground that there was an entire absence of evidence as to which party was entitled at the date to which the dispute related: *Held* that this was erroneous. On a question of parcel or no parcel, when possession has been established for a period, there is not an entire absence of evidence of anterior ownership, because *presumitur retro*. *ANANGAMANJARI CHOWDHURANI v. TRIPURA SUNDARI CHOWDHURANI*.

[I. L. R. 14 Calc. 740]

[L. R. 14 I. A. 101]

3.—*Survey Map—Suit for possession—Ejectment—Evidence of possession and title* ] In a suit for possession of certain land as appertaining to a certain estate and for ejectment of the defendant, brought by a purchaser at a Revenue-sale, the only evidence adduced by the plaintiff was two survey maps of the years 1846-47 and 1865-66. The lower Court gave the plaintiff a decree for only a portion of the land claimed, such portion being included in both of the maps. The remainder of the land claimed was not included in the map of 1846-47; *Held*, that a survey map is evidence of possession at a particular time, *viz*, the time at which the survey was made, and may be evidence of title, but as to whether it is sufficient evidence or not, is a question to be decided in each particular case: *Held*, further, that as the two maps showed that the portion of the land decreed to the plaintiff was in his predecessor's possession at the date of both surveys—that is to say, at two periods with an interval of nearly

TITLE—*concluded*

(1) EVIDENCE AND PROOF OF TITLE—*concluded*  
 twenty years between them—they might be sufficient evidence of title, and the decree of the lower Court was correct. *Mohesh Chunder Sen v. Juggut Chundra Sen*. I. L. R. 5 Calc. 212, discussed *SIAM LAL SAHU v. LUGHMAN CHOWDHRY* [I. L. R. 15 Calc. 353]

4.—*Entry of name in Collector's book.* The fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title, or defeat the title of any other person. The Collector's book is kept for purposes of revenue, not for purposes of title. *Fatma v. Darya Sahab*, I. L. R. 10 Bom. 187, followed *BRAGOTI v. BAPUJI*. [I. L. R. 13 Bom. 75]

5.—*Transfer of property—Surrender of dur-mokurari lease—Formal deed unnecessary.* Where a *mokurari* granted a *dur-mokurari* lease of part of his holding which was afterwards surrendered for good consideration, *ikhar-namas* to this effect were executed, but not being registered were not receivable in evidence: *Held* that to prove a formal deed of reconveyance was not necessary, the receipt of the money and the relinquishment of possession sufficiently showing what had been become of the *dur-mokurari* interest. *IMAMBUNDI BEGUM v. KAMLESWARI PERSHAD*, [I. L. R. 14 Calc. 109 [L. R. 13 I. A. 160]

6.—*Hypothecation—Decree for enforcement of lien—Objection to attachment and sale raised by person not a party to decree—Release of property from attachment—suit by decree-holder for declaration of right based on decree—Defence based on sale-deed found to be fraudulent—Plaintiff entitled to succeed on basis of his decree without further proof of title.* An objection to the attachment and sale of a house which was advertized for sale in execution of a decree for enforcement of lien, was allowed, upon the ground that the objector had purchased the house from the mortgagor, and his purchase was not subject to the decree to which he was not a party. The decree-holder then brought a suit against the objector, claiming a declaration of his right to recover the amount due under his decree by enforcement of lien against the house, and that the order releasing the property from attachment should be set aside. The Courts below, holding that the deed of sale set up by the defendant was fraudulent and collusive, decreed the claim. *Held*, that although the defendant was not a party to the decree obtained against the mortgagor, yet, as the basis of his title to claim the property had been found to be a mere nullity, the plaintiff was entitled to succeed on the basis of the decree, which stood unimpeached, without being put to proof of the mortgage-deed as against the defendant. *KADIR BAKSH v. SALIG RAM*

[I. L. R. 9 All. 474]

## TITLE-DEEDS.

*See* DECREE—CONSTRUCTION OF DECREE—POSSESSION.

[I. L. R. 11 Bom. 485]

*See* EXECUTION OF DECREE—MODE OF EXECUTION—POSSESSION.

[I. L. R. 11 Bom. 485]

## TOLLS, SUIT FOR, PAID IN EXCESS.

*See* BENGAL ACT IX OF 1871, s. 27.

[I. L. R. 15 Calc. 259]

## TORT.

*See* ABATEMENT OF SUIT—SUITS.

[I. L. R. 13 Bom. 677]

*See* RIGHT OF SUIT—SURVIVAL OF RIGHT.

[I. L. R. 13 Bom. 677]

## TRANSFER OF CIVIL CASE

Col.

1. General cases	...	...	1038
2. Ground for transfer	...	...	1039

## (1) GENERAL CASES.

1.—*Civil Procedure Code 1882, s. 25—Jurisdiction.* An order for the transfer of a suit from one Court to another under s. 25 of the Code of Civil Procedure, cannot be made unless the suit has been brought in a Court having jurisdiction. The judgment in *Peary Lall Mozumdar v. Komal Kishore Dassia*, I. L. R. 6 Calc. 30, entirely approved. *LEDGARD v. BULL*.

[I. L. R. 9 All. 191]

[L. R. 13 I. A. 134]

2.—*Winding up Company—Transfer of winding up from District Court to High Court—Companies Act VI of 1882, s. 219—Civil Procedure Code, ss. 25, 647—Stat. 24 and 25 Vic., c. 104, s. 15—Letters Patent, High Court, N.-W. P., s. 9.* There is nothing in the Indian Companies' Act (VI of 1882) or the High Court's Act (24 and 25 Vic., c. 104) or the Letters Patent, which prevents the High Court from calling for the record of the proceedings in the winding up of a Company under the Companies' Act, and transferring those proceedings to its own file. Such a power is given to the High Court by s. 647 read with s. 25 of the Civil procedure Code. Where, in the proceedings in the winding up of a Company under Act VI of 1882, an order was passed admitting the proof of a particular creditor of the Company before any liquidator had been appointed. *Held*, that this was an irregularity which by itself would justify the High Court in sending for the record. Where the District Judge conducting the proceedings in the winding up of a Company under Act VI of 1882 had, after receiving notice of the admission by the High Court of a petition for transfer of those proceedings to its own file, drafted and placed upon the record an order which it might have been difficult for him to reconsider if the matter

**TRANSFER OF CIVIL CASE—concluded.****(1) GENERAL CASES—concluded**

again came before him, and where the case appeared to be one in which serious questions of law were likely to arise which it would probably be difficult to discuss adequately in the District Court, in the absence of the authorities upon the subject and of any rules framed by the High Court for dealing with windings up under the Act, and the case was of a kind which would probably come before the High Court in a variety of appeals from orders brought by one side or the other. *Held* that, under these circumstances, the case was a proper one for the exercise of the High Court's jurisdiction by calling up the winding up proceedings to its own file. **IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY**

[I. L. R. 9 All. 180]

3.—*Civil Procedure Code 1882, s. 25—District Court power, of, as to suits pending in its own Court—Ultra vires.* Section 25 of the Civil Procedure Code (Act XIV of 1882) only enables a District Court to transfer a suit pending in a Court subordinate to itself, and not to transfer a suit which is pending in its own Court. Accordingly, where a District Judge made an order to retransfer to the original Court certain suits pending in his Court which had been previously transferred to his Court from a subordinate Court. *Held*, that the order of retransfer was *ultra vires*, and should be discharged. **SAKHARAM v. GANGARAM**

[I. L. R. 13 Bom. 654]

**(2) GROUND FOR TRANSFER.**

4.—*Suit for partition of property partly in Calcutta and partly in Mofussil.* In a partition suit, instituted in the second Subordinate Judge's Court of the 24-Pergunnahs, the parties being residents of Calcutta, when the property sought to be partitioned consisted of (a) moveable property situate in Calcutta; (b) immoveable property  $\frac{4}{5}$ ths of which was in Calcutta, the rest being in the immediate vicinity, and when it appeared that, if tried in Alipore, an Ameen would have to partition the Calcutta property, and that the suit could be more expeditiously and cheaply tried in the High Court. *Held*, that the case was a proper one to be transferred to the High Court to be tried on the original side, and an order was made accordingly. **JOTENDRO NAUTH MITTER v. RAJ KRISTO MITTER,**

[I. L. R. 16 Cal. 771]

**TRANSFER OF CRIMINAL CASE.**

*See CRIMINAL PROCEDURE CODE 1882, s. 526A.*

[I. L. R. 15 Cal. 455]

*See HIGH COURT, JURISDICTION OF—HIGH COURT, MADRAS—CRIMINAL.*

[I. L. R. 12 Mad. 39]

**TRANSFER OF PROPERTY.**

—*Sale—Exchange—Trade usage, Proof of—Contract Act, ss. 49, 77, 92, 151—Transfer of Property Act, s. 118—Delivery of cotton to cotton press—Ownership of cotton in press.* According to mercantile usage in the cotton trade in Tuticorin, where a dealer delivers cotton to the owner of a cotton press, not in pursuance of any special contract, the property in the cotton vests in the owner of the cotton press, who is bound to give the merchant in exchange cotton of like quantity and quality. The transaction is not a sale but an agreement for exchange. Where therefore cotton thus delivered was accidentally destroyed by fire. *Held*, that the loss fell on the owner of the press. **VOLKART BROTHERS v. VETTIVELU NADAN.**

[I. L. R. 11 Mad. 459]

**TRANSFER OF PROPERTY ACT (IV OF 1882.)**

*See LIMITATION ACT 1877, ART. 132.*

[I. L. R. 14 Cal. 730]

*See LIMITATION ACT 1877, ART. 115*

[I. L. R. 16 Cal. 693]

*See LIMITATION ACT 1877, ART. 117.*

[I. L. R. 14 Cal. 730]

—, s. 2.—*Mortgage—Foreclosure—Regulation XVII of 1806, s. 8—Provision as to the year of grace—Extension of time by mutual agreement.* The year of grace allowed by s. 8, Reg. XVII of 1806 is a matter of procedure, which it was open to the parties to extend by mutual agreement without prejudice to the proceedings already had under the section, and upon the expiration of such extended period the mortgagee acquired an immediate right to have a decree declaring the property to be his absolutely. The right so acquired by the mortgagee while the Regulation was in force is a right which falls within the meaning of cl. (c), s. 2 of the Transfer of Property Act. Proceedings under s. 8 had come to a close by the expiration of the stipulated period of extension while the Regulation was still in force, and the mortgagee brought his suit for possession in pursuance thereof after the passing of the Transfer of Property Act: *Held*, that the mortgage was entitled to a decree such as he would have had if the Regulation had been still in force. **BALJ NATH PERSHAD NARAIN SINGH v. MOHESHWARI PERSHAD NARAIN SINGH.**

[I. L. R. 14 Cal. 451]

2.—*Mortgage—Foreclosure—Suit for conditional sale—Regulation XVII of 1806—Procedure.* A suit was brought on the 24th January 1885 by a mortgagee upon a mortgage by conditional sale asking for a declaration that the mortgagor's right to redeem had been extinguished, and that he was entitled to possession of the mortgaged properties. The mortgage was dated the 6th April

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued*.

1881, and the mortgage-money was repayable on the 13th May 1881. On the 9th July 1881 the mortgagee caused a notice to be served on the mortgagor in compliance with the provisions of ss. 7 and 8 of Reg. XVII of 1806. The year of grace expired on the 10th July 1882. It was contended by the mortgagor that, as the Transfer of Property Act came into force on the 1st July 1882, the proceedings taken by the mortgagee should be regulated by the procedure laid down in ss. 86 and 87 of that Act, and not by the procedure prescribed by Reg. XVII of 1806: *Held*, that the procedure laid by the Transfer of Property Act could not be applied to the case. Although the year of grace had not expired when that Act came into force, and the full and complete right of the mortgagee had not accrued, he had acquired the right to bring a suit under the provisions of Reg. XVII of 1806 at the expiration of the year of grace, and the mortgagor was under a liability to part with his property upon a suit being brought at the expiration of that year, and such right and liability came within the meaning of these terms as used in cl. (c), s. 2 of the Transfer of Property Act. *MOHABIR PERSHAD NARAIN SINGH v. GUNGADHUR PERSHAD NARAIN SINGH*

[I. L. R. 14 Cal. 599]

3.—*Mortgage—Suit for foreclosure—Conditional Sale—Regulation XVII of 1806—General Clauses Consolidation Act (I of 1868). s. 6—“Proceedings.”* In a suit for foreclosure under a deed of conditional sale, where the due date of the deed expired and notice of foreclosure was served while Reg. XVII of 1806 was in force, but before the expiration of the year of grace that Regulation had been repealed by the Transfer of Property Act: *Held*, following *Mohabir Pershad Narain Singh v. Gungadhur Pershad Narain Singh*, I. L. R. 14 Cal. 599, that, proceedings for foreclosure having been commenced under the Regulation, those proceedings were saved by s. 6 of the General Clauses Consolidation Act I of 1868. The “proceedings” referred to in that section are not necessarily judicial proceedings, only, but ministerial proceedings, as, in the present case, the service of notice of foreclosure. *UMESH CHUNDER DAS v. CHUNCHUN OJHA*.

[I. L. R. 15 Cal. 357]

4.—s. 2 and ss 67 and 99—*Attachment of property mortgaged prior to 1882.* In 1881 a mortgagee obtained a decree for arrears of interest due under a mortgage-deed of 1879 and in execution of the decree attached and applied for the sale of the land mortgaged: *Held*, that by reason of s. 99 of the Transfer of Property Act, 1882, the land could not be sold otherwise than by a suit instituted under s. 67 of the said Act. *KAYERI v. ANANTHAYYA*.

[I. L. R. 10 Mad. 129]

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued*.

—, s. 3.—*Meaning of “notice.”* The definition of the word “notice” in s. 3 of the Transfer of Property Act (IV of 1882) correctly codifies the law as to notice which existed prior to the passing of the Act. *CHURAMAN v. BALLI*.

[I. L. R. 9 All. 591]

—, s. 6, cl. (d)—*Property—Actionable claim—Transferable claim—Civil Procedure Code, s. 266—Execution of decree—Attachment.* Under the Transfer of Property Act “property” includes an actionable claim. *RUDRA PERKASH MISSEER v. KRISHNA MOHUN GHATUCK*.

[I. L. R. 14 Cal. 241]

—, s. 52.

See *LIS PENDENS*.

[I. L. R. 12 Mad. 180, 439]

—, s. 54.

See *REGISTRATION ACT 1877, s. 17*.

[I. L. R. 10 All. 20]

See *VENDOR AND PURCHASER—COMPLETION OF TRANSFER*.

[I. L. R. 11 All. 244]

[I. L. R. 16 Cal. 622]

—, s. 58.

See *MORTGAGE—FORM OF MORTGAGE*,

[I. L. R. 9 All. 183]

—, s. 60—*Right of Redemption, Extinction of—Breach of condition in mortgage-deed—Conditional sale* ] The breach of a condition in a mortgage-deed to the effect that on default of payment on a certain date, the mortgage shall be deemed an absolute sale, does not amount to an extinguishment of the right of redemption by act of the parties within the meaning of the proviso to s. 60 of the Transfer of Property Act 1882. *PERAYYA v. VENKATA*.

[I. L. R. 11 Mad. 403]

1.—s. 67.—*Right of suit—Suit for sale by usufructuary mortgagee* ] Under s. 67 (a) of the Transfer of Property Act (IV of 1882), a usufructuary mortgagee whose possession has not been disturbed cannot maintain a suit either for foreclosure or for sale on non-payment of the mortgage-money. *Chowdhri Umrao Singh v. The Collector of Moradabad*, S. D. A. N. W. 1859, p. 13; *Dilli v. Bahadur*, 7 N. W. 55; *Ganesh Koor v. Deedar Buksh*, 5 N. W. 128; *Venkataram v. Subramanya*, I. L. R. 11 Mad. 88; and *Jhabru Ram v. Girdhari Singh*, I. L. R. 6 All. 289, referred to. *UMDA v. UMRAO BEGAM*.

[I. L. R. 11 All. 367]

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued*.

2.—s. 67.—*Usufructuary mortgage—Remedy of mortgagee.* A usufructuary mortgagee is not entitled, in the absence of a contract to that effect, to sue for sale of the mortgaged property. *Semble*—The construction placed on s. 67 (a) of the Transfer of Property Act 1882, in *Venkatasami v. Subramanya* (I. L. R. 11 Mad. 88) that a usufructuary mortgagee can sue either for foreclosure or for sale, but not for one or other in the alternative, is wrong. *CHATHU v. KUNJAN*.

[I. L. R. 12 Mad. 109]

3.—s. 67 and ss. 83, 84.—*Suit by mortgagee instituted before payment into Court—Right of mortgagee to a decree.* In a suit to recover money due on a mortgage, defendant paid the money into Court and a notice was issued to the mortgagee under s. 83 of the Transfer of Property Act. The mortgagee filed his suit before notice was served on him, and it was not proved that the mortgagee was aware of the fact of the payment into Court when he filed his suit. *Held* that the plaintiff was not debarred by s. 67 of the Transfer of Property Act from obtaining a decree *SITARAMAYYA v. VENKATRAMANNA*.

[I. L. R. 11 Mad. 371]

4.—s. 67, and ss. 86, 89.—*Usufructuary mortgage dated 20th April 1882, sued on in 1884—Form of decree.* In a suit filed in 1884 on a usufructuary mortgage, dated 20th April 1882, a decree was passed for the payment of the mortgage-money, or in default for the sale of the mortgaged property: *Held*, (*semble*, under the Transfer of Property Act) that the decree for sale was the right decree. *VENKATASAMI v. SUBRAMANYA*.

[I. L. R. 11 Mad. 88]

—, s. 68.

*See* s. 100.

[I. L. R. 15 Calc. 492]

—, s. 68(b) (c).—*Mortgage of non-transferable property—Right to sue for mortgage-money.*

Where a decree was obtained by a landholder for cancellation of a deed whereby an occupancy-holding was mortgaged with possession, and the mortgagee consequently failed to obtain possession and brought a suit against the mortgagor to recover the mortgage-money—*held* that inasmuch as the mortgagor must have known that he was mortgaging an estate not legally transferable, while the mortgagee might have believed that the estate was transferable, the act of the former was a default depriving the latter of his security within the meaning of s. 68 (b) of the Transfer of Property Act (IV of 1882), and the mortgagee was, therefore, entitled to succeed. *GANESH SINGH v. SUJHARI KUR*.

[I. L. R. 10 All. 47]

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued*.

—, s. 69.

*See* MORTGAGE—POWER OF SALE.

[I. L. R. 11 Mad. 201]

—, s. 72 (b).] Section 72 of the Transfer of Property Act only reproduces the rules of law which Courts of Justice in India have uniformly adopted. *GIRDHAR LAL v. BHOLA NATH*.

[I. L. R. 10 All. 611]

—, s. 73.

*See* MORTGAGE—SALE OF MORTGAGED PROPERTY—PURCHASERS.

[I. L. R. 15 Calc. 546]

—, s. 78.

*See* MORTGAGE—MARSHALLING.

[I. L. R. 12 Mad. 424, 429]

—, s. 81.

*See* MORTGAGE—MARSHALLING

[I. L. R. 12 Mad. 255]

—, s. 85.

*See* PARTIES—PARTIES TO SUITS—MORTGAGES, SUITS CONCERNING.

[I. L. R. 9 All. 125]

—, s. 87.

*See* MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION.

[I. L. R. 16 Calc. 246]

—, ss. 88, 89, 90.

*See* EXECUTION OF DECREE—MODE OF EXECUTION—MORTGAGE.

[I. L. R. 10 All. 632]

[I. L. R. 16 Calc. 423]

[I. L. R. 11 All. 486]

—, s. 90 and ss. 88 and 89.—*Decree for sale of mortgaged property—Decree not satisfied by sale—Recovery of balance due on mortgage.* The decree contemplated by s. 90 of the Transfer of Property Act (IV of 1882) can be made in the suit in which the decree for sale was passed; and it is not necessary to institute a fresh suit to obtain such decree. *RAJ SINGH v. PARMANAND*.

[I. L. R. 11 All. 486]

—, s. 93.

*See* MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION.

[I. L. R. 11 All. 386]

*See* RES JUDICATA—CAUSE OF ACTION.

[I. L. R. 11 All. 386]



## TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

—, s. 99.

See s. 2.

[I. L. R. 10 Mad. 129]

—, s. 99.—*Hindu law—Personal decree against managing member of joint family not impleaded as such—Effect of sale in execution of such decree—Sale of mortgaged property in execution of decree on a money-bond for interest due on the mortgage.* The managing member of a joint Hindu family executed in 1878 a mortgage on certain lands, the property of the family, to secure a debt incurred by him for family purposes, and in 1881 he together with his brother executed to the mortgagee a money-bond for the interest then due on the mortgage. In 1882 the mortgagee brought a suit on the money-bond and having obtained a personal decree against the two brothers merely, brought to sale in execution part of the mortgaged property which was purchased by a third person: *Held*, that the sale did not convey the interest of another undivided brother who was not a party to the decree. *Held*, further *per* KERNAN, J. that the sale in execution was invalid under the Transfer of Property Act, s. 99. SATHUVAYYAN v. MUTHUSAMI.

[I. L. R. 12 Mad. 325]

—, s. 100

See MORTGAGE—FORM OF MORTGAGE.

[I. L. R. 9 All. 158]

1.—s. 100.—*Charge on immoveable property—Mortgage—Construction of document—Limitation* Under s. 100 of the Transfer of Property Act for a document to create a charge on immoveable property, it must be a document that creates such charge immediately on its execution, and not operates only as a charge at some future time, such as in the event of non-payment of the money secured by it, the latter being the possibility of a charge ultimately arising on the land, and not “a charge” within the meaning of that section. *A* lent B Rs. 99, and *B* executed a document on the 24th July 1881, whereby, he agreed to repay the amount with interest in the month of Baisakh 1289, F. S. (April 1882), and further agreed that, if he did not pay the money as stipulated, he should sell his right to certain land and that *A* should take possession thereof, and that after *A* took possession of the land no interest should be paid by him (*B*), and that *A* should pay the rent of the landlord out of the profits of the land without any objection. *A* instituted a suit on the 3rd August 1885, to recover the Rs. 99: *Held*, that the document did not amount to a mortgage, nor did it create a charge under s. 100 of the Transfer of Property Act, and that the suit was barred by limitation, three years being the period applicable. MADHO MISSEER v. SIDDH BENAIX UPADHYA *alias* BENA UPADHYA.

[I. L. R. 14 Calc. 687]

## TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

2.—s. 100 and s. 58.—*Hypothecation bonds—Suit on.* The period of limitation for suits upon hypothecation bonds, which contain no power of sale, or effect no transfer of property, executed before the Transfer of Property Act came into operation is twelve years under sch. II, art. 132, of the Limitation Act of 1877—*Alaba v. Nanu* (I. L. R. 9 Mad 258), followed. *Per* MUTTUSAMI AYYAR, J.—“The transaction in suit appears to be of the kind described in s. 100 of the Transfer of Property Act, which defines how a charge is created;” but “it seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages.” RANGASAMI v. MUTTUKUMARAPPA.

[I. L. R. 10 Mad. 509]

3.—s. 100 and s. 68.—“*Charge*”—*Bengal Tenancy Act, s. 65* The provisions of s. 68 of the Transfer of Property Act are not amongst those made applicable by s. 100 of that Act to a person having a charge within the meaning of the latter section. *Semble*.—The “charge” referred to in s. 65 of the Bengal Tenancy Act (VIII of 1885) is not such a “charge” as that defined by s. 100 of the Transfer of Property Act. *Latit Mohun Roy v. Bindodas Dabee*, I. L. R. 14 Calc. 14, explained. FOTICK CHUNDER DEY SIRCAR v. FOLEY.

[I. L. R. 15 Calc. 492]

—, s. 118.

See CUSTOM.

[I. L. R. 11 Mad. 459]

See TRANSFER OF PROPERTY.

[I. L. R. 11 Mad. 459]

—, s. 123.—*Hindu Law—Gift—Delivery of possession—Immoveable and moveable property.* Assuming that delivery of possession was essential under the Hindu law to complete a gift of immoveable property that law has been abrogated by s. 123 of the Transfer of Property Act. The first para. of that section means that a gift of immoveable property can be effected by the execution of a registered instrument only, nothing more being necessary. *Semble*.—The same is the case under that section with regard to moveable property, provided that a registered deed (and not the alternative mode of delivery) be adopted as the mode of transfer. DHARMODAS v. NISTARINI DASI.

[I. L. R. 14 Calc. 446]

1.—s. 131.—*Transfer of debt—Notice to debtor.* *Held* that an assignment by endorsement of a registered bond hypothecating certain crops was not void by reason that notice thereof was not proved to have been given to the obligor, inasmuch as the effects of s. 131 of the Transfer of

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

Property Act was merely to suspend the operation of the assignment up to the time when such notice was received; that in this case the assignment would come into operation against the obligor when he became aware of it by the institution of the suit; and that if he had prior notice, and sold the property to *bona fide* transferees for value without notice either of the charge created by the bond or of the assignment, such transferees would be protected from liability. *Lala Jugdeo Sahar v. Bruj Bihari Lal*, I. L. R. 12 Calc. 505, referred to. *KALKA PRASAD v. CHANDAN SINGH*.

I. L. R. 10 All 20

2.—s. 131 and s. 135.—*Notice—Assignment of actionable claim—Rights of transferee for value.* A sued for principal and interest due on a mortgage assigned to him for value by the mortgagee. No notice of the assignment was given to the mortgagors before the plaintiff's demand. The sum sued for exceeded the amount paid by the plaintiff for the assignment and reasonable interest on it; but such amount was not paid or tendered to the plaintiff: *Held*, that the plaintiff was entitled to a decree for the whole amount due on the assigned mortgage. *SUBBAMMAL v. VENKATARAMA*.

[I. L. R. 10 Mad. 289

—, s. 132.

See RES JUDICATA—JUDGMENTS ON TECHNICAL OBJECTIONS.

[I. L. R. 12 Mad. 495

1.—s. 135.—*Transfer of a claim for smaller value—Transferee not entitled to recover more than price paid for claim.* [Section 135 (d) of the Transfer of Property Act (IV of 1882) means that if a creditor or party having an actionable claim against another, has put it into Court and has proceeded to proof of it to the point at which judgment has been delivered affirming it, or the liability of the defendant has been so clearly established that judgment must be delivered against him, the mischief or danger or any trafficking or speculation in litigation disappears, and the defendant can suffer no prejudice by any arrangement between the plaintiff and a third person as to who is to enjoy the fruits of the decree, nor is there any probability that the process of the court will be misused. On the other hand, if one who has an actionable claim against another chooses to sell it for less than its actual value, the person who buys embarks more or less in a speculation which can be defeated by payment to him of the price paid for it with interest and incidental expenses. The debtor's right to discharge himself by such payment is not forfeited by his putting the assignee to proof of his case in Court, nor did the Legislature intend that the position of the assignee should be better after suit and decree than before. *Grish Chandra v. Kashisauri Debti*, I. L. R. 13 Calc. 145, dissented from. *Chedambara*

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

*Chetty v. Ranga K. M. V. Puchaiya Naichar*, I. R. 1 I. A. 241; 13 B. L. R. 509, and *Ram Koomar Coondoo v. Chunder Canto Mookerjee*, L. R. 4 I. A. 23; I. L. R. 2 Calc. 233, referred to. The assignee under an instrument dated the 18th December 1885, and in consideration of Rs. 5,000 of a share of Rs. 10,000 out of Rs. 20,000 claimed by his assignors as unpaid dower-debt, joined with the assignors in instituting a suit for recovery of the dower-debt, on the 22nd December of the same year: *Held* that the assignee's proceedings were of the nature contemplated by s. 135 of the Transfer of Property Act (IV of 1882), and that he was not entitled to a decree for anything in excess of Rs. 5,000, the price paid by him for the Rs. 10,000 share of the debt. *JANI BEGAM v. JAHANGIR KHAN*.

[I. L. R. 9 All. 476

2.—s. 135.—*Actionable claim—Transfer of a claim for amount less than its value—Recovery of full amount of debt* [Section 135 of the Transfer of Property Act does not protect a defendant from payment of the full amount payable under a claim transferred for a sum less than that recoverable under the claim, where the money is recovered by suit after a contest as to the liability of the defendant. *Grish Chandra v. Kashisauri Debti*, I. L. R. 13 Calc. 145, followed. *KHOSHDEB BISWAS v. SATAR MONDOL*.

[I. L. R. 15 Calc. 436

3.—s. 135 and ss. 136, 137.—*Apportionment* [A sued as assignee of a bond (payable in 1872), hypothecating land in the mofussil. B, A's assignor, was a vakil practising in the High Court. B had obtained an assignment of the obligee's interest in the bond sued on, and also another bond for Rs. 3,000 between the same parties after the 1st July 1882 for Rs. 4,500. B had previously purchased the two bonds at a sale in execution of the decree of the Subordinate Judge's Court at N for Rs 5 each. A's assignment from B purported to be made to A in payment of certain debts owed to him by B. No interest has been paid on the bond and no tender had been made to plaintiff. *Held* on the evidence, that there was no consideration for the bond sued on or that it had failed. *Per cur.*—The true construction of s. 136 of the Transfer of Property Act appears to be that the officers mentioned in it habitually exercising their functions in a particular Court are precluded from buying any actionable claim cognizable by that Court. . . . In the absence of evidence showing that B practised as a pleader regularly in the Subordinate Court at N, the Court declined to hold that the assignment to him was inoperative altogether. There was, however, the Court held, no doubt that the assignments to him and by him were governed by s. 135 and that under s. 137 the person to whom a debt is transferred takes it subject to the liabilities to which the transfer was subject at the date of the transfer. Upon the facts of the case B was clearly

**TRANSFER OF PROPERTY ACT (IV OF 1882)—concluded.**

not entitled to recover more than Rs. 4,500 whatever might be due on the document. As he was the purchaser of an actionable claim, s. 135 of the Transfer of Property Act applied to him, and he could not recover more than the price he paid and the interest due thereon. There is no foundation for the suggestion that, where two actionable bonds are brought together for Rs. 4,500 and only Rs. 950 are recovered upon one of them, the assignee is precluded from recovering the difference, but that he must submit to a loss arising from an apportionment. *RATHNASAMI v. SUBRAMANYA*.

[I. L. R. 11 Mad. 56]

—, s. 136.

See s. 135.

[I. L. R. 11 Mad. 56]

1.—s. 136.—*Purchase of elephant with authority to recover the same from a stranger.* The owner of certain land in consideration of a sum of money transferred to the plaintiff, a pleader, the right to elephants caught in pits in the owner's land, and the right to sue for the recovery of such elephants from any person in possession of them. The plaintiff sued the defendants to recover possession of an elephant which had been trapped and was in defendant's possession at the time of the transfer to plaintiff. The suit was dismissed on the ground that the plaintiff had brought an actionable claim within the meaning of s. 136 of the Transfer of Property Act 1882: *Held*, that the section was not applicable. *RAMAKRISHNA v. KURIKAL*.

[I. L. R. 11 Mad. 445]

2.—s. 136.—*Purchase of actionable claim by officer of Court—Jurisdiction. Meaning of term.* S. 136 of the Transfer of Property Act 1882, provides that no officer connected with a Court of Justice can buy an actionable claim falling under the jurisdiction of the Court in which such officer exercises his functions. The plaintiff, an officer in a District Court, having purchased the rights of the mortgagee in a bond suit to recover Rs. 2,225 due upon it in the Court of the District Munsif: *Held*, that as the claim did not fall under the immediate jurisdiction of the District Court s. 136 was not applicable. *SINGARACHARLU v. SRIVABAI*.

[I. L. R. 11 Mad. 498]

—, s. 137.

See s. 135.

[I. L. R. 11 Mad. 56]

**TRANSFER OF TENURE.**

See BENGAL TENANCY ACT, s. 12.

[I. L. R. 16 Calc. 642]

**TREATY, CONSTRUCTION OF.**

—*Money settled upon royal family of Oudh and their heirs—Perpetual pension by payments arranged between sovereign powers—Construction of word "issue."* By deed in 1838 the King of Oudh declared his intention to provide pensions for various members of his family including *M J*, and her son, and to their heirs in perpetuity. By treaty in 1842 between the King and the Government of India, an additional pension was provided for *M J*, and her heirs: *Held* that the words "issue" and "heirs" having been used in the deed as convertible terms, the intention of the King must be construed to be that on the death of any pensioner having issue his heirs according to the Mahomedan law of inheritance should receive payment of the pension in the proportion regulated by that law: *Held* further that by the treaty of 1842 the devolution of *M J's* pension was not to be altered, and accordingly the rules of Mahomedan law must be observed. A grant of pensions in perpetuity, though invalid by the ordinary Mahomedan law, takes effect under a treaty between sovereign powers. *MARIAM BEGUM v. MIRZA. WAZIR BEGUM v. MIRZA*.

[I. L. R. 16 I. A. 175]

[I. L. R. 17 Calc. 284]

**TRESPASS**

See CASES UNDER CRIMINAL TRESPASS.

See MADRAS FOREST ACT, s. 21.

[I. L. R. 12 Mad. 226]

**TREES, SUIT FOR REMOVAL OF.**

See LIMITATION ACT 1877, ART. 32.

[I. L. R. 10 All. 634]

See LIMITATION ACT 1877, ART. 120.

[I. L. R. 10 All. 634]

**TROVER.**

See SMALL CAUSE COURT PRESIDENCY TOWNS—JURISDICTION—TROVER

[I. L. R. 12 Bom. 573]

**TRUST.**

See CO-SHARERS—ERECTION OF BUILDINGS ON JOINT PROPERTY.

[I. L. R. 12 Mad. 287]

See HINDU LAW—ENDOWMENT—CREATION OF ENDOWMENT

[I. L. R. 10 All. 18]

See HINDU LAW—PARTITION—AGREEMENTS NOT TO PARTITION, &amp;c.

[I. L. R. 12 Mad. 287]

See CASES UNDER LIMITATION ACT 1877, s. 10.

See RIGHT OF SUIT—CHARITIES

[I. L. R. 10 All. 18]

**TRUST—concluded.****—, Declaration of.**

See STAMP ACT 1879, SCH. I, ART. 36.

[I. L. R. 12 Mad. 89]

1.—*Trust created for specific purpose—Surplus after performance of trusts* [Where a trust had been created for specific purposes, *viz.*, the performance of religious and other duties, and the trustee had duly appointed another trustee in his place, the latter being entitled to hold the trust estate: *Held* that a decree having been made against the trustee personally, the corpus of the trust estate could not be sold to satisfy the claim of the judgment creditor, nor could any specific portion of the corpus of the estate be taken out of the hands of the trustee on the ground that there was, or might be, a margin of profit coming to him personally after the performance of the trusts: *Held*, also that in a suit in which all the parties interested were not before the Court there could be no decision as to the extent of the trusts, nor as to whether any surplus profits of the trust estate would, or would not, after the performance of the trusts, belong to the trustee personally. *BISHEN CHAND BASAWAT v. NADIR HOSSEIN.*

[I. L. R. 15 Cal. 329]

[L. R. 15 I. A. 1]

2.—*Improvements of estate—Rights of tenant for life and remainderman as to sums expended.* [A testator conveyed his property which consisted of extensive coffee estates to trustees upon trust as to part thereof for certain persons for life and then upon trust for their children absolutely. A suit having been filed for the administration of the trusts of the will a receiver was appointed. On the application of the receiver, and with the consent of all parties, the Court sanctioned the extension of the estate. This was done by raising a loan on pledge of the profits of the estate, out of which, when realised, the loan was paid off. By the will, the trustees were empowered to raise money for the purpose of managing the estate at their absolute discretion, either by using the profits, or by pledging or selling the corpus. The tenants for life claimed that the loan might be declared a charge on the estate: *Held*, that the extension was within the powers of the trustees, but that as between the life-tenants and the remaindermen, the former were entitled to have the sums expended on the improvements charged on the corpus, they keeping down the interest. *OUCHTERLONY v. OUCHTERLONY.*

[I. L. R. 11 Mad. 360]

**TRUSTEE, ASSIGNEE OF.**

See LIMITATION ACT 1877, s. 10. \* \*

[I. L. R. 15 Cal. 703]

**TRUSTEE, SUIT FOR REMOVAL OF.**

See RIGHT OF SUIT—CHARITIES.

[I. L. R. 12 Mad. 157]

**TRUSTEES' AND MORTGAGEES' ACT (XXVIII OF 1866)**

—, s. 43—*Powers of Court—Power to sanction lease.* [J S, a Hindu, died in 1865, possessed of a temple and of a piece of land near it which he bought in his lifetime. By his will he directed his executors to apply the income arising from the land in defraying the expenses connected with the temple. This was accordingly done by his son, whom he had appointed his executor. His son died in 1873, and in 1879 the petitioner, who was the son's widow, took out letters of administration, with the will annexed, to the estate of J S, still unadministered. As administratrix she continued to apply the income of the said land as directed in the will. She now filed the present petition, alleging that the said income, which amounted to about Rs. 900 *per annum*, was insufficient to keep up the said charity. She stated that a sum of Rs. 12,600 was urgently required for certain purposes connected with the said charity, and that she had agreed in September 1887, with one R B, that he should advance the said sum to her, to be expended as aforesaid, and that she should grant to him a lease of the said land for 99 years, with a proviso for renewal, at a rent of Rs. 350 *per mensem*. In October 1887, however, her adopted son served her with a notice to desist from granting the said lease. She therefore presented this petition to the Court under s. 43 of the Trustees' and Mortgagees' Powers Act XXVIII of 1866, praying (a) that she might be advised whether she had power to grant the said proposed lease; (b) that the said lease might be sanctioned or directed by the Court; and (c) that the Court might give such opinion, advice or direction in the premises as the Court might think fit. *Held* that, under the section, the Court had no power to sanction the proposed lease, or to advise as to whether the petitioner had power to grant it. The Court will not, under this section, advise trustees as to disputed points of law or fact, but will do so only as to undisputed matters of management, such as questions of advancement, maintenance, change of investment, sale of a house, compromises, taking proceedings, &c. *Held*, also, that, as a matter of general principle, the trustee of the property in question could make a lease thereof for the benefit of the trust, or raise money by way of charge for the purposes of necessary repairs and maintenance; but with regard to the details of amount, or as to the work to be done, the Court refused to give any opinion. *IN RE LAKSHMIBAI.*

[I. L. R. 12 Bom. 638]

**UNDUE INFLUENCE—**

See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY COURT (INEQUITABLE CONTRACTS.)

[I. L. R. 10 All. 535]

See DEED—CANCELLATION.

[I. L. R. 10 All. 535]

## UNLAWFUL ASSEMBLY.

1.—*Penal Code, s. 142—Common object.*] S. 149 of the Penal Code creates no offence, but was intended to make it clear that an accused person whose case falls within its terms cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object. *QUEEN-EMPRESS v. BISHESHAR.*

[I. L. R. 9 All. 645]

2.—*Penal Code (Act XLV of 1868), ss. 141 and 147.*] A party of persons, consisting of some five *peadas* and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of *M* for the purpose of either repairing or erecting a *bund* across it to cause the water to flow down a channel on the lands of their master *T*. The river at the time was almost dry, and the party did not go armed ready to fight or use force, and they did not during the subsequent occurrence use force. Having arrived at the spot about 10 A.M. they proceeded to work at the *bund* until the afternoon. At about 4 P.M. a body of men, consisting of about 1,200 in all, many of them armed with *lathies* and headed by the prisoners, who were servants of *M*, which had been seen collecting together during the day, proceeded to the spot, and about 25 or 30 of them attacked *T*'s men, some five of whom were more or less severely wounded with the *lathies*. The occurrence resulted in the conviction of some of *M*'s servants for rioting under s. 147 of the Penal Code. *M*'s people wholly denied any right on the part of *T* to construct or repair the *bund*, and had previously denied the existence of such right, and refused permission to *T* to exercise it. It was contended that the assembly of *M*'s people was not an "unlawful assembly;" that the interference by *M*'s people with the channel of the river justified them in coming to stop the work, and the show and use of force in compelling them to do so: *Held*, that the prisoners had been rightly convicted. It was further contended that *M*'s people did not assemble to enforce a right or supposed right within the terms of s. 141 of the Penal Code, but to defend a right, and that such action did not make the assembly an unlawful one. *Held*, that they were members of an assembly the common object of which was by show of criminal force, and by criminal force if necessary, to enforce the right to keep the river channel clear by preventing the construction of the *bund*, and by demolishing it so far as it was constructed, and that the case came within s. 141, para. (1). *Queen v. Mitto Singh*, 3 W. R. Cr. 41; *Shunker Singh v. Burmah Mahto*, 23 W. R. Cr. 25, and *Birjoo Singh v. Khub Lall*, 19 W. R. Cr. 66, referred to and commented on. *GANOURI LAL DAS v. QUEEN-EMPRESS.*

[I. L. R. 16 Calc. 206]

## USER.

See FISHERY, RIGHT OF.

[I. L. R. 12 Mad. 43]

—*Right of user—License to use land of another, coupled with grant—Revocation of license—Right of licensee to damages.*] A license to use the land of another, unless coupled with a grant, is revocable at the will of the licensor subject to the right of the licensee to damages if it is revoked contrary to the terms of any express or implied contract. *Wood v. Leadbitter*, 13 M. & W. 838, applied. *PROSONNA COOMAR SINGHA v. RAM COOMAR GHOSE.*

[I. L. R. 16 Calc. 640]

## VALUATION OF SUIT.

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1. Suits	...	...	...	1054
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## (1) SUITS.

1.—*Bengal Tenancy Act, s. 149—Suit by third party claiming rent paid into Court in rent-suit, Nature of—Title-suit—Institution-stamp.*] A suit by a third person under cl. (3) of s. 194 of the Bengal Tenancy Act is not a title suit and need not be stamped as such. *Per TOTTENHAM, J.*—Such suit is in the nature of a suit for an injunction under the Specific Relief Act or else a declaratory suit. *JAGADAMBA DEVI v. PROTAP GHOSE.*

[I. L. R. 14 Calc. 537]

2.—*Suit for declaration of title to paid offices—Withdrawal of claim to some of the offices—Office still claimed involving the right to the others*] In a suit to declare title to four paid offices in a temple, the plaintiffs asked that the issues with regard to three of them should not be tried, but on cross-examination asserted right to them. It was found that the fourth office carried with it the right to the other three: *Held*, that the plaintiffs were not shown to have relinquished their claim on the three offices for the purposes of the suit, but that even if they had done so, the value of all the four offices must be taken for the purposes of jurisdiction. *SUNDARA v. SUBBA.*

[I. L. R. 10 Mad. 371]

3.—*Court Fees Act (VII of 1870), s. 7, art. 5; proviso—Stamp—Construction and applicability of the proviso—Valuation of suits for land in talukdars village—Talukdar's jama—Remission.*] *Per WEST and NANABHAI, JJ.*—The proviso to art. 5 of s. 7 of the Court Fees Act (VII of 1870) was clearly intended to provide a standard of valuation in the Bombay Presidency, not only for the comparatively rare cases of land forming part but not a definite share of an estate paying revenue to Government, but for all cases of suits for land. The theory being that all land is primarily liable to be rated or taxed for the public revenue, any sum not levied according to the

VALUATION OF SUIT.—*continued.*(1) SUITS—*continued.*

appraisement made in order to show the proper amount of the land-tax may be regarded as a remission. In the case of a *talukdari* village, the proprietor of which had, under a settlement with Government for a period of twenty-two years, agreed to pay a fixed annual *jama*, or lump assessment, instead of the full survey assessment for the whole village: *Held* by a majority of the Full Bench, that the difference in amount between the *jama* and the full survey assessment was a remission, and therefore, a suit for possession of lands in this village was to be valued according to cl. 3 of the proviso to art. 5 of s. 7 of the Court Fees Act (VII of 1870). *Per* BIRDWOOD, J.:—The remission contemplated by cl. (3) of the proviso 'is an *express* remission, and not a mere difference in amount between the actual assessment payable by a *talukdar* and the survey assessment.' The three clauses of the proviso seem to apply only to lands which have been subjected to a survey settlement as ordinarily understood and legally provided for in the Bombay Presidency; the first clause being applicable to lands settled for a period not exceeding thirty years, the second to lands settled for a longer period or permanently, and the third to *mam* lands on which the whole or a part of the survey assessment has been expressly remitted. The *talukdars* are not *mamdars*. They are land-holders liable to pay a land-tax, but not under a survey settlement, such as is applicable to lands for which provision seems to have been specially made in the proviso to art. 5 of s. 7 of the Court Fees Act. No part of the proviso therefore applies to a suit for the possession of lands in a *talukdari* village. Such a suit should be valued according to cl. (d) of art. 5, of s. 7 of the Court Fees Act. *ALA CHELA v. OGHAD-BHAI THAKERSI.*

[I. L. R. 11 Bom. 541]

BAVAJI MOHAMJI v. PUNJABHAI HANUBHAI.

[I. L. R. 11 Bom. 550 note.]

4.—*Suit for Redemption—Court Fees Act (VII of 1870)—Dekkan Agriculturists Relief Act (XVII of 1879), Chap. II.* The valuation of a suit for redemption for purposes of jurisdiction is the amount remaining due on the mortgage, or claimed on it by the mortgagee. It is that amount, and the right connected with it, which is the usual subject of contention in a mortgage suit. *Per* BIRDWOOD, J.:—The rules laid down in the Court Fees Act (VII of 1870) are not to be taken as necessarily a guide in determining the value of the subject-matter of a suit for purposes of jurisdiction. *RUPCHAND KHEMCHAND v. BALVANT NARAYAN.*

[I. L. R. 11 Bom. 591]

5.—*Suit for declaration that property is liable to sale in execution of decree—Jurisdiction.* In a suit to have it declared that certain property valued at Rs. 400 was liable to sale in execution

VALUATION OF SUIT.—*continued.*(1) SUITS—*continued.*

of the plaintiff's decree for Rs. 1,500. *Held* that in this case the value of the property determined the jurisdiction, that it was immaterial that the amount of the decree was higher than the limit of the Munsif's jurisdiction, and that the case was therefore triable by the Munsif. *Gulzari Lal v. Jadaun Rai*, I. L. R. 2 All. 799, distinguished. *DURGA PRASAD v. RACHLA KUAR.*

[I. L. R. 9 All. 140]

6.—*Bengal Civil Courts Act (VI of 1871), s. 20—Value of the subject-matter in dispute—Civil Procedure Code (Act XIV of 1882), s. 283—Attached property, Suit to establish right to.* In suits brought under s. 283 of the Civil Procedure Code to test the question whether a property which has been attached in execution is liable to pay the claim of the creditor, the amount which is to settle the jurisdiction of the Court, is the amount which is in dispute, and which the creditor would recover if successful, *viz.*, the amount due to him, and not the value of the property attached, unless the two amounts happen to be identical. *Janki Das v. Badri Nath*, I. L. R. 2 All. 698; *Gulzari Lal v. Jadaun Rai*, I. L. R. 2 All. 799; *Krishnama Khariar v. Srinivasa Ayyangar*, I. L. R. 4 Mad. 339; and *Dayachand Nemchand v. Hemchand Dharamchand*, I. L. R. 4 Bom. 515, followed. *MODHUSUDUN KOER v. RAKHAL CHUNDER ROY.*

[I. L. R. 15 Cal. 104]

7.—*Madras Civil Courts Act (III of 1873) s. 12—Jurisdiction—Suit to recover share of inheritance—Subject-matter of suit.* The plaintiff sued to be declared an heir to a deceased Mahomedan and to recover her share of the inheritance, the share claimed being less than Rs. 2,500, while the value of the whole estate exceeded that amount: *Held* that the suit was to be valued according to the share, and not according to the value of the whole estate, and the suit therefore was within the jurisdiction of a District Munsif. *KHANSA BIBI v. ABBA.*

[I. L. R. 11 Mad. 140]

8.—*Act XX of 1863—Suit to remove Managers of endowment from office—Court Fees Act, 1870, sch. II, art. 17.* In a suit under Act XX of 1863 to remove the Managers of an endowment from office, the subject-matter was held to be one which did not admit of valuation, and the Court-fee payable on its institution was the fixed fee of Rs. 10. *VEERASAMI PILLAY v. CHOKAPPA MUDALIAR.*

[I. L. R. 11 Mad. 149 note]

*See* SRINIVASA v. VENKATA.

[I. L. R. 11 Mad. 148]

9.—*Suit for partition of share of land.* In a suit for ascertainment, partition, and delivery to the plaintiff, of a share of certain land, the

VALUATION OF SUIT—*continued*.(1) SUITS—*continued*.

suit should be valued at the amount of the value of the whole estate. *Tydnatha v. Subramanya*, I. L. R. 8 Mad 235, followed. *NAGAMMA v. SUBRA*  
[I. L. R. 11 Mad. 197]

10.—*Madras Civil Courts Act, s. 12—Court Fees Act, sch. II, art. 17, s. 6—Suit to remove a karnavan—Valuation for jurisdiction*.] Although, for the purposes of the Court Fees Act, a suit to remove the *karnavan* of a Malabar *tarwad* is incapable of valuation and subject to the fee prescribed by s. 6, art. 17, of sch. II of that Act, yet, for the purposes of determining jurisdiction under s. 12 of the Civil Courts Act, the right of management, which is the subject-matter of the suit, must be valued. If the value is estimated *bonâ fide* by the plaintiff, the Court should adopt it. *KRISHNA v. RAMAN*.

[I. L. R. 11 Mad. 266]

11.—*Suit for account and for balance that may be found due—Appeal—Act XIV of 1869, ss. 8 and 26.*] The plaintiffs sued for an account of all the business done by the defendants as their commission agents from 1854 to 1867, and prayed that whatever was found due might be awarded with interest. The plaintiffs valued the relief sought approximately at Rs. 510, and this was the only valuation stated in the plaint. The suit was filed in the Court of a First Class Subordinate Judge, who rejected the plaintiff's claim. Against this decision the plaintiffs preferred an appeal to the High Court. *Held*, that as the approximate amount of the claim was stated in the plaint to be Rs. 510, that must be taken to be the value of the subject-matter of the suit for purposes of jurisdiction. The appeal, therefore, lay under ss. 8 and 26 of Act XIV of 1869, not to the High Court, but to the District Court. Under s. 50 of the Code of Civil Procedure (Act XIV of 1882) if a plaintiff seeks the recovery of money, the plaint must state the precise amount so far as the case admits, while in a suit for the amount which will be found due on taking unsettled accounts, the plaint need only state approximately the amount sued for. As in the former instance the precise amount, so in the latter the approximate amount, stated in the plaint must be taken to be the amount of value of the subject-matter of the suit for purposes of jurisdiction. *KHUSHALCHAND MULCHAND v. NAGINDAS MOTICHAND*.

[I. L. R. 12 Bom. 675]

12.—*Valuation for purposes of jurisdiction.*] Questions of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters to be governed by the statements contained in the plaint in the cause. The valuation of the claim as preferred by the plaintiff, and not as set up by the plea in defence, should govern the action, not

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VALUATION OF SUIT—*continued*.(1) SUITS—*continued*.

only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigation. *JAG LAL v. HAR NARAIN SINGH*.

[I. L. R. 10 All 524]

13.—*Pecuniary valuation of suit—Court Fees Act, s. 12, sch. II, art. 17, iii—Suit for declaratory decree*.] A suit for two declarations filed in a Subordinate Court was valued by the plaintiffs at a sum in excess of the pecuniary jurisdiction of a District Munsif. It was pleaded that the matter in dispute was *res judicata* by reason of decrees passed in District Munsifs' Courts. No objection was taken in the Subordinate Court to the valuation of the suit. *Held*, that the plea of *res judicata* failed. *Per MURTHUSAMI AYYAR, J.*—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one for possession of the property regarding which the plaintiff seeks to have his title declared. *GANAPATI v. CHATHU*

[I. L. R. 12 Mad. 223]

14.—*Court Fees Act (VII of 1870), s. 7, cl. 5 (c) (c)—Paramba in Malabar, valuation of suit for—Suit for garden land or land paying no revenue*.] On its appearing that a *paramba* in Malabar is not subject to land tax, but that a tax is levied on trees of certain kinds which may grow on it: *Held*, that a *paramba* must be regarded for the purposes of the Court Fees Act as a garden or as land which pays no revenue, according to the circumstances of each case. *AUDATHODAN MOIDIN v. PULLAMBATH MAMALLY*.

[I. L. R. 12 Mad. 301]

15.—*Suit to obtain a declaratory decree—Suit to set aside a summary order—Consequential relief—Prayer to have property released from attachment—Act VII of 1870 (Court Fees Act), sch. II, No. 17 (i) and (iii).*] *Held* that the Court-fee payable on the plaint and memorandum of appeal in a suit under s. 283 of the Civil Procedure Code praying (a) for a declaration of right to certain property, and (b) that the said property might be released from attachment in execution of a decree was Rs. 10 in respect of each of the reliefs prayed. *DILDAR FATIMA v. NARAIN DAS*.

[I. L. R. 11 All. 365]

16.—*Redemption suit—Dekhan Agriculturists Relief Act (XVII of 1879), Chap II, s. 3—Appeal—Jurisdiction.*] In a redemption suit the valuation of the subject-matter does not depend on the value of the mortgaged property. Where the mortgage itself is denied, and the mortgagee does not say what he claims in respect of the mortgage-debt, the amount found to be remaining due on the mortgage, if any amount was due at the date of the suit, would represent the true



## VALUATION OF SUIT—continued.

## (1) SUITS—concluded.

valuation of the subject-matter of the suit. *Rupchand Khemchand v. Balwant Narayan*, I. L. R. 11 Bom. 591, followed. The plaintiffs, who were agriculturists, sued to redeem certain lands, alleging that they had been mortgaged to the defendants' father for Rs. 50, and that the debt had been satisfied out of the rent and profits of the mortgaged property. The defendants denied the alleged mortgage. The Subordinate Judge found that the mortgage was proved, and the mortgage-debt had been more than paid off out of the profits of the property in dispute. He therefore passed a decree awarding possession to the plaintiffs. Against this decree the defendant appealed. The District Court found that the mortgage was not established and reversed the decree of the Subordinate Judge: *Held*, on second appeal, that no appeal lay to the District Court from the decision of the Subordinate Judge. As the Subordinate Judge found that no sum remained due on the mortgage, and as the original advance was alleged to have been Rs. 50, the suit was governed by the provisions of Chapter II of the Dekkan Agriculturists Relief Act (XVII of 1879). *AMRITA BIN BAPUJI v. NARU BIN GOPALJI SHAMJI*,

[I. L. R. 13 Bom. 489]

17.—*Subordinate Judge's power to make valuation—Court Fees Act (VII of 1870), s. 7, cl. 4 (f)—Civil Procedure Code (Act XIV of 1882), s. 54, cls. (a) and (b)* The plaintiffs brought a suit for an account, and approximately valued their claim at Rs. 16-15-0. The Subordinate Judge was of opinion that the claim was for recovery of money, and should have been valued at Rs. 1,000. He therefore called on the plaintiffs to make up the stamp to that required on this valuation; and the plaintiffs refusing he dismissed their suit under s. 54 (b) of the Civil Procedure Code (Act XIV of 1882): *Held*, that in any case the Subordinate Judge was wrong. If the suit was really one for an account, the plaintiffs were entitled to value the relief they sought approximately, as they had done; if it were not one for an account, but for recovery of money, still the Subordinate Judge had no power himself to value the relief sought, but should have called on the plaintiff to value the relief he sought, and then if he had thought such relief was undervalued, he could have applied s. 54 (a) of the Code of Civil Procedure and rejected the suit. *BALVANTRAY v. BRIMASHANKAR*,

[I. L. R. 13 Bom. 517]

## (2) APPEALS.

18.—*Appeal from decree making property liable for mortgage-debt—Court Fees Act (VII of 1870), s. 6, sch. II, art. 17.* In a suit on a mortgage-bond a decree was passed for payment of principal and interest, and in default for sale of the mortgaged property. Some of the defendants filed a memorandum of appeal against so much of the

## VALUATION OF SUIT—concluded.

## (2) APPEALS—concluded.

decree as declared the liability of the property affixing a stamp of Rs. 10 only: *Held* that the proper stamp to be paid was not Rs. 10 as in the case of a declaratory decree, but on the value of the debt not exceeding the value of the property. *VENKAPPA v. NARASIMHA*.

[I. L. R. 10 Mad. 187]

## VARIANCE BETWEEN PLEADING AND PROOF.

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2. Special cases—	1060
(a) Fraud	1060
(b) Possession, suit for	1061
(c) Title...	1062

## (1) GENERAL CASES.

1.—*Pleadings—Basis of decision of case.* The determination in a cause must be founded upon a case, either to be found in the pleadings, or involved in, or consistent with, the case thereby made. *Eben Chunder v. Shama Churn Bhutto*, 11 Moore's I. A. 7 referred to. *MYLAPORE IRASAWMY VYAPORY MOODLIAR v. YEO KAY*.

[I. L. R. 14 Calc. 801]

[L. R. 14 I. A. 168]

2.—*Basis of decision of case—Exception to rule "Secundum probata et allegata"—Admission of defendant.* The rule that the decree should be in accordance with what is alleged and proved, is intended to prevent surprise and is not applicable to a case in which the defendant's own admission is adopted as the ground of decision against him. *APPAYYA v. RAMIREDDI*.

[I. L. R. 11 Mad. 367]

## (2) SPECIAL CASES.

## (a) FRAUD.

3.—*Compromise by official assignee—Insolvent Act 11 and 12 Vic., c. 21, ss. 28 and 29—Charges with a view to establish fraud—Practice—Leading—Amendment of pleading—Fraud—Restriction of power to amend.* The account of an estate, formerly in the hands of a derivative executor who became insolvent and died in 1856, having been pending in Court for many years, some of the parties being interested in the original estate and others as the insolvent's creditors, a compromise was effected, under which a suit, brought in 1858 by the official assignee, representing the deceased insolvent, was dismissed by the consent of parties in 1875. Part of a sum of money, paid to the credit of the insolvent's estate in pursuance of the compromise, was made over, upon the passing of the consent-decree with the knowledge of the assignee, but without notice to, or the sanction of, the Court to a person who had assisted in taking the account. From the representatives of the latter, he being now

# VARIANCE BETWEEN PLEADING AND PROOF—continued.

## (2) SPECIAL CASES—continued.

### (a) FRAUD—concluded.

deceased the successor in office of the assignee claimed repayment. The plaint, as presented, alleged the fraudulent concealment of the payment from the assignees. Afterwards, when all the evidence had been taken, and it had been established that the assignee knew of the payment, this was amended to the statement that if he did know of it he had no power to consent to it, and that his consent would not be binding, the payment being a fraud upon the Court: *Held*, that the amendment at the stage when it was made was not permissible. It is a well-known rule, that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged another kind cannot, on failure of proof, be substituted for it. The High Court having decreed the claim on a finding of fraud different from either of the above, *held*, that on this ground alone the judgment might have been reversed. *Montesquieu v Sandys*, 18 Ves. Jun 302, followed. *ABDUL HOSSEIN ZENAIL v. TURNER* (OFFICIAL ASSIGNEE).

[I. L. R. 11 Bom 620

[L. R. 14 I. A. 111

### (b) POSSESSION, SUIT FOR.

4.—*Adverse possession—Issues.* The plaintiff sued to recover possession of certain land alleging that it was *lakheraj* land, which he had purchased from a third party. The Court of First Instance found that he had not proved the title he alleged, and, although it had been contended at the hearing that a title by twelve years' adverse possession had been proved, the Court held that it was not proved, and that as it was not alleged in the plaint, and no issue was raised as to it, the plaintiff was not entitled to succeed and accordingly dismissed the suit. The plaintiff appealed, and one of his grounds of appeal was that he was entitled to succeed by virtue of the title of adverse possession proved. The lower Appellate Court considered that the plaintiff had proved that he and his vendor had held adverse possession for a period of over twelve years and gave the plaintiff a decree on the strength of that title. The defendant appealed to the High Court, and it was contended on his behalf that the plaintiff was not entitled to succeed upon a title of adverse possession when it was not alleged in his plaint and no issue had been laid down in respect of it: *Held*, that, as the suit was one for possession and the defendant had express notice in the lower Appellate Court that the plaintiff relied on the title of adverse possession, and as he took no objection on the ground that he should be allowed an opportunity to call evidence to rebut it, and as he had consequently not been prejudiced by the course adopted by the lower Appellate Court, the decree of that Court should be confirmed. *Bijaya Debia v. Bydonath Deb*,

# VARIANCE BETWEEN PLEADING AND PROOF—concluded.

## (2) SPECIAL CASES—concluded

### (b) POSSESSION. SUIT FOR—concluded

24 W R 444, and *Shro Kumar Debi v. Govind. Shaw Tanti*, I. L. R. 2 Calc. 418, distinguished. *Joyatra Dassee v. Mahomed Mobaruck*, I L R. 8 Calc. 975 discussed. *SUNDURI DASSEE v. MOODHU CHUNDER SIRCAR*.

[I. L. R. 14 Calc. 592

5.—*Suit for possession on allegation of partition—Failure to prove division—Change of case on appeal.* Plaintiffs being members of a joint Hindu family alleging division, and a sale to them by other members of their share in the family property more than twelve years before suit, sued to eject a more recent purchaser. The plaintiffs failed to prove division as alleged. One of the members of the family who was in possession of the property to which the sale-deed related did not join in executing it: *Held*, that the plaintiffs having failed to prove division as alleged were not entitled in second appeal to have their suit treated as a suit for partition. *MUTTUSAMI v. RAMAKRISHNA*.

[I. L. R. 12 Mad. 292

### (c) TITLE.

6.—*Failure to prove adoption—Right to succeed by inheritance—Civil Procedure Code, s. 146—Failure of plaintiff to prove unnecessary averments—Decree on admission of defendant.* In a suit brought by an undivided member of a Hindu family to set aside a sale made by the managing member and to recover a moiety of the land sold, the plaintiff alleged that he had been adopted by his deceased uncle and claimed as adopted son. The purchaser denied the adoption, alleged that plaintiff was the natural brother of the vendor, and justified the sale under Hindu law. The lower Courts found that the adoption was not proved, and, on the plaintiff urging that if the adoption was not proved, yet he was entitled to recover by virtue of the admission that he was the natural brother of the vendor, held that the latter claim was inconsistent with the claim as adopted son. The suit was therefore dismissed: *Held*, on appeal, that the suit was improperly dismissed, and that if the purchaser could not justify the sale the plaintiff was entitled to succeed. The rule that the decree should be in accordance with what is alleged and proved, is intended to prevent surprise and is not applicable to a case in which the defendant's own admission is adopted as the ground of decision against him. *APPAYYA v. RAMIREDDI*.

[I. L. R. 11 Mad. 367

## VATANDARS.

See CASES UNDER HEREDITARY OFFICES ACT (BOMBAY).

## VENDOR AND PURCHASER.

1. Breach of warranty ...	1063
2. Completion of transfer ..	1064
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See FRAUD—WHAT CONSTITUTES FRAUD  
AND PROOF OF FRAUD.

[I. L. R. 13 Bom. 229

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See SPECIFIC PERFORMANCE—SPECIFIC  
PERFORMANCE NOT ALLOWED

[I. L. R. 12 Bom. 658

## (1) BREACH OF WARRANTY.

1.—*Auction-sale by mortgagee of mortgaged property—Condition of sale—Condition that purchaser shall take such title as vendor can give where vendor has no title at all—Implied possession of some title in vendor.* *R* having stolen from *N* the title-deeds relating to a certain property in Bombay in which he had no interest, but which belonged to *N*, deposited them with the plaintiffs, to whom he also executed an indenture of mortgage of the property comprised in the deeds to secure the repayment of a loan advanced to him by the plaintiffs. The plaintiffs subsequently sold the property at an auction-sale under the power of sale contained in the mortgage. The property was put up to auction under certain conditions of sale, of which the following was one:—"The vendors shall not be bound to give any better title to the purchaser than they themselves possess; and the purchaser shall take the premises sold with such title only as the vendors can give him." Before the sale commenced, a notice on behalf of *N* was read out to the persons then present, which stated that she claimed the property as absolute owner, and that *R* (who had mortgaged it to the vendors), had no interest in it. The defendant was not present when the notice was read. He did not arrive at the auction until after the bidding had begun, but on his arrival he was told of *N*'s

## VENDOR AND PURCHASER—continued.

## (1) BREACH OF WARRANTY—continued.

claim. He was told nothing to make the above condition of sale misleading. He bid for the property, and ultimately became the purchaser for Rs. 1,075. He immediately paid Rs. 275 by way of deposit, and signed an agreement to complete, which had the conditions of sale annexed to it. He subsequently ascertained that *R* had no interest in the property, and thereupon he called upon the plaintiff's (the mortgagees), to make out a good title, or to repay his deposit. The plaintiffs, however, relying on the above condition of sale, required him to complete his purchase; and he, having failed to do so, they filed this suit against him, to recover the balance of the purchase-money. *Held*, that the defendant was not liable to pay to the plaintiffs the balance of the purchase-money. The suit, although in form a suit to recover the residue of the purchase-money, was virtually one to compel specific performance, and was governed by the principles applicable to such a suit. The purchaser was entitled to say that the above condition of sale implied that the vendors had some title, however defective it might be and he had received at the auction no information which could be regarded as giving him notice to the contrary. *MOTIVAHOO v. VINAYAK VEERCHAND*.

[I. L. R. 12 Bom. 1

## (2) COMPLETION OF TRANSFER.

2.—*Part payment of purchase-money—Execution, registration and delivery of sale-deed—Completion of sale—Right of purchaser to sue for possession—Transfer of Property Act IV of 1882, s. 54* Non-payment of the purchase-money does not prevent the passing of the ownership of the property sold from the vendor to the purchaser; and the latter, notwithstanding such non-payment, can maintain a suit for possession of the property, subject to such equities, restrictions or conditions as the nature of the case may require. *Mohun Singh v. Shih Koonwer*, 1 Agra, 85; *Goor Parshad v. Nunda Singh*, 1 Agra, 160; *Heera Singh v. Ragho Nath Sahai*, 3 Agra, 30; and *Umedmat Motiram v. Dawa*, I L. R. 2 Bom. 547, referred to. The difference between an executed contract of sale and an executory contract to sell, observed on. *Ibbat Begam v. Gobind Prasad* I. L. R. 3 All. 77 dissented from. A deed of sale of immoveable property having been duly executed and registered and delivered, and the purchaser having paid a portion of the purchase-money to the vendor's creditors—*held*, with reference to s. 54 of the Transfer of Property Act (IV of 1882) that these facts amounted to a full transfer of ownership, and the purchaser could maintain a suit for possession of the property sold, notwithstanding that he had not paid the balance of the purchase-money to the vendor, or to a mortgagee of the property, as stipulated in the deed. *SHIB LAL v. BHAGWAN DAS*.

[I. L. R. 11 All. 244

**VENDOR AND PURCHASER—continued.****(2) COMPLETION OF TRANSFER—concluded.**

3.—*Transfer of Property Act (IV of 1882), s. 54—Transfer of immoveable property by unregistered deed—Deed of which registration is optional—Suit by purchaser for possession when vendor is out of possession* [Section 54 of the Transfer of Property Act is not exhaustive, or imperative in requiring that the transfer of immoveable property of less than Rs. 100 should be made only by one of the modes there stated so as to confer a valid title. Where the plaintiff bought from the heirs of M, who were out of possession, their right, title, and interest in certain immoveable property, and such property was conveyed to the plaintiff by an unregistered deed, registration of the deed (the property being of value of less than Rs. 100) not being compulsory: *Held*, in a suit to recover the property from persons in possession without title, that the sale conferred a valid title on the plaintiff, though not made by registered deed or by delivery of the property. The dictum of GARTH, C. J., in *Narain Chunder Chuckerbutty v. Dataram Roy*, I. L. R. 8 Calc. 597, at p. 612, dissented from. KHATU BIBI v. MADHORAM BARSICK.

(I. L. R. 16 Calc. 622)

**(3) FRAUD.**

4.—*Contract Act, ss. 17, 19—Contract induced by fraud—Right to rescind.* [If a vendor has been guilty of fraud within the meaning of s. 17 of the Indian Contract Act by actively concealing a fact which it was material for the purchaser to know, and the purchaser was induced thereby to purchase, the fact that the purchaser by exercise of ordinary diligence might have ascertained the truth affords no answer to a suit to recover the purchase-money. Such a case does not fall within the exception to s. 19 of the Contract Act. *MORGAN v. GOVERNMENT OF HAIDRABAD*

(I. L. R. 11 Mad. 418)

**(4) LIEN.**

5.—*Lien on land created by agreement—Sale to stranger without notice—Purchaser, Right of.* [D mortgaged certain land to S to secure repayment of a loan, and covenanted that in a certain event S might realize the money from the house of D. D sold this house to C, who purchased without notice of the covenant: *Held*, that C could not resist the claim of S to have the house sold under the covenant. *COOLING v. SARAYANA*.

(I. L. R. 12 Mad. 69)

**(5) NOTICE.**

6.—*Assignment of equitable estate—Notice to holder of legal estate—Hindu law* [In order to complete an assignment of an equitable estate in immoveable property, it is not necessary by English law that notice of the assignment should be given to the owner of the legal estate. Nor

**VENDOR AND PURCHASER—continued.****(5) NOTICE—concluded.**

is there any rule of Hindu law which requires notice to be given to the person in possession whose position may be considered analogous to the holder of the legal estate in English law. *GOVINDRAV v. RAVJI*

(I. L. R. 12 Bom. 33)

7.—*Notice of possession of rent—Notice of tenancy—Purchaser how far affected with notice of lessor's title.* [Notice of possession of the rents of property is notice of the tenancy; but does not of itself affect a purchaser with notice of the lessor's title. *Burnhart v. Greenshields*, 9 Moore's P. C., 18, referred to. *GUXAMONI NATH v. BUS-SUNT KUMARI DASI*.

(I. L. R. 16 Calc. 414)

**(6) PURCHASE OF MORTGAGED PROPERTY.**

8.—*Assignment of the equity of redemption by the mortgagor—No notice to mortgagees of such assignment—No change of name in Collector's books—Further advances by mortgagees to original mortgagor on same security—Suit by assignee of equity of redemption to redeem—Liability of assignee to pay off the further advances to mortgagor—Standing by—Allowing original mortgagor's name to remain in Collector's books.* [In order to complete an assignment of an equitable estate in immoveable property, it is not necessary by English law that notice of the assignment should be given to the owner of the legal estate. Nor is there any rule of Hindu law which requires notice to be given to the person in possession whose position may be considered analogous to the holder of the legal estate in English law. By a registered mortgage-deed, P in 1869 mortgaged certain property with possession to the defendants. In 1871, P sold his equity of redemption to the plaintiffs, who allowed it to remain in P's name on the Collector's register. Subsequently, in 1873, the defendants made further advances to P on the security of the same mortgaged property. The plaintiffs sued to redeem. The Court of First Instance rejected the plaintiffs' claim, being of opinion that their purchase was not proved. On appeal, the District Judge reversed the decree, holding that the sale to the plaintiffs was proved. He held, further, that the plaintiffs could not redeem without paying off the further advance made by the defendants in 1873, on the ground that the plaintiffs had given no notice of their purchase to the defendants, and had allowed P's name to remain on the Collector's register as the ostensible owner. The plaintiffs appealed to the High Court: *Held* that the plaintiff's title as assignee of the equity of redemption was complete, although no notice of the assignment had been given to the defendants. But, although such notice was not necessary to complete the plaintiffs' title, it was plain, upon general principles of equity, that if the plaintiffs' conduct was such as to amount to a standing by and allowing the defendants to make further

**VENDOR AND PURCHASER—continued.****(6) PURCHASE OF MORTGAGED PROPERTY—concluded.**

advances to *P* under the supposition that he was still the owner of the equity of redemption, such conduct would give the defendants a better equity. If the property was standing in *P*'s name in the Collector's books, the allowing it so to remain after the assignment would be sufficient for the purpose. *GOVINDRAV v. RAVJI*.

[I. L. R. 12 Bom. 33]

9.—*Unregistered agreement by mortgagor to sell to mortgagee—Subsequent assignment of equity of redemption to third person for value, but with notice of agreement.* In a suit for redemption filed by an assignee for value of the equity of redemption against a mortgagee in possession, it was found that the mortgagor had agreed with the defendant to sell the mortgaged premises to him, that part of the purchase-money had been acknowledged as paid, and that the balance had been tendered in pursuance of the agreement. It was further found that the plaintiff had taken his assignment with notice of the above agreement and tender. The agreement was in writing, but not registered: *Held*, that though the agreement was not admissible in evidence as creating an interest in land, still it might be used for the purpose of obtaining specific performance, and the plaintiff having purchased the equity of redemption with notice as above was not entitled to redeem. *Per cur.*—The plaintiff having knowledge of the agreement was put upon enquiry to ascertain whether the tender had been made and whether there was any objection to his purchase on that ground. *ADAKKALAM v. THEETHAN*.

[I. L. R. 12 Mad. 505]

**(7) PURCHASERS, RIGHTS OF.**

10.—*Immoveable property—Right to good title.* A purchaser of immoveable property is entitled to receive, and the vendor is bound to give, a title free from reasonable doubt. *PITAMBER SUNDARJI v. CASSIBAI*.

[I. L. R. 11 Bom. 272]

**(8) VENDOR, RIGHTS AND LIABILITIES OF.**

11.—*Contract to sell land—Rescission—Re-sale by registered deed.* A sued to recover certain land which he claimed under a registered deed of sale executed by the owner. Prior to the date of this sale to *A*, *M* had been put in possession of the land under an agreement to purchase the land for Rs. 300. The sale-deed to *M* had not been executed, because only Rs. 200 of the purchase-money had been paid to the owner: *Held* that *A* could not recover, as it was not open to his vendor to rescind the contract with *M*. *MOIDIN v. AYARAN*.

[I. L. R. 11 Mad. 263]

**VENDOR AND PURCHASER—continued.****(9) MISCELLANEOUS CASES**

12.—*Sale by Registrar—Title to property purchased at Registrar's sale—Doubtful title, Enforcement of—Endowment—Rent charge.* The Court will not enforce a doubtful title on a purchaser where (a) there is a reasonable probability of litigation resulting; or (b) where the title depends on the construction and legal operation of some ill-expressed and inartificial instrument, and the Court holds the conclusion it arrives at to be open to reasonable doubt in some other Court. Case in which the title sought to be enforced did not fall within these rules. *KALLY DOSS SEAL v. NOBIN CHUNDER DOSS*.

[I. L. R. 14 Calc. 518]

13.—*Sale set aside—Decree in favour of vendor—Possession—Purchaser in possession after decree and pending appeal—Accident—Loss by fire—Liability for damage.* The plaintiff and the second defendant *A* were brothers, and worked a cotton press in partnership. In August 1884 *A* sold the press for Rs. 35,000 to *V* (the first defendant), who paid *A* Rs. 5,000 earnest-money and was put into possession. The plaintiff then brought a suit (No. 327 of 1884) against *A* praying for a dissolution of the partnership. *V* was also a party defendant to that suit. The plaintiff alleged that Rs. 35,000 was much too low a price for the press, and he objected to the sale. He prayed that *V* might be restrained from continuing in possession of the press and working it, and that a receiver might be appointed to take possession of it until further orders. On the 21st April 1885, on a motion the Court refused to grant an injunction and receiver, but ordered *V* to pay Rs. 30,000 (*i.e.*, the balance of the purchase-money), to the solicitors of the parties for investment until the hearing of the suit, and directed, that if that sum was not paid by the 21st May 1885, a receiver should be appointed to take possession of the press. The suit (*i.e.*, No. 327 of 1884), was heard on the 15th February 1887, when it was held by the Court that the sale by *A* to *V* was without authority; that the defendant *V* took nothing under it, and that the plaintiff was entitled to have it set aside. Certain matters still remained to be decided: but on the 28th February 1887, the decree in the suit was made, giving effect to the findings already arrived at on the 15th February. The decree by consent directed various accounts to be taken, and, among others, an account of the profits realized by the working of the press by the defendant *V* since his possession thereof, credit being given to him for all sums expended by him in the repairs, maintenance, and working of the said press and for the management thereof by him. The decree further ordered that the defendant *V* should be repaid the Rs. 30,000 which he had paid under the order of the 21st April 1885, and directed "that on such payment the said defendant *V* do forthwith give over possession of the press to the plaintiff and the defendant *A*." The defendant *V* at once gave notice of his intention

VENDOR AND PURCHASER—*concluded*.(9) MISCELLANEOUS CASES—*concluded*.

to appeal. There was some delay in drawing up the decree. The minutes were spoken to on the 31st March 1887; the decree was sealed on the 13th April 1887. Meantime, on the 6th April 1887, and while the defendant V was still in possession, a fire broke out in the press and much damage was done. Subsequently to the sealing of the decree as above stated, the press in its damaged condition was handed over to the plaintiff's firm by V, who also desisted from prosecuting his appeal, the injury to the press having made it contrary to his interest to appeal. In May 1887 the plaintiff filed the present suit, claiming to recover Rs 50,000 from the defendant V as the value of the press or such further sum as might be necessary to rebuild and restore it. He alleged that the fire was caused by the working of the press, and contended that the working of the press by the defendant V after the decree of the 28th February was an act of trespass by him, and that, therefore, independently of the question whether the fire was caused by the negligence of V and his servants, the said V was liable for the loss occasioned by the fire: *Held*, that, independently of negligence, the defendant V was not liable to the plaintiff for the loss occasioned by the fire. Down to the decree of the 28th February 1887, the defendant in keeping possession of the press and working it was, no doubt, a trespasser, but subsequently to that decree he remained in possession and worked the press with the consent of the plaintiff. The maxim *volenti non fit injuria* applied to the circumstances of the case: *Held*, also, that no negligence having been proved against the defendant, the suit must be dismissed. JAMSETJI BURJORJI BAHADURJI v. EBRAHIM VYDINA.

[I. L. R. 13 Bom. 183]

## VERDICT OF JURY.

Col.

## 1. Power to interfere with verdicts ... 1069

See MAGISTRATE, JURISDICTION OF—  
POWERS OF MAGISTRATES.

[I. L. R. 9 All. 420]

## (1) POWER TO INTERFERE WITH VERDICTS.

1.—*Criminal Procedure Code*, s. 307—*Powers of High Court on reference under s 307—Criminal Procedure Code*, ss. 418, 423 (d).] No trial can be legally speaking, concluded until judgment and sentence are passed, and the trial of a case referred by a Sessions Judge to the High Court under s. 307 of the Criminal Procedure Code remains open for the High Court to conclude and complete, either by maintaining the verdict of the jury and causing judgment of acquittal to be recorded, or by setting aside the verdict of acquittal, and causing conviction and sentence to be entered against the accused. The provisions of s. 307 of the Criminal Procedure Code are not in any way cut down by ss. 418 and 423; and the High Court has power, under s. 307, to interfere with the verdict

VERDICT OF JURY—*concluded*.(1) POWER TO INTERFERE WITH VERDICTS—*concluded*.

of the jury where the verdict is perverse or obtuse, and the ends of justice require that such perverse finding should be set right. The power of the High Court is not limited to interference on questions of law, *i.e.*, misdirection by the Judge, or misapprehension by the jury of the Judge's directions on points of law. QUEEN-EMPRESS v. MCCARTHY.

[I. L. R. 9 All. 420]

2.—*Sessions Judge, Opinion of—Criminal Procedure Code*, s. 307—*High Court, Power of*.] In the exercise of its powers under s. 337 of the Code of Criminal Procedure, the High Court will form and act upon its own view of what the evidence in its judgment proves; but, in doing so the opinion of the Sessions Judge, no less than the verdict of the jury, is entitled to its proper weight. *Reg. v. Khanderav Bajirav*, I. L. R. 1 Bom. 10; *Queen v. Mukhan Kumar*, 10 L. R. 275; *The Empress v. Dhunum Kasee*, I. L. R. 9 Calc. 53; *Queen-Empress v. Mania Dayal*, I. L. R. 10 Bom. 497; *The Queen v. Ram Churn Ghose*, 20 W. R. Cr. 33; *The Queen v. Sham Bagdi*, 13 B. L. R. Ap. 19; 20 W. R. Cr. 78; *The Queen v. Hurro Manjee*, 14 B. L. R. Ap. 2; 21 W. R. Cr. 4; *The Queen v. Wazir Mundul*, 25 W. R. Cr. 25; *The Queen v. Nobin Chunder Banerjee*, 10 B. L. R. Ap. 20; 20 W. R. Cr. 70, referred to. QUEEN-EMPRESS v. ITWARI SAHO.

[I. L. R. 15 Calc. 269]

## VOLUNTARY PAYMENT.

See CONTRACT, ACT. ss. 69, 70.

[I. L. R. 11 All. 234]

—*Money paid, but not due, and paid under compulsion—Contract Act (XI of 1872)*, ss. 15, 72.] In execution of a decree the plaintiff purchased certain property. Subsequently the defendant in execution of another decree against the former owner of the property, proceeded to execute his decree against the same property. The plaintiff thereupon preferred a claim, which was disallowed, as he had not then obtained, and consequently could not produce the sale-certificate. In order to prevent the sale he then paid the amount of the defendant's decree into Court, and subsequently instituted a suit against the defendant to recover the amount so paid into Court to prevent the sale. The defendant contended that the amount was paid voluntarily and could not be recovered back: *Held*, following *Dooli Chand v. Ram Kishen Sing*, L. R. 8 I. A. 93; I. L. R. 7 Calc. 648, that it was not a voluntary payment, and that the plaintiff was entitled to a decree. *Fatima Khatoon Chowdrain v. Mahomed Jan Chowdhry*, 12 Moore's I. A. 65; 10 W. R. P. C. 29, referred to. *Asibun v. Ram Proshad Dass*, 1 Shome 25, doubted. JUDGEO NARAIN SING v. RAJA SING.

[I. L. R. 15 Calc. 656]

**WAGERING CONTRACT.**

*See* EVIDENCE—PAROL EVIDENCE—  
VARYING OR CONTRADICTING  
WRITTEN INSTRUMENTS.

[I. L. R. 12 Bom 583]

**WAIVER.**

*See* COMPROMISE—COMPROMISE OF SUITS  
UNDER CIVIL PROCEDURE CODE.

[I. L. R. 13 Bom 137]

*See* CASES UNDER JURISDICTION—QUES-  
TION OF JURISDICTION—CONSENT  
OF PARTIES AND WAIVER OF  
JURISDICTION.

*See* JURISDICTION OF CRIMINAL COURT—  
EUROPEAN BRITISH SUBJECTS.

[I. L. R. 12 Bom. 561]

*See* LIMITATION ACT, 1877, ART. 75

[I. L. R. 14 Calc 352, 397]

[I. L. R. 12 Mad. 192]

*See* REVIEW—GROUND FOR REVIEW.

[I. L. R. 12 Bom. 228]

1.—*Civil Procedure Code, 1882, s. 37—Recognized agent—Agent's right to execute decree obtained by him as agent—Execution of decree.* *P* filed a suit in the Second Class Subordinate Judge's Court at Mahad. As *P* resided at Thana, outside the jurisdiction of the Court of Mahad, she authorized her agent, under a general power of attorney, to conduct the suit on her behalf. The agent carried on the litigation up to the final decree passed by the High Court on appeal in *P's* favour. The agent then sought to execute the decree. The Court at Mahad passed an order upon his *darkhast* granting only partial execution. Against this order the agent filed an appeal in the District Court at Thana. Then, for the first time, the judgment-debtors challenged the agent's right to represent *P*, who was residing within the District Court's jurisdiction. This objection prevailed, and the appeal was dismissed. *Held*, that the agent could not be prevented from executing the decree which he had obtained as agent. No objection had been taken to the agent's right to represent *P* at any stage of the litigation prior to the final decree. That objection must, therefore, be deemed to have been virtually waived, and could not be raised after the defendants had had their chance of success in the litigation. *PARVATIBAI v. VINAYEK PANDURANG*

[I. L. R. 12 Bom. 68]

2.—*Remission of part performance of contract—Sum accepted on account of interest.* A hypothecation-bond provided for payment of interest on the principal sum at the rate of 9 per cent. and contained a further provision, that on default being made in payment of interest accu-

**WAIVER—concluded.**

ing due, interest should be paid from the date of the bond at the rate of 15 per cent. Default was made when the first and second payments of interest became due. After the second payment had become due, the creditor accepted payment on account of interest of a sum, a little more than the arrears calculated at 9 per cent. In a suit by the creditor. *Held*, that the plaintiff had not waived any right under the bond by accepting the payment on account of interest. *NANJAPPA v. NANJAPPA*.

[I. L. R. 12 Mad. 161]

3.—*Execution of decree—Decree payable by instalments—Default—Limitation.* A decree was made for payment of the decretal amount by monthly instalments running over a period of twelve years and it was provided that on default the decree-holder might execute the decree as a whole for the balance then due. In 1883 a default was made, and in 1884, the decree-holder filed an application for execution in respect thereof, but did not proceed with it, and continued to receive the monthly instalments. In 1887, he made another application for execution, in which he relied on the same default. *Held*, that the default if it was one had been waived by the decree-holder, and that such waiver was a good defence to the present application. *Mumford v. Peal*, I. L. R. 2 All. 857, and *Asmatullah Dalal v. Kally Churn Mitter*, I. L. R. 7 Calc. 56, distinguished. *BHUDDHU LAL v. REKKHAB DAS*.

[I. L. R. 11 All. 482]

**WASTE.**

*See* LANDLORD AND TENANT—ALTER-  
ATION OF CONDITIONS OF TEN-  
ANCY—CHANGE OF CULTIVATION  
AND NATURE OF LAND.

[I. L. R. 10 Mad 351]

*See* LANDLORD AND TENANT—FORFEI-  
TURE—BREACH OF CONDITION

[I. L. R. 10 Mad. 351]

**WATER-CESS.**

*See* CESS

[I. L. R. 10 Mad. 282]

*See* MADRAS RENT RECOVERY ACT, S. 11.

[I. L. R. 10 Mad. 282]

**WILL.**

1. Attestation	...	...	1073
2. Construction	...	...	1073

**—, Construction of.**

*See* COSTS—COSTS OUT OF ESTATE.

[I. L. R. 15 Calc. 725]

*See* LIMITATION ACT, 1877, ART. 132.

[I. L. R. 15 Calc. 66]



## WILL—continued.

## (1) ATTESTATION.

1.—*Purda-nashin lady*—“In the presence of”—*Succession Act (X of 1865), s. 50* ] After execution of her will by a testatrix, a *purda-nashin* lady, and its attestation in her presence by a witness who had seen her execute it, it was presented for registration, the testatrix sitting behind one fold of a door which was closed, the other fold being open, and the Registrar and another person who identified the testatrix being in the verandah outside the room behind the door of which the testatrix sat, all that the Registrar actually saw of her being her hand. The testatrix admitted her execution of the will, and her admission was endorsed on the will and witnessed by the Registrar, and the person who identified her, at the same time: *Held*, that the witness was “in the presence of” the testatrix within the meaning of s. 50 of the Succession Act (X of 1865). *HORENDRANARAIN ACHARJI CHOWDHRY v. CHANDRAKANTA LAHIRI.*

[I. L. R. 16 Calc. 19]

## (2) CONSTRUCTION.

2.—*Bequest to charity—Public charity—Trusts affecting land—Perpetuity—Parsi religious ceremonies: baj rozgar, nirangdin, yezashni, ghambar, and dosla—Civil Procedure Code (Act XIV of 1882), s. 527.* ] A Parsi by his will directed that the income arising from one-third share of a bungalow in Bombay, to which he was entitled, should be devoted in perpetuity to “the performance of the *baj rozgar* ceremonies and the consecration of the *nirangdin* and the recitation of the *yezashni* and the annual *ghambar* and *dosla* ceremonies.” He further directed that the said share should not be sold or mortgaged. Evidence was given which showed that the above-mentioned religious ceremonies were performed among Parsis rather with a view to the private advantage of individuals than for the public benefit: *Held*, that the trusts of the will were void, and that the direction, that the property should not be sold, was invalid. *LIMJI NOWROJI BANAJI v. BAPUJI RUTTONJI LIMBUWALA.*

[I. L. R. 11 Bom. 441]

3.—*Gift over on failure of prior devise* ] A testator made the following disposition by his will: “I appoint my brother *N* sole executor of my estate and effects after my decease, who shall pay all my debts and collect all outstandings. My wife is supposed to be in the family way; should she bring forth a male, in that case he will be the sole heir of my property and effects on his attaining proper age. If, on the other hand, she is delivered of a female child, all the expenses of her marriage or maintenance till that period should be defrayed from my estate. I also wish that she should receive a legacy of a Government 4 per cent. promissory note for Rs. 2,000 on her attaining proper age. In case my son dies before attaining proper age, all my

## WILL—continued.

## (2) CONSTRUCTION—continued.

estate and property should be taken possession of by my brother. My wife is to receive a Government 4 per cent promissory note for Rs. 1,000 as a legacy, and is to be maintained from my estate if she continues to live in our family dwelling-house under my brother's protection.” The child with which the widow was *enroute* turned out to be a daughter. *Held*, that the clause in italics was one purporting to give the property, and not only the management of it, to *N*, the power of management having already been given him in appointing him executor, that the provisions for maintenance of the widow, and for the marriage expenses of the daughter, tended to show (putting aside the legacies that the widow and daughter were not to take the larger estate which they would have successively taken as heiresses: and that the wife of the testator having borne to him a son, and the apparent intention of the testator having been to give the estate to *N*, if the son did not take, or if the estate to the son failed by reason of his not attaining proper age, the gift over to *N*, on the principle laid down in *Jones v. Westcomb*, 1 Eq. Cas., Abr., 245, took effect on failure of the gift to the son, even though such failure was not in the precise manner expressed in the terms of the gift. *OKHOYMONY DASEE v. NILMONY MULLICK.*

[I. L. R. 15 Calc. 282]

4.—*Vesting—Period of distribution—Gift of dividends.* ] *S*, a Portuguese inhabitant of Bombay by his will, dated 19th March 1866, devised all his estate, real and personal, to his executors in trust to realize the same, and invest the proceeds thereof in the public funds, and directed as follows:—“(1) The dividends arising therefrom shall be applied, at the discretion of my executors, towards the maintenance and education of my children until each of my sons attains the age of twenty-one years, when his or their share shall be paid unto him or them;” “(2) I desire, further, that whatever may be remaining of the moneys collected by my executors, after all my sons shall have attained the age of twenty-one years and after my daughters shall have been married, shall be distributed, after deducting Rs. 2,000 as dowry given to two daughters, in equal parts between my sons and daughters that may be surviving at the time;” “(3) In case any of my children shall happen to die under twenty-one years, then I give and bequeath the share or shares of him, her, or them, so dying, unto the survivors or survivor of them:” *Held*, that the gift to the sons, contained in the first clause, was a gift of his share of the dividends to each son on his attaining twenty-one years of age, and that by each gift his share of the *corpus* became vested in each son when he attained that age: *Held*, further, that the provisions of the third clause, which related to the distribution, did not divest the shares so vested. Clear words must be used to divest an estate once vested: *Held*, also, that only such of the daughters as were surviving at the period of distribution

**WILL—concluded.****(2) CONSTRUCTION—concluded.**

Specified in the second clause of the will; were entitled to a share in the estate. *DE SOUZA v. VAZ*.

[I. L. R. 12 Bom. 137]

5.—*Vesting—Postponement of enjoyment—Accumulation until the age of thirty.* The testator by his will constituted his two disciples, S and J (aged eighteen and eleven years respectively), his heirs, "subject to the conditions written below," and he directed that out of the net income of his estate his trustees should expend Rs. 500 every year for the maintenance of each disciple or pay that amount to each disciple every year, and that when J should attain the age of thirty years, the trustees should give to J the net residue of his property remaining at that time, or in the case of J's decease, should give the same to S. *Held*, that the property vested in J on the testator's death, but only for a life estate: *Held*, also, (reversing the decision of *JARDINE, J.*) that the directions for postponement of enjoyment after the coming of age of the devisee must be disregarded, and that (subject to the payment of Rs. 500 a year to S.) the income of the property, (including all income accrued since his majority) must be paid to J, the respondent retaining the corpus until J should attain the age of thirty years. *Gosling v. Gosling*; *Johns* 265, followed. *GOSAVI SHIVGAR DAYAGAR v. RIVETT-CARNAC*

[I. L. R. 13 Bom. 463]

**WITHDRAWAL OF PART OF SUIT.**

See *MUNSI, JURISDICTION OF*,

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See *PLAINT—AMENDMENT OF PLAINT.*

[I. L. R. 10 Mad. 152]

**WITHDRAWAL OF SUIT.**

See *APPELLATE COURT—EXERCISE OF POWERS IN VARIOUS CASES—PLAINT.*

[I. L. R. 9 All. 191]

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See *DEKKAN AGRICULTURISTS RELIEF ACT, SS. 53, 54.*

[I. L. R. 12 Bom. 684]

See *SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622.*

[I. L. R. 11 Mad. 322]

1.—*Civil Procedure Code, s. 373—Withdrawal of suit with liberty to bring fresh suit.* On the 5th September 1874 R a Hindu and his sons borrowed Rs. 5,000 from V and mortgaged to him certain land, items 1, 2, and 3. On the 7th September 1874, V borrowed Rs. 5,000 from R N and mortgaged his rights in items 1 and 2 and land of his own to R N. In 1877 R N bought

**WITHDRAWAL OF SUIT—continued.**

at a sale in execution of a decree against R the share of R in the said items 1 and 2 subject to the mortgage created by R on 5th September 1874, and to another mortgage created by R on 11th January 1875. In 1880 R N sued V and the sons of R for arrears of interest due under his mortgage-bond. This suit was withdrawn with liberty to bring a fresh suit for the principal and interest due under the bond. In 1885 R N sued the sons of R and V to recover principal and interest due under his mortgage-bond: *Held* that the claim of R N was not barred. *VENKATA v. RANGA*.

[I. L. R. 10 Mad. 160]

2.—*Specific Relief Act (1877—1), s. 21—Arbitration—Agreement to refer—Order under s. 506, Civil Procedure Code, to refer matters in dispute in action then pending—Order under s. 373, pending the reference, granting plaintiff permission to withdraw with liberty to bring fresh suit.* The parties to a suit, while it was pending, agreed to refer the matters in difference between them to arbitration and for this purpose applied to the Court for an order of reference under s. 506 of the Civil Procedure Code. The application was granted, arbitrators were appointed, and it was ordered that they should make their award within one week. Before the week had expired, and before any award had been made, one of the parties made an *ex-parte* application under s. 373 of the Code for leave to withdraw from the suit with liberty to bring a fresh suit in respect of the same subject-matter. The application was granted, the suit struck off, and a fresh suit instituted in pursuance of the permission thus given by the Court. In defence to this suit it was pleaded that the suit was barred by s. 21 of the Specific Relief Act (I of 1877): *Held* that the Court in the former proceedings had no power to revoke the order of reference prior to award except as provided by s. 510 of the Code; that consequently the Court's order under s. 373 was *ultra vires* if involving such revocation, or, if not involving it, left the order of reference still in force; that in either alternative the suit was barred by s. 21 of the Specific Relief Act; and that it was immaterial that the period within which the award was to be made expired before the bringing of the second action. *Per TYRRELL, J.*, that the suit was barred by the second clause of s. 373, the Court having had no jurisdiction to pass the order under that section, or, having referred the suit to arbitration, to restore the suit to its file and treat it as awaiting the Court's decision. *SHEOAMBER v. DEODAT*.

[I. L. R. 9 All. 168]

3.—*Civil Procedure Code, ss. 373, 374, 647—Application for execution withdrawn by decree-holder—Act XV of 1877, sch. II, No. 179 (4).* S 647 of the Civil Procedure Code makes ss. 373 and 374 applicable to proceedings in execution of decree. *Kifayat Ali v. Ram Singh*, I. L. R. 7 All. 359, and *Pirjade v. Pirjade*, I. L. R. 6 Bom. 681, followed. *Tara Chand Megraj v. Kashinath*

**WITHDRAWAL OF SUIT—continued.**

*Timbak*, I. L. R. 10 Bom. 62, and *Ramanandan Chetti v. Periatambi Cherrai*, I. L. R. 7 Mad. 250, dissented from. A first application for execution of a decree was withdrawn by the decree-holder on account of formal defects, the Court returning the application, but without giving permission to the decree-holder to withdraw with leave to take fresh proceedings: *Held* that, with reference to the second paragraph of s. 373 read with s. 647 of the Code, the decree-holder was precluded from again applying for execution; but that, even assuming that permission to apply again could be inferred from the action of the Court in returning the application, s. 374 was applicable so as to make a subsequent application presented five years after the decree barred by limitation, with reference to art. 179 of the Limitation Act. *SARJU PRASAD v. SITA RAM*.

(I. L. R. 10 All. 71)

4.—*Civil Procedure Code, s. 373—Dismissal of suit—Decree containing clause stating that a fresh suit might be instituted as to a part of the subject-matter—Res judicata*] A suit for possession of immoveable property was wholly dismissed, on the ground that the plaintiff had not made out his title to the whole of the property claimed, though he had proved title to a one-third share of such property. The decree included an order in these terms:—"This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of *M L* in the fields specified in the deed of sale," upon which the suit was based. No appeal was preferred from this decree. Subsequently the plaintiff brought another suit upon the same title to recover possession of the one-third share referred to in the order just quoted: *Held* by the Full Bench that the Court in the former suit had no power to include in its decree of dismissal any such reservation or order; that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effect. *Kudrat v. Dinu*, I. L. R. 9 All. 155, *Ganesh Rai v. Kalha Prasad*, I. L. R. 5 All. 595, *Salig Ram Pathak v. Torbhawan Pathak*, Weekly Notes, All. 1885, 171, and *Muhammad Salim v. Nabian Bibi*, I. L. R. 8 All. 282, explained. *SUKH LAL v. BHIKHI*.

(I. L. R. 11 All. 187)

5.—*Jurisdiction—Withdrawal of part of claim—Part of property in suit within and part without the jurisdiction of the Court.*] Suit for partition and possession of an undivided share of property sold to plaintiff by an aged *gosha* lady of the class of Canarese Mahomedans called *Navayats*. The property sold was the vendor's share as heiress of her father, brother, and sister, who died in 1856, 1866, and 1871, respectively; but it appeared that the property of the family had been in the possession of one managing member since 1856. The plaintiff, during the suit, withdrew his claim against that part of the immoveable property in suit which was within the local limits of the jurisdiction of the Court, having compromised

**WITHDRAWAL OF SUIT—concluded.**

with the defendants, who had it in their possession, and pursued his claim against the other immoveable property and obtained a decree: *Held*, that the withdrawal of the claim with regard to the property situated within the local limits of the jurisdiction of the Court (the compromise not having been shown to be otherwise than *bona fide*) did not operate to take away the jurisdiction of the Court to adjudicate on the plaintiff's suit. *KHATIFA v. ISMAIL*.

(I. L. R. 12 Mad. 380)

**WITNESS—CIVIL CASES**

Col.

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**—, Damages Caused by False Statement of.**

See DAMAGES—SUITS FOR DAMAGES—TORTS.

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(I. L. R. 12 Bom. 440)

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(I. L. R. 13 Bom. 336)

**(1) PERSON COMPETENT TO BE WITNESS.**

1.—*Criminal Procedure Code, 1882, s. 488—Evidence Act (Act I of 1872), s. 120—Bastardy proceedings—Order of affiliation—Evidence—Competent witness—Maintenance, order of Criminal Court as to.*] Bastardy proceedings under the provisions of s. 488 of the Criminal Procedure Code are in the nature of civil proceedings, within the meaning of s. 120 of the Evidence Act, and the person sought to be charged is a competent witness on his own behalf. *NUR MAHOMED v. BISMULLA JAN*.

(I. L. R. 16 Calc. 781)

WITNESS—CIVIL CASES—*continued*

## (2) ABSCONDING WITNESSES.

2.—*Civil Procedure Code*, 1882, s. 174.—*Production of document—Court's jurisdiction to punish a witness for refusing to produce a document—Procedure—Penal Code Act (XLV of 1860), s. 175—Criminal Procedure Code (Act X of 1882), s. 480.* A witness was summoned to produce a document in Court in connection with a certain suit. He attended the Court, but did not produce the document, stating on oath that it was not in his possession. But this statement was disbelieved, and the Court fined him Rs. 75 under s. 174 of the Code of Civil Procedure. *Held*, that the fine was illegally levied. The jurisdiction of the Court to punish under s. 174 of the Civil Procedure Code exists only in the case of a witness, who, not having attended on summons, has been arrested and brought before the Court. The case of a witness who having a document will not produce it is provided for by s. 175 of the Penal Code, and s. 480 of the Code of Criminal Procedure. *IN RE PREMCHAND DOWLATRAM*

[I. L. R. 12 Bom. 63]

## (3) EXAMINATION OF WITNESSES.

3.—*Refusal to examine witnesses—Dismissal of suit by first Court without examining defendants' witnesses—Reversal of decree on appeal—Duty of Appellate Court to direct examination of witnesses before reversing decree.* Where a Court of First Instance, considering it unnecessary to examine certain witnesses for the defence, dismissed the suit, and the lower Appellate Court, disbelieving the evidence of those witnesses for the defence who were examined, allowed the plaintiff's appeal: *Held*, that before doing so, the lower Appellate Court should have afforded the defendants an opportunity of supplementing the evidence which they had given in the first Court by the testimony of those witnesses whom that Court had declared it unnecessary to hear, and that the case must be regarded as one in which the first Court had refused to examine the witnesses tendered by the defendants. The Court directed the first Court to examine the defendants' witnesses, and, having done so, to return their depositions to the lower Appellate Court, which was to replace the appeal upon its file and dispose of it. *KHUDA BUKHSH v. IMAM ALI SHAH.*

[I. L. R. 9 All. 339]

## (4) PRIVILEGES OF WITNESSES.

4.—*Right of Suit—Slander—Slander uttered by witness whilst under examination in judicial proceeding.* A witness in a Court of Justice is absolutely privileged as to anything he may say as a witness having reference to the enquiry on which he is called as a witness. The plaintiff sued to recover damages for slander, the statement complained of being alleged in the plaint to have been made by the defendant while being examined as a witness during the hearing of a case before a Magistrate. It was found that the statement was made in answer to questions put

WITNESS—CIVIL CASES—*continued*.(1) PRIVILEGES OF WITNESSES—*continued*.

to the defendant as a witness and allowed by the Court as relevant to the case. The plaintiff alleged that the statement was made maliciously, that the defendant bore him a grudge, and that it was to give vent to that grudge and to injure his reputation that the statement was made: *Held*, that the plaint disclosed no cause of action, and that the suit had been properly dismissed. *BHIKUMBER SINGH v. BECHARAM SIRCAR. BHIKUMBER SINGH v. GOTI KRISTO DAS.*

[I. L. R. 15 Calc. 264]

*See CHIDAMBARA v. THIRUMANI.*

[I. L. R. 10 Mad. 87]

5.—*Penal Code, s. 500—Statement by witness—Defamation.* M S was convicted under s. 500 of the Penal Code of defaming S S by making a certain statement when under cross-examination as a witness before a Court of Criminal Jurisdiction. *Held*, that the conviction was bad. The statements of witnesses are privileged: if false, the remedy is by indictment for perjury and not for defamation. *MANJYA v. SRESHA SHETTI.*

[I. L. R. 11 Mad. 477]

6.—*Defamation—Cause of action—Verbal abuse—Special damage.* The plaintiff was cited as a witness by one S in a suit instituted by him against defendant. After plaintiff's evidence had been concluded, in which he stated that there was no enmity between him and defendant, the defendant was examined by the Court, and stated that there was enmity between him and the plaintiff, and on the Court inquiring to know what was the cause of enmity, defendant used words conveying the meaning that plaintiff's descent, was illegitimate. *Held* by BRODHURST, J., that under the circumstances, the statement complained of was made by defendant while deposing, in the witness-box, and therefore absolutely privileged. *Per MAHMOOD, J. (contra)*, that the question whether or not the statement complained of was made by defendant in course of his deposition, or after it was finished and when he was no longer in the witness-box, had not been tried, and the order remanding the case for trial on the merits was right. Further, that the English law of slander as forming part of the law of defamation, and, as such, drawing somewhat arbitrary distinctions between words actionable *per se* and words requiring proof of special or actual damage, is not applicable to this country, either by reason of any statutory provision or by any uniform course of decision sufficient to establish such distinctions as part of the common law of British India; that whilst the English law of defamation recognises no distinction between defamation as such and personal insult in civil liability, the law of British India recognises personal insult conveyed by abusive language as actionable *per se* without proof of special or actual damage; that such abusive and insulting lan-

WITNESS—CIVIL CASES—*concluded.*(1) PRIVILEGES OF WITNESSES—*concluded.*

guage, unless excused, or protected by any other rule of law, is in itself a substantive cause of action and a civil injury, apart from defamation and that malice is an element of liability for abusive and insulting language, and that such malice will be presumed or inferred, unless the contrary is shown; that when the defendant is absolutely privileged and protected by reason of the office or occasion on which he employed such language, he renders himself subject to a civil liability for damage, irrespective of any plea of justification based upon proving the truth of the statements contained in the abusive and insulting language complained of; that the rule of English law as to the privilege or protection of a witness in regard to defamatory statements made in the witness-box is based upon a public policy which is equally applicable to insulting and abusive language used by such witness; and such statements when made in the witness-box are privileged and protected, even though made maliciously and falsely, so long as they are relevant to the inquiry in the broadest sense of the phrase; and that even where such statements have no reference to the inquiry, the defendant may prove the absence of malice and that they were made in good faith for the public good. *DAWAN SINGH v. MAHIP SINGH.*

[I L. R. 10 All. 425]

## WITNESS—CRIMINAL CASES. Col.

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*See* COMPLAINANT.

[I L. R. 13 Bom. 600]

*See* PENAL CODE, s. 179.

[I L. R. 13 Bom. 600]

## (1) PERSON COMPETENT TO BE WITNESS.

1—*Evidence Act, s. 118—Competency of persons of tender years.*] The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or has affirmed. In determining the question of competency, the Court, under s. 118 of the Evidence Act, has not to enter into inquiries as to the witness's religious belief, or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain, in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established. *QUEEN-EMPRESS v. LAL SAHAI*

[I L. R. 11 All 183]

WITNESS—CRIMINAL CASES—*concluded.*

## (2) EXAMINATION OF WITNESSES.

2.—*Witness called by Court—Tendering witnesses for cross-examination—Criminal Procedure Code (Act X of 1882), s. 540.*] In a trial before the Sessions Court the prosecution is not bound to tender for cross-examination all witnesses called before the committing Magistrate. The Court should not call a witness on whose evidence it could not put implicit reliance. *QUEEN-EMPRESS v. KALIPROSONNO DOSS.*

[I L. R. 14 Cal. 245]

## (3) CONSIDERATION AND WEIGHT OF EVIDENCE.

3—*Evidence disbelieved in some parts and accepted in others.*] Where the evidence at a trial is in part disbelieved, as to which part it is thought that the witnesses had committed perjury, it is unsafe to accept the evidence of those witnesses in other parts and to convict the prisoner thereon. *JASPETH SINGH v. QUEEN-EMPRESS.*

[I L. R. 14 Cal. 184]

## WRONGFUL CONFINEMENT.

*See* WRONGFUL RESTRAINT,

[I L. R. 12 Bom. 377]

—*Penal Code, ss. 339, 340, 342—Wrongful restraint—Malice.*] Malice is not an essential ingredient in the offence of 'wrongful confinement' as defined by s. 340 of the Indian Penal Code (Act XLV of 1860). The offence is complete when a person is wrongfully restrained in such a manner as to be prevented from proceeding beyond certain circumscribing limits. And a person is wrongfully restrained when he is voluntarily obstructed so as to be prevented from proceeding in any direction in which he has a right to proceed. The accused as abkai inspector visited a toddy shop where the complainant and one *D* were employed as agents for the sale of toddy. Having reason to suspect that an offence under the Abkai Act (Bombay Act V of 1878) had been committed, the accused made an inquiry, in the course of which the complainant made certain statements implicating his fellow-servant. The accused thereupon resolved to prosecute *D* and make the complainant a witness in the case. In order to prevent him being tutored, the accused ordered his sepoy to bring the complainant to his camp, and there detained him during the night, and on the following morning sent him in charge of a sepoy to a Magistrate's Court, where the complainant repeated the statements made by him before the accused. He was then allowed to go away. The accused prosecuted *D*, and in the course of his trial admitted in his deposition that he had ordered his sepoy to bring the complainant to his camp, and had detained him there during the night. After the termination of *D*'s trial, the complainant charged the accused with wrongful confinement under s. 342 of the

**WRONGFUL CONFINEMENT—concluded.**

Indian Penal Code. The accused pleaded that the complainant had voluntarily come to his tent to have his statements reduced to writing, and that he had of his own accord stopped in his camp during the night. The trying Magistrate held this plea proved and discharged the accused under s. 253 of the Code of Criminal Procedure (Act X of 1882). The Sessions Judge held that though the accused had detained the complainant in his camp during the night, still he was not guilty of any offence under the Penal Code, as he had acted without malice and to the best of his judgment: *Held*, by the High Court on revision, that the mere circumstance that the accused had acted without malice and to the best of his judgment did not protect him, if his act otherwise satisfied the definition of s. 340 of the Indian Penal Code. **DHANIA v. CLIFFORD**

• [I. L. R. 13 Bom. 376]

**WRONGFUL RESTRAINT.**

• See WRONGFUL CONFINEMENT.

[I. L. R. 13 Bom. 376]

—*Penal Code, ss 52, 79, 99 and 342—Act done by a person by mistake of fact in good faith believing himself justified by law—Right of private defence against acts of a public servant acting bona fide under colour of his office—Act XIII of 1856 s. 35—Reasonable suspicion—Obstruction to a police-officer while acting in execution of duty—Arrest—Criminal Procedure Code (Act X of 1882), s. 54*]. On the 29th December 1887, the accused, a police-constable, was on duty at a temporary post near the Arthur Crawford Market. His turn of duty lasted from 4 to 7 A.M. Between 6-30 and 7 A.M. he saw the complainant carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen property, he went up to the complainant and questioned him. In answer to one of the questions the complainant stated that the cloth was made in England. The accused noticing that each piece bore Gujarathi marks, and not knowing that such marks are placed on English-made goods, concluded that this statement was false and that the cloth had been stolen. He took hold of one of the pieces of cloth in order to examine it more closely. The complainant objected to this, and there was a scuffle between them for the possession of the cloth. The accused then arrested the complainant and took him to a European Inspector to whom he stated the facts, alleging that he had arrested the complainant because he had assaulted him. The Inspector seeing that the complainant was an old man, and on the accused saying

**WRONGFUL RESTRAINT—concluded.**

he was not hurt, let the complainant go. The complainant then lodged a complaint before the Acting Chief Presidency Magistrate charging the accused with wrongful restraint and wrongful confinement, offences punishable under ss. 341 and 342, respectively, of the Indian Penal Code (XLV of 1860.) The defence was that the complainant had assaulted the accused, and had been on that account arrested and kept in confinement until released by the Inspector of Police. The Magistrate found that there was no justification for the suspicion which the accused professed to entertain; that there were no reasonable grounds for questioning the complainant about the cloth in his possession, and that the scuffle was caused solely by the action of the accused in treating the complainant without any valid reason as a suspected thief. The Magistrate convicted the accused of wrongful confinement under s. 342 of the Indian Penal Code (Act XLV of 1860), and sentenced him to four months' rigorous imprisonment: *Held*, by the High Court, that the conviction was wrong. The accused having, under the circumstances of the case, an honest suspicion that the cloth in the possession of the complainant was stolen property was justified in putting questions to the complainant, the answers to which might clear away his suspicions, and having received answers which were not, in his opinion, satisfactory, he acted under a bona fide belief that he was legally justified in detaining what he suspected to be stolen property. The putting of questions to the complainant not for the purpose of causing annoyance or from idle curiosity, but in order to clear up his suspicions, was an indication of good faith, as defined in s. 52 of the Indian Penal Code (Act XLV of 1860). He was therefore protected by s. 79 of the Code. Even though the act of the accused in detaining the cloth might not have been strictly justifiable by law,—that is, even though there might not have been a complete basis of fact to justify a reasonable suspicion that the cloth was stolen property,—still the complainant had no right of private defence under s. 99 of the Code, as the accused was a public servant acting in good faith under colour of his office, and his act was not one which caused the apprehension of death or of grievous hurt. The complainant was not justified in refusing to allow the accused to inspect the cloth, in snatching it from his hands, and in scuffling with him. He was therefore legally arrested, under s. 54, cl. 5 of the Criminal Procedure Code (Act X of 1882), for obstructing a police-officer while acting in the execution of his duty. **BHAWOO JIVAJI v. MULJI DAYAL.**

[I. L. R. 12 Bom. 377]

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**WRONGFUL CONFINEMENT—concluded.**

Indian Penal Code. The accused pleaded that the complainant had voluntarily come to his tent to have his statements reduced to writing, and that he had of his own accord stopped in his camp during the night. The trying Magistrate held this plea proved and discharged the accused under s. 253 of the Code of Criminal Procedure (Act X of 1882). The Sessions Judge held that though the accused had detained the complainant in his camp during the night, still he was not guilty of any offence under the Penal Code, as he had acted without malice and to the best of his judgment: *Held*, by the High Court on revision, that the mere circumstance that the accused had acted without malice and to the best of his judgment did not protect him, if his act otherwise satisfied the definition of s. 310 of the Indian Penal Code. **DHANIA v. CLIFFORD**

[I. L. R. 13 Bom. 376]

**WRONGFUL RESTRAINT.**

See WRONGFUL CONFINEMENT.

[I. L. R. 13 Bom. 376]

—*Penal Code, ss 52, 79, 99 and 342—Act done by a person by mistake of fact in good faith believing himself justified by law—Right of private defence against acts of a public servant acting bonâ fide under colour of his office—Act XIII of 1856 s. 35—Reasonable suspicion—Obstruction to a police-officer while acting in execution of duty—Arrest—Criminal Procedure Code (Act X of 1882), s. 54* On the 29th December 1887, the accused, a police-constable, was on duty at a temporary post near the Arthur Crawford Market. His turn of duty lasted from 4 to 7 A.M. Between 6-30 and 7 A.M. he saw the complainant carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen property, he went up to the complainant and questioned him. In answer to one of the questions the complainant stated that the cloth was made in England. The accused noticing that each piece bore Gujarathi marks, and not knowing that such marks are placed on English-made goods, concluded that this statement was false and that the cloth had been stolen. He took hold of one of the pieces of cloth in order to examine it more closely. The complainant objected to this, and there was a scuffle between them for the possession of the cloth. The accused then arrested the complainant and took him to a European Inspector to whom he stated the facts, alleging that he had arrested the complainant because he had assaulted him. The Inspector seeing that the complainant was an old man, and on the accused saying

**WRONGFUL RESTRAINT.—concluded.**

he was not hurt, let the complainant go. The complainant then lodged a complaint before the Acting Chief Presidency Magistrate charging the accused with wrongful restraint and wrongful confinement, offences punishable under ss. 341 and 342, respectively, of the Indian Penal Code (XLV of 1860.) The defence was that the complainant had assaulted the accused, and had been on that account arrested and kept in confinement until released by the Inspector of Police. The Magistrate found that there was no justification for the suspicion which the accused professed to entertain; that there were no reasonable grounds for questioning the complainant about the cloth in his possession, and that the scuffle was caused solely by the action of the accused in treating the complainant without any valid reason as a suspected thief. The Magistrate convicted the accused of wrongful confinement under s. 342 of the Indian Penal Code (Act XLV of 1860), and sentenced him to four months' rigorous imprisonment. *Held*, by the High Court, that the conviction was wrong. The accused having, under the circumstances of the case, an honest suspicion that the cloth in the possession of the complainant was stolen property was justified in putting questions to the complainant, the answers to which might clear away his suspicions, and having received answers which were not, in his opinion, satisfactory, he acted under a *bonâ fide* belief that he was legally justified in detaining what he suspected to be stolen property. The putting of questions to the complainant not for the purpose of causing annoyance or from idle curiosity, but in order to clear up his suspicions, was an indication of good faith, as defined in s. 52 of the Indian Penal Code (Act XLV of 1860). He was therefore protected by s. 79 of the Code. Even though the act of the accused in detaining the cloth might not have been strictly justifiable by law,—that is, even though there might not have been a complete basis of fact to justify a reasonable suspicion that the cloth was stolen property,—still the complainant had no right of private defence under s. 99 of the Code, as the accused was a public servant acting in good faith under colour of his office, and his act was not one which caused the apprehension of death or of grievous hurt. The complainant was not justified in refusing to allow the accused to inspect the cloth, in snatching it from his hands, and in scuffling with him. He was therefore legally arrested, under s. 51, cl. 5 of the Criminal Procedure Code (Act X of 1882), for obstructing a police-officer while acting in the execution of his duty. **BHAWOO JIVANI v. MULJI DAYAL.**

[I. L. R. 12 Bom. 377]

